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Accession No. 5825

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COMPARATIVE TABLES

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24 Nagpur Law Reports=All India Repor er.

NLR)	A. I. R.			NLR)	A. I. R.			NLR)	A. I. R.			NLR)	A. I. R.			NLR)	A. I. R.		
1	1927	*N*	276	48	1926	*N*	17	85	1929	*N*	41	112	1928	*N*	313	171	1928	*N*	324
3	1928	"	70	54	"	"	31	87	1928	"	52	119	"	"	145	172	1929	"	2
5	1926	"	379	55	1928	"	173	92	1926	"	84	122	"	"	184	176	1928	"	241
8	1924	"	354	59	"	*PC*	75	95	1928	"	295	127	"	"	265	179	"	*PC*	96
17	1928	*PC*	27	63	1927	*N*	330	97	"	"	63	142	"	"	316	182	"	"	137
23	"	*N*	288	66	1928	"	89	100	"	"	194	148	"	"	284	186	"	"	165
25	"	*PC*	10	68	1926	"	389	104	"	"	305	153	1929	"	30	189	1929	*N*	30
36	1927	*N*	308	76	1928	"	102	106	"	"	239	154	1928	*PC*	200	197	"	"	1
40	1928	*PC*	39	83	"	"	192	110	"	"	188	158	1929	*N*	17				

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1928 with corresponding references of the ALL INDIA REPORTER.

11 Nagpur Law Journal=All India Reporter.

NLJ)	A. I. R.			NLJ)	A. I. R.			NLJ)	A. I. R.			NLJ)	A. I. R.			NLJ)	A. I. R.		
1	1928	*N*	123	65	1928	*N*	194	96	1928	*N*	239	142	1928	*N*	265	232	1929	*N*	1
4	"	"	117	70	"	*Notes*	9*b*	101	"	"	241	162	1929	"	27	238	"	"	89
7	"	"	108	74	"	*N*	196	104	"	"	213	169	"	"	2	240	"	"	59
14	"	"	189	78	"	"	165	113	"	"	176	182	1928	"	324	242	"	"	87
21	"	"	153	82	"	"	211	119	"	"	248	184	"	"	305	245	1928	"	343
26	"	*PC*	10	84	"	"	219	123	1929	"	41	186	1929	"	8	247	"	*Notes*	87*d*
41	"	*Notes*	37*f*	87	"	"	192	125	1928	"	249	192	1928	"	316	251	"	"	89*a*
46	"	*N*	188	89	"	"	145	133	"	"	254	200	"	"	194	259	"	"	88*f*
49	"	"	1	93	"	"	227	137	"	"	198	229	"	*PC*	200	260	1929	*N*	42
62	"	*Notes*	6*c*																

Non-J. C. Court's cases are not included.

For **9 & 10 All India Criminal Reports=All India Reporter.**
Please refer to COMPARATIVE TABLE *No. II in* **A.I.R. 1928 Allahabad.**

For **29 Cr. L. J & 106 to 112 Indian Cases=All India Reporter.**
Please refer to COMPARATIVE TABLE *No. II in* **A.I. R. 1928 Lahore.**

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1928 NAGPUR SECTION with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the NAGPUR LAW REPORTS.

A. I. R. 1928 Nagpur=Other Journals.

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
1	28	*N L R*	143	21	9	*A I Cr R*	49	39 (1)	106	*I C*	429	56	106	*I C*	7				
	107	*I C*	517	23	105	*I C*	129	39 (2)	105	*I C*	113	58	28	*Cr L J*	996				
	11	*N L J*	49	24	10	*N L J*	177	41	10	*N L J*	162		105	*I C*	820				
4	10	*N L J*	201		105	*I C*	30		104	*I C*	843		9	*A I Cr R*	204				
	104	*I C*	786	27	23	*N L R*	152		23	*N L R*	174	63	10	*N L J*	242				
10	105	*I C*	155		10	*N L J*	169	43	100	*I C*	565		105	*I C*	852				
14	10	*N L J*	197		105	*I C*	43	44	105	*I C*	75		24	*N L R*	97				
	105	*I C*	335	29	23	*N L R*	126	48	23	*N L R*	141	65 (1)	105	*I C*	777				
16	104	*I C*	803		101	*I C*	279	FB	10	*N L J*	228	65 (2)	105	*I C*	799				
17	23	*N L R*	136	30	23	*N L R*	121		106	*I C*	170	67	23	*N L R*	168				
	10	*N L J*	191		106	*I C*	420	51	23	*N L R*	124		105	*I C*	758				
	105	*I C*	454	32	105	*I C*	559		104	*I C*	810	68	105	*I C*	567				
	28	*Cr L J*	934		10	*N L J*	257	52	107	*I C*	206	69	23	*N L R*	150				
	9	*A I Cr R*	87	33	104	*I C*	762		24	*N L R*	87		109	*I C*	177				
20	105	*I C*	81	34	105	*I C*	123	54	105	*I C*	780	70 (1)	105	*I C*	891				
21	10	*N L J*	184	37	104	*I C*	569	55	105	*I C*	840	70 (2)	105	*I C*	495				
	28	*Cr L J*	898	39 (1)	23	*N L R*	160	56	23	*N L R*	170		24	*N L R*	3				
	105	*I C*	226		10	*N L J*	167		10	*N L J*	232	71	23	*N L R*	161				

A. I. R. 1928 Nagpur=Other Journals—(*Concld.*)

A.I.R.)	Other Journals		A.I.R.)	Other Journals		A.I.R.)	Other Journals		A.I.R.)	Other Journals	
71	106 *I C*	397	127	106 *I C*	53	196	11 *N L J*	74	257	109 *I C*	497
73	23 *N L R*	180	128	106 *I C*	14		108 *I C*	446		10 *A I CrR*	358
	105 *I C*	843	131	106 *I C*	57	198	109 *I C*	566	262	107 *I C*	897
74	105 *I C*	477	133	107 *I C*	205		11 *N L J*	137	264	109 *I C*	579
75	105 *I C*	842	134	109 *I C*	457	199	109 *I C*	79	265**FB**	24 *N L R*	127
76	23 *N L R*	156	135(1)	108 *I C*	439	202	109 *I C*	129		11 *N L J*	142
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78	105 *I C*	471	135(2)	111 *I C*	576	206	107 *I C*	513	273	107 *I C*	903
79	28 *Cr L J*	952		29 *Cr L J*	896	207	108 *I C*	437	275(1)	108 *I C*	424
	105 *I C*	664	136(1)	107 *I C*	193	209	109 *I C*	383	275(2)	108 *I C*	435
	9 *A I CrR*	157	136(2)	109 *I C*	449	210	107 *I C*	663	277	109 *I C*	253
80	23 *N L R*	166	143	106 *I C*	665	211(1)	11 *N L J*	82	279	108 *I C*	439
	107 *I C*	666	144	109 *I C*	95		109 *I C*	775	280	109 *I C*	401
81	28 *Cr L J*	929	145	11 *N L J*	89	211(2)	107 *I C*	905	281(1)	109 *I C*	403
	105 *I C*	449		24 *N L R*	119	213	11 *N L J*	104	281(2)	109 *I C*	443
	9 *A I CrR*	374		109 *I C*	251		29 *Cr L J*	609	283	111 *I C*	148
84	10 *N L J*	253	146(1)	107 *I C*	661		109 *I C*	801	284	24 *N L R*	148
	106 *I C*	813	146(2)	107 *I C*	671		10 *A I CrR*	340		111 *I C*	662
86	10 *N L J*	262	147	113 *I C*	111	216	109 *I C*	421		29 *Cr L J*	902
	110 *I C*	834	149(1)	109 *I C*	727	217(1)	29 *Cr L J*	589	287	109 *I C*	205
87	23 *N L R*	192	149(2)	108 *I C*	881		109 *I C*	605	288	24 *N L R*	23
	107 *I C*	522	150	107 *I C*	911		10 *A I CrR*	282		109 *I C*	643
89 (1)	23 *N L R*	178	151	107 *I C*	516	217(2)	107 *I C*	663	289	111 *I C*	402
	107 *I C*	194	153	11 *N L J*	21	219	11 *N L J*	84	291	109 *I C*	671
89 (2)	10 *N L J*	258		111 *I C*	488		29 *Cr L J*	575	292(1)	110 *I C*	48
	106 *I C*	803	162	109 *I C*	123		109 *I C*	511	292(2)	112 *I C*	430
	24 *N L R*	66		29 *Cr L J*	475		10 *A I CrR*	348	294	109 *I C*	636
91 (1)	10 *N L J*	226		10 *A I CrR*	242	220	109 *I C*	387	295	24 *N L R*	95
	109 *I C*	281	165	11 *N L J*	78	221	107 *I C*	671		111 *I C*	135
91 (2)	23 *N L R*	183		108 *I C*	879	222	107 *I C*	908	296	112 *I C*	875
	107 *I C*	193	166	107 *I C*	668	223	109 *I C*	195	297(1)	110 *I C*	46
92	10 *N L J*	266	169	113 *I C*	225	226	108 *I C*	433	297(2)	109 *I C*	381
	107 *I C*	198	171	108 *I C*	740	227	107 *I C*	910	299	109 *I C*	385
93	105 *I C*	353	172	10 *A I CrR*	173		11 *N L J*	93	301	109 *I C*	770
96	10 *N L J*	174		29 *Cr L J*	486	229	108 *I C*	790	303	109 *I C*	459
	111 *I C*	76		109 *I C*	214	230	110 *I C*	441	305(1)	24 *N L R*	104
97	23 *N L R*	164	173	24 *N L R*	55	232	110 *I C*	351		111 *I C*	759
	105 *I C*	427		107 *I C*	525	238	108 *I C*	445	305(2)	11 *N L J*	184
98	10 *N L J*	236	175	107 *I C*	662	239	24 *N L R*	106	306	...	
	105 *I C*	291	176	11 *N L J*	113		11 *N L J*	96	308	...	
100	105 *I C*	420	178	108 *I C*	785		110 *I C*	498	313	24 *N L R*	112
102	108 *I C*	805	179	107 *I C*	514	241	11 *N L J*	101		112 *I C*	120
	24 *N L R*	76	181	108 *I C*	801		24 *N L R*	176	316	24 *N L R*	142
106	106 *I C*	575	182	107 *I C*	201		111 *I C*	159		11 *N L J*	192
108	11 *N L J*	7	184	107 *I C*	203	242	29 *Cr L J*	313		111 *I C*	650
	108 *I C*	442		24 *N L R*	122		107 *I C*	912	319	109 *I C*	785
	9 *A I CrR*	408	186	29 *Cr L J*	581		10 *A I Cr R*	19	322	112 *I C*	893
	29 *Cr L J*	400		109 *I C*	597	243(1)	109 *I C*	576	324	24 *N L R*	171
111	106 *I C*	333		10 *A I CrR*	300	243(2)	109 *I C*	777		11 *N L J*	182
112	106 *I C*	861	188	11 *N L J*	46	244	110 *I C*	163		112 *I C*	642
113	9 *A I CrR*	282		24 *N L R*	110	246	107 *I C*	902	325	111 *I C*	445
	29 *Cr L J*	86		10 *A I CrR*	215	248	11 *N L J*	119		29 *Cr L J*	861
	106 *I C*	678		29 *Cr L J*	506		109 *I C*	586	328	110 *I C*	420
114	106 *I C*	531		109 *I C*	234	249	11 *N L J*	125	329(1)	110 *I C*	823
115	106 *I C*	270	189	11 *N L J*	14		109 *I C*	615	329(2)	...	
117	11 *N L J*	4		107 *I C*	899	251	107 *I C*	657	332	110 *I C*	524
	107 *I C*	617	192	11 *N L J*	87	252	109 *I C*	522	333	111 *I C*	291
118	106 *I C*	495		24 *N L R*	83	254	109 *I C*	624	336	110 *I C*	893
119	106 *I C*	305		110 *I C*	76		11 *N L J*	133	337	10 *A I CrR*	566
120	106 *I C*	38	193	108 *I C*	447	255	10 *A I Cr R*	2		29 *Cr L J*	785
123	11 *N L J*	1	194	11 *N L J*	65		29 *Cr L J*	312		111 *I C*	113
	107 *I C*	527		24 *N L R*	100		107 *I C*	907	338	111 *I C*	358
124	106 *I C*	661		109 *I C*	559	256	112 *I C*	126	340	111 *I C*	535
126	107 *I C*	199		11 *N L J*	200	257	29 *Cr L J*	561	343	11 *N L J*	245

LIST OF CASES OVERRULED IN A. I. R. 1928 NAGPUR.

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P. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

THE
ALL INDIA REPORTER
1928
NAGPUR J. C'S COURT

**** A. I. R. 1928 Nagpur 1**

FINDLAY, J. C., AND MACNAIR, A. J. C.
Afterwards
PRIDEAUX, A. J. C.

Vyankatesh—Defendant—Appellant.

v.

Annasa Lad—Plaintiff—Respondent.

F. A. No. 45-B of 1925, Decided on 21st October 1927, against the decree of the Sub-Judge, First Class, Buldana, in Civil Suit No. 50 of 1924.

** (a) *Registration Act, S. 28 — Property not intended to be mortgaged included for jurisdiction purposes—Registration is wholly invalid.*

Where a mortgage-deed has been fraudulently registered in a wrong district by including land not intended to be mortgaged, no contract contained in the deed can be considered to be validly registered: *A. I. R. 1923 Mad. 447, Diss.: A. I. R. 1914 P. C. 67, Foll.; A. I. R. 1921 P. C. 8, Expl.* [P 1 C 2, P 2 C 2]

(b) *Registration Act, S. 60—Registrar having jurisdiction—Property existing —Registration is valid unless fraud or collusion exists.*

The registration of a document by the registrar having jurisdiction over the property covered by it is not invalid unless fraud or collusion on the part of or between the parties is proved, if, in fact, the property in question does exist: *A. I. R. 1925 Pat. 787* and *A. I. R. 1926 Pat. 582, Rel. on.* [P 4 C 1]

(c) *Fraud—Proof—Evidence is usually circumstantial.*

Fraud is difficult to prove by means of direct evidence. It can usually only be established by the circumstances surrounding the case. [P 4 C 1]

Y. G. Deshpande—for Appellant.

B. K. Bose—for Respondent.

Order of Reference

Prideaux, A. J. C.—It seems to me that this case should be heard by a Bench as a difficult question of law is involved and I am not quite in agreement with the decision in *Ram Rao* v. *Vedayya* (1). The question is whether a mortgage-deed, invalid because registration was procured by fraud, is not also invalid for all purposes as far as registration is concerned i. e., would the registration extend limitation from three to six years. Forwarded to the Judicial Commissioner.

Opinion

The question which has been referred for the decision of this Bench is this:

Where a mortgage deed has been fraudulently registered in a wrong district by including land not intended to be mortgaged, is the registration good so far as a personal covenant contained in the deed is concerned?

The decision of this question affects the period of limitation for a suit for compensation for the breach of the personal covenant.

The question has been considered at length in *Ram Rao* v. *Vedayya* (1). The learned Judges who decided that case have answered it in the affirmative. The respondent's counsel adopts the arguments on which they relied, and we have, therefore, to consider whether, in our opinion, those arguments are convincing.

In *Harendra Lal Roy* v. *Haridasi Debi* (2), their Lordships of the Privy Council state:

An entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact existed, was a fraud on the registration law, and no registration obtained by means thereof was valid.

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(1) A. I. R. 1923 Mad. 417=46 Mad. 435.
(2) A. I. R. 1914 P. C. 67=41 Cal. 972=41 I. A. 110 (P. C.).

In *Biswanath Prasad* v. *Chandra Narayan Chowdhury* (3) this opinion was quoted with approval. Phillips, J., in *Rama Rao* v. *Vedayya* (1), cites and remarks:

> The principle which I take to underlie this decision is that no person shall be allowed to take advantage of his own fraud. If that principle be applied to the present case, the object attained by the fraud was the registration of the mortgage-deed as such, for had the document been merely a covenant to repay, the Peddalpur Sub-Registrar would have had jurisdiction under S. 29, Registration Act (Act 16 of 1908); for under that section parties are at liberty to choose their own place of registration. In so far as the document evidenced a mere covenant to repay there was no fraud upon the registration law, and to hold that such registration was invalid would be to extend the principle above mentioned so as to deprive a party of a right which he had not obtained by fraud as well as of the advantage gained by his fraud

Devadoss, J., states:

> The Registration Act does not prohibit the use of a document as a registered one if the provisions of S. 28 of the Act are contravened. If a document is otherwise properly registered there can be no objection to the use of it as a registered one.

We respectfully state our opinion that the learned Judges of the Madras High Court have not kept in mind the fact that a document can only be registered as a whole. The document presented for registration was of the nature described in S. 17 (1) (b), Indian Registration Act. The inclusion of a covenant to repay does not alter this fact. Even if the document recorded two entirely distinct contracts, only one of which created a title of the value of Rs. 100 or upwards in immovable property, the document as a whole would still be one of those mentioned in S. 17 (1) (b). S. 28, Registration Act, therefore, refers to such a document. S. 29 of that Act begins:

> Every document other than a document referred to in S. 28 . . .

and has no application to documents to which S. 28 refers.

It follows that the sub-registrar, to whom the document was presented, had no power to register the document. It must be presumed that, but for the false representation that the document related to some property within his jurisdiction, he would have refused to register it. If the parties had been able and willing to cancel the part of the document which affected immovable property the amended document might then have been registered; but this would not have been registration of the document which was before the learned Judges. Registration was then obtained by means of fraud and is invalid.

The learned Judges of the Madras High Court draw an inference in favour of their view from the action of the Privy Council in the case reported in *Biswanath Prasad* v. *Chandra Narayan Chowdhury* (3). Their Lordships in that case remitted the case to the Calcutta High Court for a decision whether the plaintiff had a valid alternative claim for a personal judgment for the mortgage debt. It is inferred that in their opinion the personal debt was secured by a registered instrument : for the argument before their Lordships was that the payment of interest in 1903 would save limitation for the suit brought in 1908. In our opinion, if any inference can be drawn from their Lordships' action, it can at most be that their Lordships did not think fit at that stage of the case to decide the question we are now considering.

We are then of opinion that no registration of the deed including a personal covenant could have been effected but for the fraud of the parties, and that no contract contained in the deed can be considered to be validly registered.

(On receipt of the above opinion, the following judgment was delivered.)

Prideaux, A. J. C. — One Madho Vyankatesh executed a mortgage deed dated 28th September 1873 for Rs. 1,200 and another mortgage-deed dated 16th July 1881 for Rs. 400 in favour of the firm of Gopalsa Krishnasa the plaintiff's predecessors-in-interest. On these documents the present plaintiff brought civil suit No. 293 of 1910 and civil suit No. 166 of 1910 against Tulsabai, the widow of the deceased Madho. He obtained two decrees which were afterwards made absolute. It is contended that as Tulsabai could not discharge the decrees and was in need of money for pilgrimage she executed the mortgage-deed dated 8th October 1907, now sued on. She re-mortgaged the property covered by the first two deeds and mortgaged the rest of her husband's immovable property. She has failed to discharge her last debt. She has adopted defendant 1 as a son, and it is contended that as the mortgage was on account

(3) A. I. R. 1921 P. C. 8=48 Cal. 509=48 I. A. 127 (P. C.).

of the father's debts and for legal necessity, it is binding on the minor defendant 1, who at the time of the adoption was made liable to pay the father's debt to the extent of the assets of his father. Defendant 2, Ambadas Laxman, is in possession of a site at Chikhli mortgaged by the document sued on, while defendant 3 is joined for being in possession of certain fields mortgaged.

The case proceeded ex parte against defendants 2 and 3. For defendant 1 the two mortgages of 1873 and 1881 were admitted. He pleaded ignorance of the two mortgage decrees and denied the execution of the mortgage-deed in suit and contended that, even if its execution is proved, the document is not binding on him owing to the plaintiff having practised fraud on the registration department in getting the document executed at Chikhli. The rest of the property is not in the Chikhli registration circle and the only portion of the property in that circle was the site which did not belong to the mortgagor. It was further contended that there was no legal necessity for the mortgage and that it was not a prudent act on the part of Tulsabai to mortgage the whole property when the former decrees were only against a part of the property. It was stated that the suit for personal claim or against the assets of the deceased Madhorao is barred by time.

The plaintiff denied all adverse allegations, and the case was tried on the following issues. (The judgment then narrated the issues and proceeded to discuss the findings of the lower Court.) The lower Court finds that the two deeds of the last century are proved and also that the plaintiff sued on them and obtained decrees. It is also found that Tulsabai executed the mortgage-deed in suit in favour of the plaintiff, and that the deed was properly attested; but the Court finds that the site at Chikhli did not belong to Tulsabai at the time of the mortgage and belonged to the writer of that document Ambadas Laxman and still belongs to him, it being simply inserted in the mortgage-deed to enable that document to be registered at Chikhli. It is also found that it was fraud on the registration department, and the document is invalid as far as it affects immovable property. It was not a prudent act on the part of Tulsabai to mortgage additional seven fields of the value of Rs. 6,500 for the debt due on the two mortgage-deeds, nor was the condition of foreclosure a prudent one. As regards the Rs. 300, it was found that the plaintiff did not make enquiry about the loan and is not binding on defendant 1. Dealing with the question whether the registration is valid so far as the personal decree was concerned, the Judge finds that it is, and enables the mortgagee to sue for his money within six years as provided by Art. 16, Limitation Act. There was a personal covenant for repayment of the money, and there was a mention in the deed of adoption as regards the plaintiff's two decrees, and Tulsabai made the defendant 1 liable for the money. Tulsabai was found to be the de jure guardian of the person and property of the minor at the time, and as such she could have acknowledged the plaintiff's debt on the two decrees on 22nd March 1920 i.e. within six years from the date of the suit. Acknowledgment of the debt was held to be for the benefit of the minor. The suit for personal claim was found to be within time. Deducting the sum of Rs. 300 and its damdupat, Rs. 5,800 was found due on the mortgage in suit and that sum was decreed against defendant 1 to the extent of the ancestral assets of his deceased father Madho.

Against that decree the present appeal has been filed by the defendant 1. The plaintiff has filed cross-objections, but these have not been argued and, therefore, need not be discussed.

I found it necessary to ask for a decision by a Bench of this Court of the following question :

> Where a mortgage-deed has been fraudulently registered in a wrong district by including land not intended to be mortgaged, is the registration good so far as a personal covenant contained in the deed is concerned ?

The finding of the Bench is that no contract contained in the deed can be considered to be validly registered.

The appellant here follows the reasoning given by the lower Court for its findings that the site at Chikhli did not belong to Tulsabai but to Ambadas, and that the insertion of the site in the mortgage-deed was not meant to affect that property but was merely made to allow the document to be registered at Chikhli; and it is contended that under the circum-

stances no personal decree can be passed and the whole suit must be dismissed.

For the respondent it is contended that unless it can be shown that deliberate fraud has been committed on the registrar, the document registered must be presumed to be correct (*Gangamoyi Debi* v. *Troiluckhya Nath Chowdhry*) (4): to start with, there is a presumption that the registration is correct and that it is necessary to prove that the mortgagee was a party to the fraud before the registration can be held to be ineffective. I am referred to *Mt. Jasoda Kuer* v. *Janak Missir* (5) and to *Ram Sumran Prasad* v. *Govind Das* (6), which lays down that

> the registration of a document by the registrar having jurisdiction over the property covered by it is not invalid in the absence of fraud or collusion on the part of or between the parties if, in fact, the property in question does exist.

In the present case fraud is distinctly alleged. *Durga Prasad Sahu* v. *Tameshar Prasad* (7) and *Pahladi Lal* v. *Mt. Laraiti* (8) are also quoted. It is submitted that the registration must stand as far as the personal covenant to repay is concerned.

I have no doubt that the lower Court's finding as to the ownership of the Chikhli site at the time of the mortgage in suit is correct. (The judgment then discussed evidence relating thereto and concluded). It is perfectly clear that the inclusion of the Chikhli site, which did not belong to the mortgagor but to Ambadas, in the mortgage-deed was to allow registration to take place at Chikhli.

It is contended that even if this is so, there is nothing to show that the plaintiff was aware of this fact or that he knew that the site was Ambadas,' or to show that as far as he was concerned there was any fraud. Now, fraud is difficult to prove by means of direct evidence. It can usually only be established by the circumstances surrounding the case. The site is about 100 yards from the plaintiff's house. Any real enquiry would have shown him that the site did not belong to Tulsabai. The site was of little value and more than sufficient immoveable property had been mortgaged to satisfy the plaintiff's claim. In these circumstances is it likely that a site said to be worth Rs. 75 would have been included in the document, except for the purpose of giving the Chikhli registrar jurisdiction? It seems to me inconceivable that the plaintiff was not a party to the insertion of this site in the mortgage-deed. Everything points to his being a party in the fraud on the registrar. This being so, that registration is invalid.

Now the mortgage was executed on 8th October 1914, and the covenant was that repayment was to be made in November 1915. There is no proof of any acknowledgment between 1915 and 1918 to extend limitation. The suit was filed on 2nd May 1924, i. e., more than six years after the agreed date of repayment. No personal decree can, therefore, be passed in the suit. The result is that the whole suit must stand dismissed. I set aside the decree of the lower Court and dismiss the plaintiff's suit with costs. The plaintiff will pay the appellant's costs. The cross-objections also stand dismissed. The plaintiff will bear the costs of the cross-objections.

D.D. *Appeal allowed.*

(4) [1906] 33 Cal. 537=33 I.A. 60=3 C.L.J. 349=10 C.W.N. 522 (P C.).
(5) A.I.R. 1925 Pat. 787=4 Pat. 394.
(6) A.I.R. 1926 Pat. 582=5 Pat. 646.
(7) A.I R. 1924 All. 857=46 All. 754.
(8) [1919] 41 All. 22=48 I.C. 200=16 A.L.J. 871.

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* A. I. R. 1928 Nagpur 4

KINKHEDE, A. J. C.

Sabhaji—Plaintiff—Appellant.

v.

Nawalsingh and *others*—Defendants—Respondents.

S. A. No. 519 of 1926, Decided on 30th July 1927, from the decree of the Dist. Judge, Nimar, D/- 30th July 1926, in Civil Appeal No. 43 of 1926.

* (a) *Evidence Act, S. 92—Extrinsic evidence at the instance of a third party is admissible to show real nature of the transaction.*

What the section says is not between the parties to the contract but between the parties to the instrument, and therefore the section is no bar to the admission of evidence to show what the true nature of the written transaction was, at the instance of a third party, and evidence as to the third party's right cannot only be admissible but is most relevant: 4 *N. L. R.* 115; 27 *Mad.* 329; 28 *All.* 473 and *A. I. R.* 1917 *P. C.* 207, *Rel. on.* [P 8 C 1, 2]

(b) *Evidence Act, S. 92, prov. 6—Sale-deed—Plot sold described by wrong number—Evi-*

dence is admissible to show what plot was intended to be sold.

Where the intention of the parties was to sell survey No. 181 but by 'mistake survey No. 161 was put in the sale-deed instead of No. 181.

Held : that extrinsic evidence was admissible as to circumstances which would show that survey No. 181 was intended to be sold and not survey No. 161. [P 9 C 1]

* (c) *Evidence Act, S.* 92, *Prov.* (1), *Cl.* (*a*) —*Mistake in written contract can be proved by either party—Suit for rectification of contract is not a necessary preliminary—Specific Relief Act, S.* 31.

When parties have come to a contract but have failed to express themselves correctly, if a mistake is a real one and mutual, and can be established by satisfactory proofs, a Court of equity will re-form written instrument so as to make it conformable to the precise intent of the parties. [P 9 C 2]

The combined effect of S. 92, Cl. (a). Prov. (1) and of S. 31, Specific Relief Act is to entitle either party to a contract, whether plaintiff or defendant, to protect his right by proving a mistake in contract, for example, mistake in the description of the property sold by giving wrong survey number to same : 30 *Mad.* 792, *Rel. on.* [P 9 C 2]

What in such cases is rectified is not the agreemamt but the mistaken expression of it : 28 *Bom.* 420 and *A. I. R.* 1932 *All.* 42, *Ref.* [P 10 C 1]

In such a case a party is entitled to succeed upon a construction of a conveyance itself without the necessity of having to take proceedings by way of a separate suit for rectification of the deed, as a Court is competent to give effect to what was indisputably the real agreement between the parties without driving the plaintiff to a separate suit for rectification : 2 *C. W. N.* 230 and *A. I. R.* 1923 *Cal.* 53, *Foll.* [P 10 C 1]

(*d*) *Evidence Act, S.* 94—*Misdescription.*

In cases of misdescription S. 94, Evidence Act, can have no application. [P 10 C 1]

W. R. Puranik—for Appellant.

S. B. Gokhale—for Respondents.

Judgment.—The appellant contracted to purchase from respondents 1 and 2 the latter's malik makbuza field No. 181 for 'a sum of Rs. 450 and paid them Rs. 10 as earnest-money on 8th October 1924. The vendors on their part agreed to complete the transaction by the execution of the sale deed in 15 days' time, and to receive the balance of consideration before the sub-registrar. Ex. P-3 is a letter acknowledging the receipt of Rs. 10 as earnest-money, but it does neither mention any relevant details as regards the terms of the contract of sale nor give the description of the property agreed to be sold by reference to its number, area, name or situation. Within ten days of the contract, the defendants 1 and 2 tempted by a better offer struck a fresh bargain with defendants 3 to 7, whereby they sold the said field for a consideration of Rs. 600 to the latter and executed sale deeds (Exs. III. D.-1 V. D-1 and VI D 1,) dated 18th October 1924 in their favour, but misdescribed the field sold as bearing No. 161 instead of No. 181 in them and delivered possession of the right number, i.e. No. 181, to them. Similarly, on the occasion of selling their other fields of inferior quality, bearing Nos. 161 and 186 for Rs. 200 on 1st March 1923, to defendant 8, defendants 1 and 2, through mistake, had entered S. No. 181 instead of No. 161 in the sale-deed (Ex 3 D-2) as the field sold to him ; but all the same the vendee took possession of the right land namely S. No. 161. Plaintiff therefore sued for specific performance of his contract of sale and for possession of field No. 181 and impleaded all the persons interested in denying his claim as parties to the suit.

The defence of defendant 1 was a denial of the plaintiff's contract of sale coupled with the affirmance of the title of the other defendants to or in respect of the fields expressly mentioned as sold in their respective sale-deeds : the other defendants except defendants 2 and 4 joined in the defence and also in the assertion that defendants 3 to 7 and defendant 8 were in possession of the fields mentioned in their respective title-deeds as sold to them. For facility of reference I may mention here that it is common ground that fields Nos. 161 and 186 form a block called Ziriwala divided by the Arsi Road, while field No. 181 is near the southern boundary of the village and is called Kala Bavdi. One very significant fact elicited at the trial is that defendant 8 Nihal's own field No. 221-1 adjoins the Ziriwala lands and that similarly defendant 7's own field No. 182 adjoins No. 181. It is also brought out in evidence that field No. 181 is of better quality and therefore of higher value than field No. 161 and that Nihal held possession of the Ziriwala lands, and defendants 3 to 7 of Kala Bavdi field. This would go to show that possession did not accord with the apparent title which the sale-deeds purported to convey, but all the same, the purchasers who paid higher price got into possession of land of higher value and better quality than that of the other who paid less. The attempt to ex-

plain away the discrepancy between title and actual possession by alleging that defendant 8, Nihal, held No. 161 also, as a sub-lessee from defendant 1, had signally failed in the Courts below, and the story of the alleged sub-lease is rejected as an afterthought. The main facts found by the Court of first instance may therefore be briefly stated as under :

(a) that defendants 1 and 2 agreed to sell Kala Bavdi field No. 181 to plaintiff on 8th October 1924.

(b) that before that date, on 1st March 1923, they had sold field Ziriwala bearing Nos. 161 and 186 intersected by a road to Nihal, defendant 8, and put him in possession of his purchase ;

(c) that after the date of the plaintiff's contract of sale, and with a view to back out of it, they sold on 18th October 1924, field Kala Bavdi bearing No. 181 to defendants 3 to 7 for a higher price and put them in possession thereof.

On these findings the first Court passed a decree for specific performance of the contract of sale of field Kala Bavdi, bearing No. 181 against defendants 1 and 2 and directed all the defendants to deliver possession of the said field to plaintiff.

The plaintiff's success thus depended upon proof of his version that the discription as given in the sale-deed of defendant 8 (Ex. III. D-2) and in those of defendants 3 to 7 (Exs. III. D-1, V-D-1, and VI.-D-1) was mistaken, or, in other words, on proof of the fact that in spite of the prior sale of 1923 which on the face of it purported to convey No. 181, defendants 1 and 2 continued to be the owners of that number and that, though the sale of 1924 in favour of defendants 3 to 7 purported to deal with No. 161, they really transferred No. 181 to them, but that the first purchaser rightly took possession of No. 161, and the later purchasers had wrongly taken possession of field bearing No. 181. The question, therefore, is whether the plaintiff who was not a party to the sale of 1923 or to those of 1924 was or was not bound by the description as given therein and whether on his showing that the description was mistaken in both cases, his contract of sale could operate as regards No. 181 of which defendants 1 and 2 continued to be the owners and defendants 3 to 7 were in possession without title. According to the plaintiff defendants 3 to 7 had notice of his prior contract of sale, and this has been found in his favour by the trial Court.

Defendants 1 and 8 appealed, against the decree and impleaded the plaintiff and the rest of the defendants as co-respondents thereto, to the Court of the District Judge. While agreeing with the trial Judge as regards the above findings on questions of fact, the learned District Judge held that the ostensible title as set out in the sale-deeds must prevail as the language of the documents is plain and no extraneous evidence could be admitted to show that anything else was meant. The result of this decision was that the so-called title of defendant 8 to field Kala Bavdi No. 181 by virtue of the sale-deed dated 1st March 1923 was confirmed by the lower appellate Court, although it did not accord with the existing fact found by it as regards the possession which the said defendant held over Ziriwala fields Nos. 161 and 186, and, similarly, the so-called title of defendants 3 to 7 under their sale-deeds dated 18th October 1924 to Ziriwala field No. 161 was also upheld by the learned Judge, although it did not conform to their possession which, as found by it as a fact, was over field Kala Bavdi bearing No. 181. The District Judge was thus landed in the absurd position, that his ultimate decision was contrary to the facts found by him ; and he consequently had no alternative but to act upon the resultant finding that defendants 1 and 2 had no title to field No. 181 called Kala Bavdi on the date of their contract of sale of that field to plaintiff ; he accordingly dismissed the plaintiff's suit for specific performance and possession, and only passed a decree for Rs. 150 for compensation against defendants 1 and 2 assessing the same at the difference between the prices respectively agreed to be paid by plaintiff and defendants 3 to 7 to them. Both plaintiff and defendants 1 and 2 were naturally dissatisfied with this decree, and they have respectively filed second appeals Nos. 519 and 533 of 1926. This judgment will dispose of both these appeals.

The main contention of the plaintiff-appellant is that on the findings arrived at the only logical conclusion was that defendants 1 and 2 had a subsisting title to Kala Bavdi field No. 181 at the date of his contract of sale, and that

specific performance of the said contract of sale and possession ought to have been decreed in his favour as all other defences were ruled out. The plaintiff has impleaded defendants 3 to 8 as co-respondents to his appeal along with defendants 1 and 2. But the former have not cared to put in appearance or contest the appeal. Defendants 1 and 2 alone are the contesting respondents in second appeal No. 519 of 1926. They urge that the findings on questions of fact arrived at by the lower appellate Court must be treated as findings provisionally given on the supposition that extraneous evidence is admissible to show that something else was meant than what appears from the wording of the sale-deeds, and that the District Judge's main decision is that defendants 1 and 2 had no title to convey No. 181 to plaintiff as the title was in defendant No. 8, and that the title to field No. 161 was in defendants 3 to 7, and though the actual possession of the vendees was not according to the titles acquired or purported to be conveyed under the plain language of their documents of title, that circumstance must be ignored and excluded from consideration on the ground that no amount of subsequent acts and conduct can undo the plain wording of the instrument. In defendants 1 and 2's own appeal also their main contension is that the lower appellate Court having rightly held that oral evidence was inadmissible was wrong in dicussing it and expressing its opinion thereon and holding (inconsistently with its own view) that the defendants 1 and 2 had agreed to sell field No. 181, that on its own findings on law points it should have dismissed the suit altogether, and that the award of damages was wrong in law and fact.

The decision of these two appeals will thus depend upon the right decision of the question whether the findings of fact concurrently arrived at by the Courts below are vitiated on the ground that they are based on legally inadmissible evidence. If the evidence adduced in the case of the proximity of the lands intended to be purchased to the intending purchasers' own other fields, of their relative qualities and prices, and as also of the fact that the respective purchasers entered into possession of numbers not mentioned in their respective title-deeds, and, of how they, when confronted with the anomaly, tried to wriggle out of the situation by inventing a palpably false story to explain away the discrepancy between title and actual possession, on the basis of an alleged sub-lease of No. 161 to defendant 8, has no relevance at all in this case, under any of the provisions of the Indian Evidence Act, then I must say the contention of the respondents 1 and 2's learned pleader ought to prevail and the learned District Judge's decision also upheld. But I daresay they both are mistaken in the view propounded by them as I will presently show.

The argument advanced on behalf of respondents 1 and 2 is that S. 91, Indian Evidence Act, lays down restrictions as to the admissibility of all evidence in proof of terms of a contract, grant, or disposition of property, reduced to a form of a document, or, required by law to be so reduced, other than the document itself, or secondary evidence of its contents, in cases in which secondary evidence is admissible under the provisions of the Indian Evidence Act, and that this prohibition applies not merely to parties to the instrument, or privies but to strangers as well. What S. 91 lays down is that it insists upon the best primary documentary evidence being given in proof of the terms of an instrument This rule is fully justifiable in principle and policy, because where by the requirements of the law, or by the contract of the parties, written instruments are made the repositories and memorials of truth, any other evidence ought to be excluded from being used either as a substitute for such instruments or to contradict, or alter them. The very object for which the writing is used, is to perpetuate the memory of what is written down and so to furnish permanent proof of it.

But this does not mean that truth must always remain hidden, merely because there was mistake, or fraud, or carelessness in rendering the intention of the parties into words. Having thus laid down the necessity of adducing the best documentary proof, in the first instance, in proof of the terms of a contract etc., the legislature proceeds to provide special barriers against the reception of evidence of oral agreement in cases where the question arises:

as between the parties to any such instrument or their representatives in interest,

for certain purposes, in the form of S. 92, Evidence Act; it also enacts S. 99 for the benefit of strangers or persons not parties to the documents giving them a free hand in such matters. It must, therefore, be borne in mind that S. 92 of the Act enacts a barrier against extrinsic evidence but at the same time limits its operation to cases where the issue as to the real nature of the written transaction arises between the parties thereto, or their privies. The scope of S. 92 is thus very restricted and it leaves out cases of strangers to the instrument wishing to adduce extrinsic evidence in order to prove that the real transaction was different from what it purports to be according to the language of the instrument. The obvious reason for making such an exception in favour of strangers is that they cannot be precluded from proving the truth by reason of the ignorance, carelessness, or fraud of the parties, nor, in proceedings between a party and a stranger, will the former be estopped from doing so on the principle of mutuality. The parties to the instrument and their representatives are to blame if the writing contains what was not intended, or omits what it should have contained. But third persons are not prejudiced by things recited in writing, contrary to the truth, through the ingnorance, carelessness or fraud of the parties, or thereby precluded from proving the truth, however contradictory it may be to the written instrument.

Here I may point out that what the section itself says is not between the parties to the contract but between the parties to the instrument. Fortunately, the respondents' pleader concedes, nay, while denying to the appellant the benefit of Prov. (1) of S. 92 of the Act, he even goes to the length of insisting that though the appellant claims under an agreement of sale from his clients, he should be looked upon as a stranger to the several sale-deeds (Exs. III, D-1, III D.-2, V D-1 and VI D-1) referred to in the earlier part of this judgment. He denies to him the position of a 'representative-in-interest' on the ground that his clients have not yet given to him any conveyance transferring their interest in the subject-matter of the suit, and cites S. 54, Transfer of Property Act in support of the position taken by him.

Proceeding then, as I must, on the basis that the appellant is a total stranger to the instruments in question as contended for by the respondents, the barrier created by S. 92, Evidence Act, is all the more inoperative as against him. It is remarkable that the District Judge treats the plaintiff as an outsider and yet holds him debarred from the privileges of such an outsider. The position of a stranger was made clear by this Court so far back as in 1907 in *Gangabai* v. *Pandu* (1), by laying down that either side may give extrinsic evidence in variation of the terms of the document, where the issue as to the real nature of a wtitten transaction is one between the parties thereto and a third person who is not bound by the writing. The District Judge had only to open the report to know it, if the section itself was not clear to him. To the same effect is the decision of the Madras High Court in *Pathammal* v. *Kalai Raunthar* (2), and of the Allahabad High Court in *Bageshri Dayal* v. *Pancho* (3). Their Lordships of the Privy Council have in *Maung Kyin* v. *Ma Shwe La* (4), laid down that the language of S. 92, Evidence Act, 1872, with regard to a "contract, grant or disposition reduced to writing," in terms applies, and applies alone:

as between the parties to any such instrument or their representatives-in-interest.

Wherever, accordingly, evidence is tendered as to a transaction with a third party it is not governed by the section or by the rule of evidence which it contains, and in such a case, therefore, the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions. This series of decisions is, therefore, an authority for the view that S. 92, Evidence Act, is no bar to the admission of evidence to show what the true nature of the written transaction was at the instance of a third party and that evidence as to the third party's right cannot only be admissible but is most relevant.

The plaintiff who is a third party and claims to establish a right to the field bearing No. 181, under his contract, by showing that the field sold to defen-

(1) [1907] 4 . N. L. R 115.
(2) [1904] 27 Mad. 329.
(3) [1906] 28 All. 473=3 A. L. J. 314=(1903) A. W. N. 89.
(4) A. I. R. 1917 P. C. 507=45 Cal. 320=44 I. A. 236 (P. C.).

dant 8 was misdescribed in his sale-deed (Ex. III D-2) is, therefore, entitled to prove the truth, however contradictory it may be to the written instrument. In this view of the law, I overrule the contention and hold that the evidence tendered by plaintiff was legally admissible to prove that defendants 1 and 2 continued to be the owners of the malik makbuza field, Kala Bavdi, bearing No. 181, down to the date of his contract of sale, despite the execution of the registered sale-deed, dated 1st March 1923 (Ex. III. D-2) in favour of defendant 8, which purported to convey it ; and that, as a matter of fact, the parties intended that the bargain should cover the Ziriwala field bearing No. 161 and not that field, viz., Kala Bavdi No. 181, as is clear from the proved fact that the vendee actually entered into possession of No. 161 and not of No. 181. The findings of fact based on such legally admissible evidence were legal findings and are not liable to be questioned in second appeal.

If the position of the plaintiff be regarded as that of a representative-in-interest of defendants 1 and 2, he is not the worst for it. Prov. (1), S. 92, Evidence Act, entitles him to prove any fact which would invalidate the document (Ex. III D-2) or which would entitle him to a decree or order relating thereto,

> such as ..... mistake in fact or law.

Proviso (6) also entitles him to prove any fact which would show

> in what manner the language of a document is related to existing facts.

Their Lordships of the Privy Council made this position clear in their decision in *Balkishan Das* v. *W. F. Legge* (5), where they observe that a case must be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of the surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts. In the case of *Hussonalli* v. *Tribhowan* (6), where there were conflicting statements of the parties as to the circumstances leading up to the execution of an agreement for sale, and it was difficult to reconcile them their Lordships of the Privy Council held that the Court was justified in admitting extrinsic evidence to explain the facts. Amongst such "existing facts" proved in this case are : the proximity of defendant 8 Nihal's own field bearing No. 221/1 to Ziriwala field bearing No. 161 ; the comparative cheapness of Ziriwala field No. 161, its inferior quality and, above all, the conduct of the vendors and the vendee in letting the vendee into possession of field No. 161 though the sale-deed (Ex. III D-1) purported to transfer No. 181 and not No. 161. It is in the light of the surrounding circumstances such as these, that the Court can know in what manner the language of the document (Ex. III D-2) is related to existing facts.

The principle involved is that defect in expression should not be allowed to defeat the intention of the parties if they are agreed as to that. The actual expression of a thought very often fails to express the whole thought, sometimes more may be expressed, sometimes less, sometimes something totally different may be expressed. When parties have come to a contract, but have failed to express themselves correctly, if a mistake is a real one and mutal, and can be established by satisfactory proofs, a Court of equity will re-form written instrument so as to make it conformable to the precise intent of the parties. The real intention may have been misrepresented in writing, either by mutal mistake, or by fraud. Equity, therefore, affords relief in either case in accordance with its general policy to suppress fraud and to promote general good faith and confidence in the formation of the contracts: 1 Storey, Equity, S. 154, It is on this principle that S. 31 Specific Relief Act, is enacted for giving to the aggrieved party the relief of the rectification of the instruments. In *Rangasami Ayyangar* v. *Suri Ayyangar* (7) it was held that the combined effect of S. 92, Cl. (a), Prov. (1), Indian Evidence Act, and of S. 31, Specific Relief Act, is to entitle either party to a contract, whether plaintiff or defendant, to protect his right by proving a mistake in contract, as, e. g. (as was the case there and is also here) a mistake in the description of the property sold by giving wrong survey number to same. On the strength of the decision in *Mahadeva Ayyar* v. *Gopala Ayyar* (8), it was also held that a prior

(5) [1900] 22 All. 149=27 I. A. 58=7 Sar. 661 (P. C.).
(6) A. I. R. 1921 P. C. 4).
(7) [1915] 39 Mad. 792=29 M. L. J. 229=29 I. A. 588=(1915) M. W. N. 448.
(8) [1911] 34 Mad. 51=8 I. C. 390=(1911) 1 M. W. N. 36.

rectification of the deed is not necessary to the advancement of the plea of mistake. It will thus be seen that what in such cases is rectified is not the agreement, but the mistaken expression of it: cf. *Dagdu* v. *Bhana* (9) and *Abdul Hakim* v. *Ramgopal* (10). The cases of *Mahendranath Mukerji* v. *Jogendranath* (11): *Asiatulla* v. *Sadatulla* (12) and *Nandi Ram* v. *Jigendra* (13) affirm the principle that the plaintiff is entitled to succeed upon a construction of a conveyance itself without the necessity of having to take proceedings by way of a separate suit for rectification of the deed, as a Court is competent to give effect to what was indisputably the real agreement between the parties without driving the plaintiff to a separate suit for rectification. In cases of misdescription S. 94, Evidence Act, can have no application.

It is thus clear that the learned District Judge was wrong in holding that evidence as to how the subject-matters of the contracts made by defendants 1 and 2 in 1923 and 1924, with defendant 8 and defendants 3 to 7 respectively were misdescribed in their respective title-deeds (Ex. III-D-2 and Ex. III-D-1, V-D-1 and VI-D-1), was inadmissible. I, therefore, hold that the plaintiff is entitled to ask this Court to give effect to the findings of fact concurrently arrived at by the Courts below and to decree specific performance of his contract of sale dated 8th October 1924 on the strength of the necessary conclusion resulting from such findings that defendants 1 and 2 continued to be owners of Kala Bavdi field bearing No. 181 and were, therefore, competent to convey the same to him for consideration stipulated in the contract. As it has also been found that defendants 1 and 2 receiving a better offer sold the said field to defendants 3 to 7, but believing that field No. 161 was Kala Bavdi field described it through mistake as bearing No. 161 in Ex. III-D-1, V-D-1 and VI-D-1 and whereas it is also found that, labouring under similar mistake, the parties to the instrument (Ex. III-D-2) described the Ziriwala field as bearing Nos. 181 and 186 instead of Nos. 161 and 186, which is their true description, I further hold that the plaintiff is entitled to get a decree for possession of field Kala Bavdi bearing No. 181 from defendants 3 to 7 whose purchase, not having been proved to be without notice of the plaintiff's prior contract of sale, is of no avail as against the latter. In this view of the case the decree for payment of conpensation passed by the District Judge is out of place and must be set aside. I accordingly set it aside and restore the decree for specific performance and possession passed by the Court of first instance.

This disposes of this appeal as also S. A. No. 533 of 1926. As regards costs of this litigation I direct that plaintiff shall get his costs in all the three Courts from defendants 1 to 8 who have all joined together in setting up a false and collusive defence with the deliberate intention of defeating the plaintiff's claim.

It is but fit and proper that the defendants must bear their own costs throughout.

It has just come to my notice that in pursuance of the decree of the first Court the plaintiff had deposited into Court the sum of Rs. 306-12-0 on 5th March 1926 after deducting costs awarded to him. This amount continued in deposit until 15th September 1926 when, consequent on the reversal of the decree by the lower appellate Court, he claimed and got it back. The date originally fixed for the deposit was 20th March 1926; it having expired, and the deposit once made having been withdrawn, it is necessary to fix a fresh date for depositing the balance that may be due on account of purchase-money after setting off against it the amount of costs of three Courts awarded to the plaintiff. I accordingly fix 30th September 1927 as the date on or before which the deposit should be made by the plaintiff and 15th October 1927 as the date for execution of the sale-deed.

G.B. *Suit decreed.*

(9) [1904] 28 Bom. 420=6 Bom. L. R. 126.
(10) A. I. R. 1922 All. 42=44 All. 246.
(11) [1898] 2 C. W. N. 260.
(12) [1918] 28 C. L. J. 197=41 I. C. 747.
(13) A. I. R. 1923 Cal. 53.

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* A. I. R. 1928 Nagpur 10

FINDLAY, J. C., AND MACNAIR, A.J.C.

Commissioner of Income-tax, Nagpur —Applicant.

v.

M. E. R. Malak—Non-applicant.

Misc. Judicial Reference No. 59 of 1926, Decided on 4th August 1927, made by the applicant.

(a) *Income-tax Act, S. 4 (3) (i)— "Wholly" means "solely."*

The word "wholly" in the section must be read in its ordinary acceptation and is in this respect closely akin to the word "solely." *Lambton v. Kerr* (1895) 2 *Q. B.* 233, *Ref.* [P 13 C 1]

* (b) *Income-tax Act, S.4 (3)(i)—Alleged trust deed giving absolute power of disposal to the spiritual head—Object to serve some needs of a community—No ultimate and permanent dedication to religious object—Income of property is not exempt.*

Where under deeds of trust the religious head had full power to use the income of the property or the corpus thereof for the following purposes :

(a) For the suitable maintenance of his dignity and for defraying all personal expenses ;

(b) for providing all the members with board and lodging and the like ;

(c) for carrying on agricultural, commercial and other pursuits of the said community ;

(d) for giving suitable secular and religious education to the members ;

(e) for entertaining guests and the like ; and

(f) for donations for charitable or religious purposes, contribution to memorial funds raised for holding social, educational, religious, industrial or political conferences or congresses, or for public entertainments ;

and he was to have absolute authority to sell, mortgage, or lease, either permanently or for a term of years, any of the property of the community :

Held : that, even if the deeds were assumed to create a trust, the trust cannot be described as one wholly for religious or charitable purposes, that there was no trust of the property even in part for religious and charitable purposes and that the Mussalman Waqf Validating Act did not apply, there being no permanent dedication of property for religious or charitable purposes. [P 13 C 2 P 14 C 1]

G. P Dick—for Applicant.

M. V. Abhyankar and *Wazalwar*—for Non-applicant.

Judgment.—This is a reference by the Commissioner of Income-tax under S. 66, Indian Income-tax Act (11 of 1922). The non-applicant, the Atba-e-Malak, Badar community, residing at Mahdibagh, who for convenience of reference will be described in this judgment as the Mahdibagh community, as assessed to income-tax on an amount of Rs. 28,160 for the year 1924-25. The assessment was made in respect of the following items of income.

Rs. 463 .....Interest on securities ;
„ 1,785 .....Income from property ;
„ 20,287 .....Income from business ;
„ 5,615 ..... Income from partnership.

Total exemption from Income-tax was claimed on the ground that the income in question was derived from the property held under a trust or other legal obligation wholly for religious or charitable purposes, vide S. 4, sub-S. (3) (i), Income-tax Act. The Commissioner of Income-tax was asked to refer the following points for the opinion of this Court :

Issue 1.

(a) Whether assuming the facts as set out in paragraphs 1 to 8 of the report made by Mr. D. E. Sanjana (Income-tax Officer) to be correct, is there or not a wakf of the whole of the property covered by the trust deeds of 1917 and 1922 as well as of what was freshly acquired with the help of that property within the meaning of the Wakf Validating Act 6 of 1913 and within the meaning of the general law relating to religious and charitable trusts ?

(b) Is there any uncertainty in the trust having special regard to the Mahomedan law ?

(c) Whether the word "property," as used in S. 4, sub-S. (3), Cl (i), Income-tax Act, does or does not include the carrying on of a trade in accordance with and for the purpose of the trust ?

Issue 2.

(a) In the event of the learned High Court holding that only a part of the property is held in a religious and charitable trust, is it or is it not necessary to enquire into the point, viz., what portion of property fell under the heading of trust property and what was the income from that part which permits the exemption being granted ?

(b) Whether the rule of Mahomedan Law with respect to allowable charges of management of a wakf ought or ought not to be respected in deciding the question what the taxable income was ?

Issue 3.

(a) Whether having regard to assumption made by the Assistant Commissioner of Income-tax that bicyles worth Rs. 432 were connected with the Itwari and Sitabuldi shops, could the Commissioner disallow those items on the ground set out in para. 8 of his order without allowing the petitioner an opportunity of proving the fact doubted by the Commissioner.

(b) Whether the Income-tax Department was competent to charge more than 12½ percentage on the income from business when no special or unusual circumstances have been shown to have intervened, nor without showing that similar business men were charged more percentage than what is stated above. Whether the observations of the Commissioner on the point in para. 7 were justified in view of the materials on record which were available to the assessee.

(c) Whether the procedure of the Commissioner in not making available to the assessee the report made by the Income-tax officer or further enquiry after remand and in not giving the assessee a right to urge objection to that report was a valid one.

As regards issues 2 and 3, the commissioner of Income-tax held that a reference to this Court was either unnecessary or incompetent. No application was made to this Court under S. 66, sub-S. (3) of the Income-tax Act, on the subject of the disallowance of the reference on issues 2 and 3, and it is not, therefore, competent for us to consider the questions contained therein. We may add that, on 4th July 1927, application was made by the non-applicant community to the effect that it was proposed to argue, before this Court, the contentions already offered before the Commissioner of Income-tax that their case, in any event, would fall under sub-heads (ii) and (vii) of sub-S. (3) of S. 4, Income-tax Act. We found it necessary to hold in this connexion that the reference made by the Income-tax Commissioner amounted to a refusal to state these points for reference to this Court, even if it can be assumed that there was a request from the applicant to the said Commissioner so to do. As in the case of issues 2 and 3, therefore, no application having been filed within due period of limitation by the non-appiicant against this refusal, we found ourselves unable to admit the argument with reference to the two points in question, we are, therefore, solely concerned with issue 1 in the present order.

We find it unnecessary to re-state here in detail the history and constitution of the Mahdibagh community. A fair exposition thereof is to be found in the statement of the case submitted by the Commissioner of Income-tax and we have also on record enclosure filed by the non-applicant community before the Commissioner of Income-tax, which enclosure gives a detailed history of the community. We may say at once that as regards Cl. (c) of issue 1, which relates to the question whether the word "property" in S. 4 (3) (i), Income-tax Act, does or does not include the carrying on of a trade such as this community indulges in, the learned standing counsel for the purposes of this proceeding admitted that such trading might be considered to come within the term "property" in question. We, therefore, now proceed to dispose of Cls. (a) and (b) of issue 1.

For the non-applicant to succeed it was necessary for him to prove that there was either a trust or that the property was held under a legal obligation wholly or in part for religious or charitable purposes. It has been urged in this connexion that the Dayee or the head of the community is a trustee purely and solely of all the property, that the trust is of such a nature that he cannot resile from it without committing a breach of trust and that, in the event of any such breach, action under S. 92, Civil P. C., would be possible. It has further been urged that the property belongs to the community and does not belong to any particular individual including the trustee. The Dayee, in short, holds sway over the property only in his capacity of a spiritual head and has no personal interest therein. His heir-at-law or ordinary successors cannot take any interest therein. Again, the contention has been put forward that an entrant into the community, even if penniless, could claim equal interest with the other members, while, on the other hand, anyone who leaves the community, even if he has contributed all his property thereto, is liable so to leave without receiving anything in return. The members thus, in a sense, being personally propertyless, it has been urged that although the main object of the community is a religious and charitable one, its constitution inevitably demands that secular purposes should be included therein for the clothing, feeding and maintenance of the members and their families, while in the case of the Dayee, personal expenses are essential for the maintenance of his dignity as spiritual head of the community. It has thus been claimed on behalf of the non-applicant that the ultimate aim of the community is a charitable and religious one.

Our attention has also been directed to the fact that the community has manifold activities besides those of trade activities which include religious education, the maintenance of a charitable dispensary and the like. It has been suggested that the absolute power, which rests in the Dayee of choosing his successor and of holding office himself as long as he likes, is not inconsistent with the legal position of a trust.

Leaving aside for a moment the question whether there is in reality a legal trust at all in the case, and assuming that this is so, we find it impossible to hold

that the trust in question could be described as one wholly for religious or charitable purposes. The learned standing counsel has suggested that, even if the word "wholly" were to be read as equivalent in popular language to "mainly," the non-applicant community would not, in the circumstances of this case, be entitled to succeed in their contention. For my own part, we think the word "wholly" must be read in its ordinary acceptation and is in this respect closely akin to the word "solely." Charles, J., in *Lambton* v. *Kerr* (1) held that a house occupied solely for trade of business [S. 13 (1, 2), Customs and Inland Revenue Act, 1878, 41. v. c. 15]. does not include a house occupied not only for business but also for the actual dwelling of persons, not mere caretakers, who are the servants of the occupier.

Turning to the deeds of 25th August 1917 and 25th November 1922, it does not seem to us that the provisions of these deeds render it possible to accept the position urged on behalf of the non-applicant. Under these deeds, the Dayee had full power to use the income of the property or the corpus thereof for the following purposes:

(a) For the suitable maintenance of his dignity and for defraying all personal expenses;

(b) for providing all the members with board and lodging and the like;

(c) for carrying on agricultural, commercial and other pursuits of the said community;

(d) for giving suitable secular and religious education to the members;

(e) for entertaining guests and the like;

(f) for donations for charitable or religious purposes, contribution to memorial funds raised for holding social, educational, religious, industrial or political conferences or congresses, or for public entertainments.

Not only so, but the Dayee was to have absolute authority to sell, mortgage, or lease, either permanently or for a term of years, any of the property of the community. Here, we have, in fact, a small body of persons united by the bond of a common religion, who have bound themselves to come into a society more or less of a communistic nature. The property of the society is administered by the Dayee, the income being devoted to the maintenance and education of the members, to the carrying on of trade and other pursuits and also to certain religious and charitable purposes. It is pertinent to point out that no particular portion of the income or of the property is compulsorily devoted to religious or charitable purposes. The Dayee in this connexion has apparently an absolutely free hand and so far as the terms of the deeds go he cannot be called to account, if only 1 per cent. of the income is devoted to religious and charitable purposes.

Our attention has been directed to certain remarks of Marten, J., in *Advocate General of Bombay* v. *Yusuf Ali Ebrahim* (2), where the learned Justice remarked that the more absolute the power of the trustee, the greater the trust. That is, in itself, an unexceptionable proposition, but the remarks do not seem to us to be capable of apposite application to the facts of the present case. The objects laid down in the constitution of the community are manifold, including as they do agricultural, industrial, commercial, religious and other pursuits: cf. for example, para 3 of the deed of 25th November 1922. We are, therefore, of opinion that, in any event, even assuming that we are here dealing with a trust, the trust cannot be described as one wholly for religious or charitable purposes. This fact, of itself, would take the so-called trust outside the purview of S. 4, sub-S. 3 (1), Income-Tax Act.

In the terms in which issue 1 (a) referred to us is framed, the question whether there could be said, in any event to be a trust of the property in part for religious and charitable purposes, was not specifically raised, but we, nevertheless, find that, in his statement of the case, the Commissioner of Income-Tax has dealt with this matter. We, therefore, consider it desirable to record our opinion whether in the present case there was, even in part, a trust for religious and charitable purposes. We do not, however, think that even this position can be properly predicated as regards the present case. The manifold purposes of the trust are so inextricably mingled that it is impossible to hold that any definite part of the property or of its income is allocated to such religious and charitable purposes. From this point of view also,

(1) [1895] 2 Q. B. 233=64 L. J. Q. B. 719=59 J. P. 775=43 W. R. 541.

(2) A.I.R. 1921 Bom. 538.

we do not think it is possible to hold that there is even a trust here of the property in part for religious and charitable purposes.

We are, however, further of opinion that we are not, in reality, here dealing with a trust. The executant of the deeds in question has absolute control over the property in his own hands. Although it is true that, under the terms thereof, the income and corpus must be devoted to the numerous objects shown in the deeds, these objects we have already indicated are extremely wide, and they are further not only wide but vague. In this connexion, it is necessary to lay stress on the words "other pursuits of the said community", which occur in para 3 of the deed of 25th August 1917. The position in reality, is that after providing for the maintenance of himself and the members of the community, the Dayee is at liberty to devote the property and its income to any or all of the other purposes stated in the documents. There is no definite portion of the property or of the income devoted to religious and charitable purposes. The decision of their Lordships of the Privy Council in *Mahomed Ahsanulla Chowdhury* v. *Amarchand Kundu* (3), is on this ground, distinguishable from the present case. Moreover, we agree, for the reasons stated by the Commissioner of Income-Tax, that the element of uncertainty enters into the constitution of the community to an extremely large extent. We may add that we do not think that S. 92, Civil P. C., could possibly be applied to the present community, for we are of opinion that the provision for the maintenance, education and the like of the community, which is obviously the primary purpose provided for in the deeds cannot possibly be described as a public purpose.

A reference has been made by counsel for the non-applicant as well as by the standing counsel to the Mussalman Wakf Validating Act (6 of 1913), but we do not think the said Act has any application in the present case. It is impossible to postulate here that there has been a permanent dedication of property for religious, pious or charitable purposes. So far as the legal position of the community in this connexion is concerned, the Wakf Validating Act of 1913 makes, in reality, no difference. We find in the present case no wakf in respect of the maintenance and support of the family of the person constituting the trust. The present case is, moreover, closely parallel to that of *Mujib-un-nissa* v. *Abdur Rahim* (4). It is impossible, on the facts of the present case, to hold that the property is in substance dedicated to religious or charitable purposes. There has been no such entire or substantial dedication of the property as to bring it within the term "wakf", and it is, moreover, pertinent to point out here that there is no provision regarding the incidence of the ultimate benefit. It is conceivable, if not likely, that the community might entirely disappear through internal discord or the like. The law makes it imperative, vide S 3, Mussalman Wakf Validating Act, that the ultimate benefit should be expressly or impliedly reserved for the poor or for any other purpose recognized by the Mahomedan Law as a religious, pious or charitable purpose of a permanent character.

We, therefore, answer issue 1 (a) in the negative and hold that there was no wakf or trust of the property wholly for religious or charitable purposes, and we are further of opinion that the property is not held in part for such purposes Issue 1, (b), in the circumstances of the last finding, does not require an answer because we hold that no trust was constituted for the reasons given above. Issue 1 (c), for the reason already stated viz., the admission of the standing counsel on the point, requires no finding. The non-applicant will bear the costs of the Commissioner of Income-Tax as well as his own. We fix Rs. 200 as pleader's fee.

D.D. *Reference answered.*

(3) [1890] 17 Cal. 498=17 I A. 28=5 Sar. 476 (P.C.).

(4) [1901] 23 All. 233=28 I. A. 15=7 Sar. 829 (P.C.).

A. I. R. 1928 Nagpur 14

FINDLAY, J. C.

S. R. Vaidya—Judgment-debtor—Appellant.

v.

Abdul Samad and *another*—Decree-holder and Purchaser—Respondents.

Misc. Appeal No. 4 of 1927, Decided on 12th August 1927, from the order of the 1st Cl. Sub-Judge, Nagpur, D/- 4th October 1926, in Civil Suit No. 8 of 1925.

Civil P. C., O. 21, R. 66—Sale—Proclamation—Omission by a decree-holder to file a verified statement is only an irregularity—Substantial injury to the judgment-debtor must be shown.

The omission of the decree-holder to file a verified statement of property required under O. 21, R. 66, Civil P. C., is not an illegality which vitiates the sale. It is only an irregularity, and, it is incumbent on the judgment debtor to prove that he was preiudiced substantially by such irregularity : 28 *All.* 244, *Foll.*: *A. I. R.* 1924 *Pat.* 111, *Dist.* [P 15, C 1]

V. N. Harlekar—for Appellant.

A. V. Khare and *S. R. Mangulkar*—for Respondents.

Judgment.—The facts of this case are so far clear from the lower Court's order. Various grounds have been put forth in the petition of appeal, but only two have in reality been pressed. The first of these is that the omission of the decree-holder to file a verified statement required under O. 21, R. 66 Civil, P. C., amounted to an illegality which vitiated the sale. I do not think the said omission can properly be described as an illegality. It was, at the most, an irregularity and it was incumbent on the appellant to show that he was prejudiced substantially by the said irregularity : cf. *Nasir-un-Nissa* v. *Ghafur-ud-Din* (1).

Ground 2 of the petition of appeal does not admit of discussion. The matter was set at rest by the order of Kotval, O.J.C., dated 18th September 1926, in Civil Revision No. 299 of 1926. What, however, does seem to me fatal in the circumstances of the case to the order of the lower Court is the fact that, in the sale proclamation, mauza Isapur was expressly mentioned as subject to a mortgage of Rs. 30,000. Now, admittedly the facts are that the mortgage in question, which dates from the year 1922, was not only of mouza Isapur but of another village Gangnala as well. It is no doubt true that the mortgagee is entitled to enforce his debt against any other village, but the fact still remains that, if one village is described as subject to a mortgage of a certain amount, while, in reality another village is also included in the mortgage, the price obtained at such an auction-sale for the first village will inevitably be less, if it is shown as solely subject to the mortgage in question. It is true that, even so, it was incumbent on the appellant to show that he suffered substantial loss by reason of the wrong description in question, but in a case like the present it is not easy to see what specific evidence of substantial loss parties in the position of the appellant could in ordinary circumstances produce. In view of the rental collections of the village, which amount to about Rs. 2,000 per year, the price obtained seems prima facie a highly inadequate one, even if allowance is made for the encumbrance on the property. It is true that the judgment-debtor did not prove his allegation that only Rs. 9,500 was due on the mortgage, but equally so it is not clear that Rs. 30,000 could have been due on the date of the sale.

Even allowing for the fact of the encumbrance and for the further fact that the *sir* and khudkasht lands were not to pass under the sale, the only reasonable inference to my mind, on the scanty evidence on record, is that there must have been a substantial reduction in the price obtained owing to the fact that mauza Isapur was shown as solely subject to the mortgage of Rs. 30,000 in question. It follows, therefore, that, in the circumstances of the present case, the reasonable presumption is that substantial injury must have been caused to the appellant by the sale of the village. In the case of so large and valuable a village, it was highly important and indeed compulsory that all essential particulars should have been given. Not only was this not done but the particulars given of the encumbrance on the village were misleading to a degree, and it matters not whether the mistake occurred intentionally or otherwise.

In argument it has been suggested on behalf of the respondents that a peculiar duty lay on the judgment-debtor of attending and assisting the Court as regards the correctness or otherwise of the particulars included in the proclamation. I have been referred to the decision of *Mahadeo Singh* v. *Dhobi Singh* (2), but the facts of that case were somewhat dissimilar, and in the present case it is perfectly obvious that the decree-holder did not fully comply with the duty which rested on him of giving along with the judgment-debtor, if necessary, the particulars required under R. 66, sub-R. (2), O. 21, Civil P. C. The finding, I may add, of the lower Court as to the amount of loss suffered by the judgment-debtor in this connexion is far from satisfactory. In para. 16 of his judgment, the Subordinate Judge

(1) [1905] 28 All. 244=(1905) A. W. N. 263.

(2) A. I. R. 1924 Pat. 111=2 Pat. 916.

holds that the auction price of Rs. 7,000, which was obtained "is not proved to be very small or inadequate." In para. 19 he holds that it is likely that the judgment-debtor has been put to some actual loss on account of the decree-holder's default in not ascertaining from the mortgagee the amount due on his mortgage. Neither finding is satisfactory. What the lower Court had to determine was whether any substantial loss or injury had been caused to the judgment-debtor. When, in addition to the facts referred to by the lower, Court, we also consider the all-important fact of the mortgage being described as an encumbrance only on the one village (mauza Isapur), I am of opinion that the only reasonable inference from the evidence on record is that the sale occurred under circumstances which caused substantial injury to the appeliant and that the decree-holder was mainly responsible for these circumstances.

In these circumstances, the appeal succeeds and the order, dated 4th October 1926, of the lower Court is reversed. As both parties have been to some extent to blame for the result, they will bear their own costs in this Court and in the Court below.

N.D. *Appeal allowed.*

A. I. R. 1928 Nagpur 16

HALLIFAX, A. J. C.

Jaitram and *others*—Plaintiffs—Appellants

v.

Girdhari and *another*—Defendants—Respondents.

S. A. No. 154 of 1926, Decided on 29th March 1927, from the decree of the Additional District Judge, Bilaspur, D/- 30th January 1926, in Civil Appeal No. 218 ot 1925.

(*a*) *Landlord and Tenant—Lease of land owned by co-sharers cannot be made by the lambardar alone.*

Where some persons were co-sharers in a village of which one was lambardar and the land in question had been held in severalty by persons other than lambardar as their khudkasht for some years with his consent and the lambardar agreed with the persons that they were to have the sole management of the village and were to cultivate all the khudkasht land in it but later the lambardar made a perpetual lease of the land:

Held: that the deed of lease was void and the lambardar had no right to grant it.

There is a common delusion that a lambardar has some sort of personal authority in himself to grant leases of land in which he owns a share. Such a grant can of course be made only by the whole body of proprietors though they must frequently make it through the lambardar as their representative. [P16 C 2]

(*b*) *Specific Relief Act, S.* 42—S. 42 *does not exclude verbal denials of a title.*

Verbal denials of title are not excluded from the scope of S. 42; 16 *N. L. R.* 209, *Ref.* [P 17 C 1]

J. Sen—for Appellants.

C. B. Parakh—for Respondents.

Judgment. — The plaintiffs and the defendant 1 Girdhari are co-sharers in a village of which Girdhari is the lambardar, and the land in question has been held in severalty by the plaintiffs as their khudkasht for some years with the consent of the remaining co-sharer Girdhari. That is enough for the purposes of this case, though it is very clearly proved by the evidence that Girdhari agreed with the plaintiffs that they were to have the sole management of this village and were to cultivate all the khudkasht land in it. On the 15th January 1925 Girdhari executed a deed, which was registered, giving Sukhiram, defendant 2, a perpetual lease of the land in dispute. Sukhiram, however, never got possession and on the 14th April of the same year the plaintiffs, acting with unusual promptitude, filed the suit out of which this appeal has arisen, praying for a declaration that the lease was void.

It has been held in both the Courts below that the deed of lease is void because the defendant Girdhari had no right to grant it. That is undoubtedly correct. There seems to be a very common delusion that a lambardar has some sort of personal authority in himself to grant leases of land in which he owns a share. Such a grant can of course be made only by the whole body of proprietors, though most frequently they make it through the lambardar as their representative. Here, however, Girdhari did not even purport to act on behalf of the whole proprietary body; he granted the lease himself, in denial of the right of the other co-sharers to have any voice in the matter and in supersession of the grant already made by the whole body of proprietors including himself.

The declaration for which the plaintiffs prayed was granted to them in the first Court, but the suit was dismissed by the appellate Court in a judgment containing hardly one premise or inference which is sound. It starts with the statement which was apparently accepted by both parties,

that if without bringing into existence a need of transfer defendant 1 simply went about trumpeting that he was in possession of the land and not the plaintiffs and had the right to the same, a declaration against him could not probably be had.

The word "probably" in a statement of that sort is entirely out of place, but anyhow the principle stated as probable is treated as absolute for the purposes of the argument.

The statement is obviously much too wide to be anywhere near correct. There is nothing in S. 42, Specific Relief Act, to exclude verbal denials of a title from its scope. The statement of the same principle is repeated later in the judgment where the learned Judge says :

that merely saying something could give no cause of action for a declaratory suit would appear from *Mt. Ujaria* v. *Roshanlal* (1).

That the direct opposite of this is stated in *Mt. Ujaria* v. *Roshanlal* (1) is apparent from a perusal of no more than the head-note; the judgment makes it still clearer.

From the false premise that

a mere bluster could not throw a cloud on the title,

we have next the more obviously impossible deduction that

mere execution of a deed of transfer as a further act by the person ought not to throw any cloud.

The cloud is described as

one for which a declaration could be maintained.

The learned Judge then holds, quite correctly, that the lambardar had no right to grant the lease, which was void, or to deal with the property at all, and then goes on to say :

His act of dealing, therefore, cannot really effect any transfer, and if that dealing consists of no other act except of executing a document, that act cannot be said to throw any cloud on the title of the co-sharer in possession.

It is impossible to imagine any "act of dealing" that could be declared void under S. 42, Specific Relief Act, except one that was void.

Finally, on a perusal of an explanation of the scope of S. 42 in a judgment of the Calcutta High Court, the learned Judge is led

to the conclusion that a declaration such as is asked for is not probably warranted by the section.

An expression of the opinion that a finding on a material issue is "probable" is no decision at all, and the words of the section which does not seem to have been read are the best explanation of its scope. Those words lead to the conclusion that a declaration such as the plaintiffs seek is certainly warranted by the section, and the judgment mentioned is to the same effect as might be expected.

The decree of the lower appellate Court will be set aside and that of the first Court, declaring that the registered deed of lease is not binding on the plaintiffs, will be restored. The defendants will pay the whole of the costs of the plaintiffs in all three Courts. The pleader's fee in this Court will be fifty rupees.

N.D. *Decree set aside.*

(1) [1920] 16 N. L. R. 209=60 I. C. 343.

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* A. I. R. 1928 Nagpur 17

FINDLAY, J. C.

Bholu—Accused—Applicant.

v.

Punaji — Complainant — Non-Applicant.

Cr. Rev. No. 179 of 1927, Decided on 22nd August 1927, from the order of the Sessions Judge, Chhindwara, D/- 21st April 1927, in Cr. Rev. No. 3 of 1927.

(a) *Criminal P. C., S. 195—False charge made to police but no proceedings in Court—No complaint by Court is necessary to prosecute under S. 211, Penal Code.*

When a false charge has been made only to the police, but the person making the false charge has not applied to the Magistrate and no Court proceedings whatever have ensued, no complaint is necessary under S. 195, Criminal P. C., before a prosecution under S. 211, Penal Code, can be instituted against the informant: 43 *Cal.* 1152, *Foll.*; A. I. R. 1924 *All.* 779, *Appr.*; 34 *All.* 522, *Doubted.* [P 19 C 1]

(b) *Penal Code, Ss. 182 and 211—Difference shown.*

Sections 182 and 211, Penal Code in reality differ fundamentally as regards the ingredients of the offence concerned. [P 19 C 2]

Section 182 is primarily intended for cases of false information which do not ordinarily involve a particular allegation or charge against a specified and definite person. S. 211 covers cases where there is a definite information or

charge with reference to a criminal offence against a particular person. [P 19 C 2]

P. C. Dutta and *A. Razak*—for Applicant.

D. T. Mangalmoorti—for Non-Applicant.

G. P. Dick—for the Crown.

Order.—The non-applicant in this Court, Punaji, filed a complaint in the Court of the Sub-Divisional Magistrate, Chhindwara, against the present applicant, Bholu, under S. 211, I. P. C. The complaint against Bholu was that he had specifically reported to the police that the present non-applicant Punaji and another man had committed arson in respect of burning of the house of one Dewaji in the village concerned. The complainant, before the Sub-Divisional Magistrate, alleged that the police, on enquiry, found no evidence against the present non-applicant and took no action on the ground that the report was a false and malicious one. The Sub-Divisional Magistrate held that, although the facts of the case might constitute an offence under S. 211, I. P. C., they nevertheless, equally constituted an offence under S. 182, I. P. C., and that, this being so, the complaint in writing of the public servant—in this case, the police officer who took report—was necessary under S. 195 (1) (a), Criminal P. C., and that, as this was not forthcoming, he could not entertain the complaint.

The complainant Punaji applied in revision to the Sesssions Judge, Chhindwara, for the reversing of the Sub-Divisional Magistrate's order in question. His application succeeded and the learned Sessions Judge held that no sanction was necessary in the circumstances of the present case and directed the Sub-Divisional Magistrate to make further enquiry into the complaint. The applicant (accused) has now come up on revision to this Court against the said order of the learned Sessions Judge.

The main argument offered on behalf of the applicant is that, although S. 211, I. P. C., may be wider than S. 182 idem, yet every offence, which falls under S. 211 is nevertheless, an offence under S. 182, and that this being so the sanction of the public servant concerned was necessary to the institution of criminal proceedings as held by the Sub-Divisional Magistrate.

I am wholly unable, however, to agree that Ss. 182 and 211, I. P. C., cover and refer to the same class of case. It is true that Ill (c) of S. 182, which was added by the Amending Act of 1895, does cover the case where a criminal offence is alleged to have been committed but there is this important difference that the person giving the information makes no implication whatever against any particular person. The other two illustrations (a) and (b) clearly do not necessarily relate to matter of criminal offences. The gist of S. 182 is that a person gives information which he knows or believes to be false intending thereby to cause, or knowing it to be likely that he will thereby cause, the public servant to do or omit anything which such public servant ought not to do or omit if the truth were known to him, or to use the lawful power of such public servant to the injury or annoyance of any person. S. 211 is, in my opinion, an offence of a different nature. There must be, from the first, a distinct intent to cause injury to a particular person and a distinct criminal offence must be alleged.

The decision in *Emperor* v. *Hardwar Pal* (1) is, no doubt, in favour of the contention of the present applicant, but with all deference, I am unable to agree with the learned Judge who decided that case. I am humbly of opinion that the reasoning contained therein contains a fallacy, for it is assumed that, if, in the circumstances of a particular case, an offence under S. 211 is equally an offence under S. 182, I. P. C., previous sanction, or now a complaint, is necessary to the prosecution, even although no such sanction would be necessary under S. 195, Criminal P. C., if the offence were considered as solely falling under S. 211, I. P. C. The correctness of the decision in *Emperor* v. *Hardwar Pal* (1) quoted above was doubted by Walsh, Ag. C J., and Ryves, J., in *Emperor* v. *Kashi Ram* (2), but doubt was only expressed on another question with which I am not directly concerned in the present case. The decision, however, contains what is, in my opinion, a valuable and sound definition of what may be held to amount to making a charge within the meaning of S. 211, I. P. C. The definition is as follows:

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(1) [1912] 34 All. 522=16 I. C. 510=10 A. L. J. 61.

(2) A. I. R. 1924 All. 779=46 All. 906.

If the complainant confines himself to reporting what he knows of the facts, stating his suspicions, and leaving the matter to be further investigated by the police, or leaving the police to take such course as they think right in the performance of their duty, he may be making a report, but he is not making a charge. But if he takes the further step, without waiting for any official investigation, of definitely alleging his belief in the guilt of a specified person, and his desire that the specified person be proceeded against in Court, that act of his, whether verbal or written, if made to any officer of the law authorized to initiate proceedings based upon the complaint's statement, whether amounting to an expression of the complainant's belief in the guilt of the specified person, or his desire that Court proceedings be taken against him, amounts to making a charge.

For my own part, I have not the slightest doubt as to the propriety of the decision of Mookerjee and Sheepshanks, JJ., in *Tayebulla* v. *Emperor* (3), viz., that when a false charge has been made only to the police, or when the person making the false charge has not applied to the Magistrate and when no Court proceedings whatever have ensued, then clearly, in my opinion, as the law at present stands, no complaint is necessary under S. 195, Criminal P. C., before a prosecution under S. 211, I. P. C., can be instituted against the informant.

It has been urged on behalf of the applicant that the view taken in the Calcutta case just quoted leads to a gross anomaly, because under S. 195 (1) (a) what may be termed the minor offence under S. 182, I. P. C., requires the complaint of the public servant concerned, while the major offence under S. 211 does not require such a complaint unless the offence has been committed in, or in relation to, a proceeding in any Court when the complaint of such Court is necessary. I am not prepared to assume that any anomaly necessarily arises in this connexion, but, even if there were, I can see no reason for going behind the very clear terms of S. 195 (1) (b), Criminal P. C. If the facts alleged in the present case are correct, there was very clearly an offence under S. 211, I. P. C. It is equally established that no criminal proceedings ensued and it seems to me inevitably to follow that no complaint from the public servant concerned is necessary before a criminal complaint under S. 211 is lodged. I do not, however, think that mere fact of the relative gravity of offences is the only consideration which may have entered into the intention of the legislature when it decided that thee minor offence under S. 182 required the complaint of the public servant concerned while the major offence under S. 211 does not require such complaint unless the offence was committed in, or with regard to, a proceeding in Court. As I have shown, S. 182 and S. 211, I. P. C., in reality differ fundamentally as regards the ingredients of the offence concerned, and it may be that the legislature had in view other considerations besides the mere gravity of the respective offences when it enacted the law, as it at present stands, under S. 195, Criminal P. C.

I have been referred to various old decisions of the Calcutta and Allahabad High Courts in support of the view that every offence under S. 211, I, P. C., necessarily includes an offence under S. 182 idem. In a recent Patna case *Daroga Gope* v *Emperor* (4) a similar view was taken but it is pertinent to point out that in that case the informant to the police did not stop there but eventually filed a formal complaint before the Magistrate. In my opinion, therefore, the position is as follows : S. 182 is primarily intended for case of false information which do not ordinarily involve a particular allegation or charge against a specified and definite person. S. 211 covers cases where there is a definite information or charge with reference to a criminal offence against a particular person. As the law stands at present, a complaint can lie under S. 211 by the person aggrieved without any complaint from the public servant to whom the information was given provided that no proceedings in Court have ensued. It might well be that, in a case like the present, the definite intention of the legislature, when a person like the non-applicant in this case has had false information given against him to the police, and the police have taken no action beyond the necessary enquiry made to satisfy themselves that the information was false, was deliberately to leave the door open to the person aggrieved to have his remedy by direct complaint under S. 211. Whatever the intention of the legislature was, however, it seems to me clear that, as S. 195, Criminal P. C., at present stands, no complaint from the police officer to whom the report was

(3) [1916] 43 Cal 1152=24 C. L. J. 131=36 I. C. 845=20 C. W. N. 1265.

(4) A. I. R. 1925 Patna 717=5 Pat. 33.

made was necessary in the circumstances of the present case. I am in full agreement, therefore, with the order of the learned Sessions Judge. The present application is dismissed.

R.K. *Application dismissed.*

A. I. R. 1928 Nagpur 20

KINKHEDE, A. J. C.

Jagdeo and *others*—Plaintiffs—Appellants.

v.

Vithoba and *others*—Defendants—Respondents.

S. A. No. 221-B of 1926, Decided on 11th July 1927, from the decision of the First Addl. Dist. Judge Akola, D/- 12th February 1926, in Civil Appeal No. 222 of 1925.

Evidence Act, S. 32 (6) *and S.* 90—*Pedigree satisfying conditions of Ss.* 32 (6) *and* 90—*Relationship as given corroborated—Presumpsion as to its genuineness ought to be made.*

Where relationship as described in a genealogical tree is corroborated in material parts by evidence on record and it prima facie satisfie sall the conditions prescribed by S. 32 (6) and S. 90, Evidence Act, presumption ought to be made in favour of its genuineness : 37 *All.* 600 ; *A. I. R.* 1921 *Nag.* 49 ; and *A. I. R.* 1925 *Nag.* 271 ; *Rel. on.* [P 21 C 1]

P. B. Gole—for Appellants.

V. K. Rajwade—for Respondents.

Judgment.—This is an appeal by the plaintiffs who have lost their suit in both the Courts below. They claim certain property as reversioners after the death of one Mt. Savitri, the widow of one Raisingh. They claim to be the descendants of Danaji who is said to be the common ancestor. Defendants denied the relationship and stated that Danaji had only two sons Khanaji and Janaji whereas the plaintiff's contention was that Mukram, through whom they traced their descent was also one of the sons of Danaji.

The Court of first instance held that plaintiffs were not the reversioners and had no right to sue, and on that ground dismissed the suit. Plaintiffs preferred an appeal to the First Additional District Judge, Akola, who dismissed the appeal and confirmed the dismissal of the suit.

They have, therefore, come up in second appeal to this Court.

The lower appellate Court rightly remarks that the main strength of the plaintiffs' case lies in the genealogical tree (Ex. P-5) produced by Pundlik (P. W. 2). The said witness has deposed that the pedigree was prepared by his grandfather, Bhagwan, as he learnt from his father. Plaintiffs have examined witnesses P. W. 2, P. W. 3 and P. W. 5 to prove the several links in the pedigree ; even the defendants' witnesses D. W. 2, D. W. 3 and D. W. 5 have proved the family tree in certain degrees. Thus in the words of the Additional District Judge himself,

> the evidence on the record proves the tree for about four generations

but no further. He, ultimately, concluded that the evidence failed to establish the immediate relationship of the plaintiffs with the deceased Raisingh. The reasoning on which this conclusion is based is stated in these words in the judgment :

> It is difficult to believe in the truth of the genealogy produced because it tallies with the relations of the existing persons merely without proof of other material circumstances which shall establish its genuineness.

It is also remarked that

> none of the witnessess prove the entire pedgree as given in this tree but only parts of them are proved.

It will thus be seen that the learned Additional District Judge treats the document as partly proved, but at the same time, for want of evidence to prove the remote links in the pedigree, entertains suspicion as regards its genuineness. He has, however, not come to a definite finding that the document is not genuine.

It thus appears that in the opinion of the Additional District Judge some more proof was necessary to enable him to come to the conclusion that the entire pedigree was proved as that alone would have established the plaintiffs' relationship with the deceased Raisingh. In this state of evidence and findings the plaintiffs-appellants urge that if the statement of relationship contained in the genealogical tree is proved to be true in material parts, and it is also proved that it had come into the hands of the witness who produced it from his ancestors who were dead and gone at the time of the present controversy, the Court of appeal below was bound to presume that the rest of the statement of relationship contained therein was also correct in view of the provisions of S. 32 (6), Indian Evidence Act. Except the testimony of plain-

tiff as P. W. 1 and of P. W. 2 there is no independent evidence on record to prove the handwriting of the genealogical tree. The statement of P. W. 2 that his father used to say that the genealogical tree was prepared by Bhagwan, his father, uncorroborated though it is, makes the document more than 30 years old as Bhagwan is said to have died more than 32 years ago. In my opinion the lower appellate Court before proceeding to consider the weight to be attached to Ex. P-5 ought to have come to a definite finding whether that document is genuine or not in all its particulars. In judging its evidentiary value before judging its genuineness it has really put the cart before the horse. In view of the fact that the relationship as described therein was corroborated in material parts by the oral testimony of plaintiffs' witnesses, as also of defendants' witnesses, and of the prima facie believable evidence on record that Bhagwan, its author, had died more than 32 years prior to the present litigation, and of the further circumstance that it prima facie satisfies all the conditions prescribed by S. 32 (6), Indian Evidence Act, and also of S. 90 of the said Act, I think the learned Judge ought to have made a presumption in favour of its genuineness. This view finds ample support in the case *Jahangir* v. *Shivrajsingh* (1) and *Lahnoo* v. *Motiram* (2). In those cases there was no evidence to show who had actually written the document. In any case the document in question was admissible and had a great evidentiary value as a statement of a deceased relation of Raisingh, the last male holder, or at any rate of the witness's ancestor who must be taken to have adopted it, as pointed out by this Court in *Namdeo* v. *Ganoba* (3).

Under these circumstances, I think this is a fit case for the exercise of the jurisdiction vested in me under S. 103, Civil P. C., of recording my findings on the crucial point left undecided by the lower appellate Court, namely the genuineness or otherwise of the genealogical tree as given in Ex. P-5. On going through the entire evidence on record and judging of the facts of the case in the light of the presumption above referred to, and in the absence of any evidence to the contrary, I hold that the mere circumstance that the genealogical tree was not previously produced in any Court of law is not sufficient to outweigh the presumption of genuineness which I make in respect of Ex. P-5 so far as the links beyond four generations are concerned. I accordingly find that Ex. P-5, taken as a whole, amply proves that the plaintiffs were related to the common ancestor, Danaji, through Makram who was one of his sons.

As the suit was dismissed on the sole ground that the plaintiffs' relationship was not established, and as differing from the Courts below I hold that it is established, I remand the case to the Court of first instance for the decision of the rest of the points involved but left undecided. Appellants will get refunds of Court-fees paid on the memoranda of appeal to this Court and the lower appellate Court. Other costs of both the appeals will be paid by the respondents. Costs in the first Court will be costs in the suit.

N.D. *Case remanded.*

(1) [1915] 37 All. 600=30 I. C. 505=13 A. L. J. 817.
(2) A. I. R. 1921 Nag. 49.
(3) A. I. R. 1925 Nag. 271.

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*A. I. R. 1928 Nagpur 21

FINDLAY, J. C.

Pandurang Krishnaji Deotale — Accused—Applicant.

v.

Emperor—Opposite Party.

Mis. Petn. No. 29 of 1927, Decided on 20th July 1927, for transfer of Criminal Case No. 4 of 1927.

*(a) *Criminal P. C., Ss.* 526 (1) *(b) and (e)—Intricate questions arising in a case—Case should be tried by stipendary Magistrates—Criminal P. C., S.* 15.

Cases, which are likely to be keenly contested and intricate in nature, are, on the whole, likely to be more efficiently disposed of by stipendiary Magistrates than by Honorary Magistrates. [P 22, C 2]

(b) Criminal P. C., S. 526 (1) *(a) and (e)—Test is that High Court must think that fair and impartial trial shall not be obtained.*

The criterion for a transfer under Cl. (1) (a), S. 526, is that the High Court must be of opinion that the applicant will not receive a fair and impartial trial in the Court below. The mere fact that the applicant entertains an absolutely unreasonable belief that he will not have a fair trial would not be sufficient to order a transfer under Cl. (e), S. 526 (1), Criminal P. C.: *A. I. R.* 1926 *Nag.* 448, *Doubted.* [P 23, C 1]

S. S. Deshpande—for Applicant.
G. P. Dick—for the Crown.

Order.—This is an application for transfer of a pending criminal case. The applicant, Pandurang Krishnaji Deotale, described as a malguzar and a durbari, etc., has been acc sed of offences under Ss. 426 and 295, I. P. C., by one Karim Miya Musalman, the complaint being that the applicant has desecrated and destroyed a certain tomb of a Mahomedan saint. The complaint would appear to have been filed in the Court of the City Magistrate, Nagpur, who endorsed it for disposal according to law to a Mahomedan Honorary Magistrate of the second class. It is not clear on what grounds the order of transfer was passed, or under what provision of law, and it is alleged on behalf of the applicant that, under the ordinary routine, the case should have been filed in the Court of another Magistrate of the second class who happens to be a Hindu. The present applicant applied to the District Magistrate, Nagpur, for transfer of the case. The District Magistrate passed an order to the effect that the case did not appear to be a communal one as 14 prosecution witnesses were Hindus and only seven Mahomedans. In these circumstances he declined to transfer the case.

For my own part it seems to me impossible at the present juncture for this Court, like any other one, to ignore the patent fact that considerable communal tension exists all over India. The very nature of the present criminal complaint tends to make it a communal one. A Hindu of some standing in the locality concerned is said to have desecrated the tomb of a Mahamedan saint and is being criminally prosecuted therefor by a Mahomedan. A copy of the appeal has been produced by the applicant relating to the case, showing that an appeal is being made to the Mahomedan community to collect funds for carrying on the case and the like. In those circumstances, I am unable to agree with the learned District Magistrate either in the terms of the order in which he dismissed the application for transfer, or in his letter to this Court showing cause against the present application, in which he states that the case is of no administrative importance.

It seems to me, moreover, that, in all probability difficult questions, both of law and fact, will arise in the case and that it will be a keenly contested one both on the prosecution and defence sides is sufficiently patent. While I value the services of Honorary Magistrates highly, there can be no gainsaying the fact that cases, which are likely to be keenly contested and intricate in nature, are, on the whole, likely to be more efficiently disposed of by stipendiary Magistrates than by Honorary Magistrates, or at least the accused persons concerned well believe this to be the case. The former Magistrates have had a more specific and detailed technical training and, as a rule, have much more experience in the conduct of criminal cases. From this point of view, therefore, it would seem to me advisable that this case should be tried by a stipendiary Magistrate of the first class, and I come to this conclusion, even having regard to the provisions of S. 526 (1) (b) and (e), Criminal P. C., both of which would seem to be applicable in the circumstances of the present case.

I now desire, however, to pass to the allegation put forward on behalf of the applicant that a fair and impartial trial was unlikely to be had in the Court of the Second Class Honorary Magistrate, to whom the City Magistrate sent the criminal complaint for disposal. I desire at once to dissociate myself from what, in effect, is the allegation offered on behalf of the applicant in this connexion, viz., that the mere fact of this case having been sent to an Honorary Magistrate, who happens to be a Mahomedan, gives him reasonable cause for apprehension that he will not have a fair and impartial trial. An intolerable position would arise, if it were to be open to any accused person in a case of a communal or quasi-communal nature to obtain a transfer of a case from the Court of a Hindu Magistrate merely because he, the accused, was a Mahomedan, or vice versa. I have, however, been referred to the decision of Hallifax, A. J. C., in *Abdulla* v. *Bakaram* (1). While, with deference, I am not prepared, as at present advised, fully to agree with that decision, I do not find it necessary at the juncture to refer this matter to a Bench of this Court. It seems to me in the present case that, if the standard laid down by Hallifax, A. J. C., in the said case be accepted as correct, then the applicant would be entitled to a transfer of

(1) A. I. R 1926 Nag. 448=22 N. L. R. 99.

the case even under S. 526 (1) (a), Criminal P. C. The applicant may be a Durbari, a malguzar, and a man of some little position, but I have little doubt but that he, however unreasonably, does entertain some fear that he might not receive a fair and impartial trial in the Court of the Honorary Magistrate. For my own part, however, with all deference I should have found myself unable to accept the dictum laid down in the case quoted above that, if an accused person does, in fact, believe that he will not have a fair and impartial trial in a certain tribunal however unreasonable that belief may be, the case should be transferred to another Court. I may say that, for my own part, it appears to me that the criterion for a transfer under Cl. (1) (a) of the section quoted is that this Court must be of opinion that the applicant will not receive a fair and impartial trial in the Court below. Again, I am not prepared to admit that merely because the applicant entertains an absolutely unreasonable belief that he will not have a fair trial, the fact would be sufficient to order a transfer under Cl. (a), S. 526 (1), Criminal P. C. As I have said, however, I do not find it necessary to decide the present case under Cl. (a) and, therefore, it is needless at the present juncture to refer the point I have alluded to to a Bench.

As I have stated above, I consider that, for the reasons given in the beginning of this order, it is expedient under Cls. (b) and (e) that this case should be tried by a stipendiary Magistrate of the first class. I have already endeavoured to make it clear that, by passing this order, I do not for one moment intend to suggest that Honorary Magistrates are as a class unable or unsuited to dispose of the ordinary type of criminal cases, yet at the same time the fact remains that more difficult or intricate a criminal case is, the more a priori desirable it is that a stipendiary Magistrate should dispose of it. Accordingly I order Criminal Case No. 4 of 1927 to be transferred from the Court of the Honorary Magistrate, 2nd Class, either to the Court of the District Magistrate, Nagpur, or to such stipendiary Magistrate of the 1st Class, whether the latter be a Hindu or a Mohamedan, as the District Magistrate may select for the purpose.

R.K. *Case transferred.*

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* A. I. R. 1928 Nagpur 23

FINDLAY, J. C.

Anand Rao—Decree-holder—Appellant.

v.

Pandurang and *others* — Judgment-debtors—Respondents.

S. A. 269 of 1927, Decided on 25th July 1927, from the decree of the District Judge, Chhindwara, D/- 26th February 1927, in Civil Appeal No. 14 of 1927.

* (*a*) *Civil P. C., S. 60 (1) (c)—House dilapidated—Decree-holder cannot ask for sale of site unless the owner is proved to have no intention to rebuild.*

Merely because the house requires re-construction or re-building and a short period of a year or so has elapsed since the old house disappeared or became dilapidated, the decree-holder is not entitled to come in and attach the site with the dilapidated house standing thereon in absence of clear proof that the owner has no intention of re-building and continuing to make use of the site for the same purpose as before. [P 23 C 2 & P 24 C 1]

(*b*) *Civil P. C., S. 60 (1) (c)—Whether agriculture must be main means of subsistence (Quaere). — One of the judgment-debtors wholly dependent on agriculture—House belonging to all is protected.*

It is doubtful whether it is correct, as regards the question whether any particular person is an agriculturist within S. 60 (1) (c), to adopt the criterion that agriculture must necessarily be his main means of subsistence. Where, however, one of the judgment-debtors is wholly dependent on agriculture, the house belonging to judgment-debtors jointly is not liable to attachment: *Remarks of Devadoss, J., in A. I. R. 1926 Mad. 350, Doubted.* [P 24 C 2]

V. R. Dhoke—for Appellant.

Judgment.—The sole question in this second appeal is whether the house of the judgment-debtors is or is not liable to attachment having regard to the provisions contained in S. 60 (1) (c), Civil P. C.

Two points are urged on behalf of the appellant (decree-holder) in this connexion. The first of these is that the house has recently fallen down, or is at least in a dilapidated state, and that, therefore, the site on which the house stood cannot be said to be protected. The District Judge has, however, in his appellate order, pointed out that the father of the judgment-debtors only died a year or so before the date of the judgment and that he had actually cultivated the land in mauza Sirata. I am wholly unable to accept the contention that merely because the house requires reconstruction or re-

building and a short period of a year or so has elapsed since the old house disappeared or became dilapidated, the decree-holder is entitled to come in and attach the site with the dilapidated house standing thereon. It seems to me that there must be clear proof, before the appellant's contention in this connexion can succeed that the new owners have no intention of re-building and continuing to make use of the site for the same purpose as before. That is certainly not made out in the present case, and the first contention offered on behalf of the appellant, therefore, fails.

The second point urged in this second appeal is that the judgment-debtors cannot be regarded as agriculturists. It is admitted that they have sub-let their field in mauza Sirata since the death of their father. It is also admitted that they live in another village and make a large part of their livelihood by selling *pan* or by private service. The District Judge, however, has found that at least one of the judgment-debtors is a minor and has no other means of livelihood except the cultivation of the Sirata land, which has meanwhile been sub-leased on a rent of Rs. 100. This fact of itself would, in my opinion, imply that this minor judgment-debtor is an agriculturist and ipso facto the house would not be liable to attachment. On the broader question whether, in view of the fact that the major judgment-debtors have no other means of occupation besides the cultivation of the field in question and reside elsewhere, they can be described as agriculturists, I do not find it necessary at present to give a detailed finding. I have been referred to the decision in *Jamna Prasad* v. *Raghunath Prasad* (1) and *Muthuvenkatarama Reddiar* v. *Official Receiver, South Arcot* (2). In the former case, the judgment-debtor was both a zamindar and a cultivator, and the learned Justices concerned held that he could not be described as an agriculturist. The decision of Ismay, J. C., in *Ganpat Ram* v. *Lakshman Rao* (3) is somewhat to the contrary effect. As regards the Madras case, quoted above, I, with all deference, entertain considerable doubt as regards the correctness of the remarks made by Devadoss, J., at p. 229 thereof. It seems to me that there might be another ratio decidendi of the question involved than the criterion whether the so-called agriculturist, whose estate is in question, is one whose sole means of livelihood is gained by the cultivation of the land. In my opinion, an equally possible criterion might be whether it was not essential that any particular person, who is a tenant in a particular village, should be deemed to be an agriculturist with reference to that village, even if he has other sources of income elsewhere. A house in the village would be equally essential in such a case for the storing of his agricultural instruments, the stabling of his cattle and the like, if not for his personal residence. It is noticeable in this connexion that in Cl. (c), S. 60 (1), Civil P. C., unlike Cl. (b), there is no requirement laid down that a house must be necessary to enable an agriculturist to earn his livelihood as such. I do not desire in the present case to deliver any considered pronouncement on the point involved, but I do entertain considerable doubt as to whether it is correct, as regards the question whether any particular person is an agriculturist for the purpose of S. 60 (1) (c), Civil P. C., to adopt the criterion that agriculture must necessarily be his main means of subsistence. As I have already said, the fact, that one of the judgment-debtors-respondents has been held to be wholly dependent on agriculture, is sufficient in itself to save the present property from attachment.

The appeal is accordingly dismissed without notice to the respondents.

D.D. *Appeal dismissed.*

(1) [1913] 35 All. 307=19 I. C. 125=11 A. L. J. 437.
(2) A. I. R. 1926 Mad. 350=49 Mad. 227.
(3) [1890] 13 C. P. L. R. 30.

A. I. R. 1928 Nagpur 24

KINKHEDE, A. J. C.

Kisan and *others*—Plaintiffs—Applicants.

v.

Manjai and *others*—Defendants—Non-Applicants.

Civ. Rev. No 229-B of 1926, Decided on 30th July 1927, from the order of the 2nd Addl. Dist. Judge, Akola, D/- 23rd November 1926, in Miscellaneous Case No. 24 of 1925.

(a) *Civil P. C , S.* 115—*Pauper application rejected and Court-fee demanded—Revision filed against this order—Subsequently suit dismissed for not producing stay order—Revision from the original order is still maintainable—Civil P. C., O.* 7, *R.* 11 ; *O.* 17, *R.* 3 *and O.* 33, *R*, 1.

Petition to continue a suit in forma pauperis was rejected on 23rd November 1926. Revision against this order was filed on 18th December 1926 The demand for Court-fee was revived and time granted to make good the deficiency till 20th December 1926. The plaintiffs made an application supported by an affidavit on 20th December 1926 for stay of the order demanding Court-fees and of the further proceedings in the suit until the disposal of the revision petition by High Court. The other parties did not object to the application being granted. The Judge granted one month's time to plaintiffs to obtain an order of stay from High Court, and fixed the case for 21st February 1927. On 20th December 1926 the High Court fixed the case for hearing parties, but fixed it for 29th July 1927. On that day the non-applicants' pleader by a petition brought to the notice of this Court that the suit was dismissed by the first Court, for want of prosecution and non-payment of Court-fees, on 21st February 1927, and urged that, in face of that order, the High Court had no longer any jurisdiction to decide the revision on its merits.

Held : that the lower Court's order, dated 21st February 1927, did not operate to deprive High Court of its jurisdiction to dispose of the petition of revision on its merits, as it was neither a judgment nor a decree, nor a decision within the meaning of O. 17, R. 3, Civil P. C. It was also not an order of rejection of the plaint, because it did not conform to the requirements of O. 7, R. 11 (c). [P 26, C 1]

(b) *Civil P. C , O.* 17, *R.* 3—*Production of stay order is not an " act " within the rule.*

An act in order to fall within the purview of acts contemplated by O. 17, R. 3, must be an " act necessary to the further progress of the suit " ; but an act which brings about a stay and thus arrests the further progress of the suit, can by no stretch of reasoning be interpreted to be an act necessary to the further progress of the suit. A Court cannot, therefore, dismiss a suit for non-prosecution because the party failed to produce a stay order within the period allowed. [P 26, C 1, 2]

(c) *Civil P. C., O.* 33, *R.* 1—*Interlocutory order.*

Revision is entertainable against an interlocutory decision rejecting an application for permission to sue in forma pauperis : *A. I. R.* 1922 *All.* 1, *not Foll.* ; *A. I. R.* 1924 *Nag.* 44 and *A. I. R.* 1925 *Nag.* 43 *Foll.* [P 26, C 2, P 27, C 1]

(d) *Civil P. C., O.* 33, *R.*—*An applicant to be disqualified to sue as pauper must be possessed of means to pay Court-fees and not merely entitled to property.*

While holding an enquiry into the fact of pauperism, the Court must address itself to the question whether the applicants before it are or are not possessed of means to pay the requisite Court-fee and not to the righteousness or unrighteousness of the claim. [P 27, C 1]

A mere finding that an applicant is jointly interested in the property held by his joint father will not suffice. It would simply show that he is entitled to property, but not that he is possessed of means : 1 *All.* 77, *Rel. on.* [P 27, C 1]

G. R. Deo—for Applicants.

A. V. Khare, *G. G. Hatwalne* and *S. T. Bhave*—for Non-applicants.

Order.—From a senior officer in the judicial service of Mr. Atrey's standing and experience one is entitled to expect a much better form of disposal of a suit than what is disclosed in this case. He is also supposed to be aware of the vocabulary of technical expressions which the Civil Procedure Code employs and of the forms of procedure it prescribes. In this case Mr. Bhagade passed an order on 11th July 1925 demanding ad valorem Court-fee from the plaintiffs on a claim valued at Rs. 27,816 which required a Court-fee of Rs. 935. Time was given to the plaintiffs to make up the deficiency till 17th September 1925

The plaintiffs (out of whom three are minors and are represented by the major brother plaintiff 1) found it difficult to raise the money required to make up the deficiency and, therefore, applied for permission to continue the suit in forma pauperis. That petition, however, was rejected on 23rd November 1926, on grounds which form the subject of this revision, which was filed on 18th December 1926. The demand for Court-fee was revived and time granted to make good the deficiency till 20th December 1926. The order demanding Court-fee and fixing 20th December 1926 as the date for its payment does not form part of the order dated 23rd November 1926 under revision, but was separately recorded in the order-sheet with the result that it was not challenged in revision. But all the same the plaintiffs made an application supported by an affidavit on 20th December 1926 for stay of the order demanding Court-fees and of the further proceedings in the suit until the disposal of the revision petition by this Court. The other parties did not object to the application being granted (vide order-sheet dated 20th December 1926) and, therefore, the Court could have straight-off granted it and stayed the further proceedings of the suit and awaited the decision of this Court in revision. But unmindful of the complications which his order might entail,

the Judge granted one month's time to plaintiffs to obtain an order of stay from this Court, and fixed the case, curiously enough, for a date two months ahead, i. e., for 21st February 1927.

On 20th December 1926 this Court fixed the case for hearing parties, but no earlier date being available fixed it for 29th July 1927. On that day the non-applicants' pleader by a petition brought to the notice of this Court that the suit was dismissed by the first Court, for want of prosecution and non-payment of Court-fees on 21st February 1927, and urged that, in face of that order, this Court had no longer any jurisdiction to decide the revision on its merits I have therefore, to consider the question raised as a preliminary objection as to whether, and if so, how far the lower Court's order dated 21st February 1927 operates to deprive this Court of its jurisdiction to dispose of the petition of revision on its merits. The applicants contend that that order is of no consequence and does not operate as a bar to the exercise of this Court's revisional jurisdiction as it is neither a decree nor a decision within the meaning of S 2, Civil P. C., which determines the suit ; nor does it amount to a rejection of the plaint so as to be termed a decree particularly as it does not purport to have been passed under O. 7, R. 11, Civil P C.

I think, the applicants' contention is correct and must prevail. A perusal of the order will convince anybody that it is neither a judgment nor a decree, nor could it be styled a decision within the meaning of O. 17, R. 3, Civil P. C. Much less am I prepared to call it an order of rejection of the plaint, because it does not conform to the requirements of O. 7, R. 11 (c), Civil P. C. It will be seen that the order dated 20th December 1926 does not fix a time for supplying the requisite stamp paper and, therefore, the plaintiff's failure could not be visited with the penalty of rejection of the plaint. The dismissal of the suit was, therefore, out of question. Even assuming that the one month's time allowed on 20th December 1926 for obtaining an order of stay from this Court, was time granted to plaintiffs for the doing of an act, still that act in order to fall within the purview of acts contemplated by O. 17, R. 3, Civil P. C., must be an act necessary to the further progress of the suit; but an act which brings about a stay and thus arrests the further progress of the suit, can by no stretch of reasoning be interpreted to be an act necessary to the further progress of the suit. The law does not empower the Court to penalize all failures irrespective of the nature of the acts. But, even then, what is the penalty provided in the rule, not a dismissal of the suit; but what the Court is enjoined to do "notwithstanding such default," is "to proceed to decide the suit forthwith," i. e., without any further adjournment. It is, therefore, clear that it cannot dismiss the suit for non-prosecution as the learned Judge has chosen to do, apparently in his eagerness to secure a mere nominal disposal for statistical purposes, where he was bound to decide, i. e., try the suit on the merits on such material as he had before him at that stage. None who reads the order dated 21st February 1927 will ever characterize it as a decision on the merits of the case. Nor had the learned Judge the mind to draw up a decree, which must follow every judgment, which alone could give the plaintiffs a right of appeal. I daresay that the Judge had not applied his judicial mind to find out the legitimate requirements of the case at that stage, and, had not the patience even to think out the proper mode of disposal applicable to or provided for a case of this kind. In this state of the record I am constrained to say that the disposal does no credit to the Judge who secured it for merely statistical purpose. The order dated 21st February 1927 set up as a bar to the exercise of my jurisdiction has thus neither the dignity nor the value or operation of a judgment, or decision or decree or order having the force of decree; it has not got that finality of adjudication which is peculiar to a decree or to the rejection of a plaint which could amount to a decree within the meaning of S. 2 Civil P. C. I have no other alternative but to ignore it altogether and treating the *lis* as still continuing in the lower Court (the record of the case being only shelved, as it were, in the meantime, proceed to decide the petition for revision as if nothing had happened to hamper my jurisdiction.

Before I proceed to consider the merits of the petition, I must dispose of one more objection. It is to the effect that no revision is entertainable against an interlocutory decision rejecting an appli-

cation for permission to sue in forma pauperis, as held in *Mahadeo Sahai* v. *Secretary of State* (1). But on the view taken in this Court such revisions are entertainable: cf. *Achalsingh* v. *D. B. Seth Jiwandas* (2) and *Chandansingh* v. *Laxman* (3).

Now as regards the merits of the petition for revision, suffice it to say that the question at issue has not received the attention which it deserved, at the hands of the Judge. He seems to have been swayed away by the so-called unrighteousness of the claim. The Court has really nothing to do with that aspect of the case while holding an enquiry into the fact of pauperism. It must address itself to the question whether the applicants before it are or are not possessed of means to pay the requisite Court-fee. I have explained in *Chandansingh* v. *Laxman* (3), what the expression means. The means must not be possessed by the applicants. The distinction between non-possession of means and not being entitled to property for purposes of the enquiry into pauperism under O. 33, Civil P. C., must be clearly borne in mind, before one can appreciate the real question he has to decide in such cases. The applicants are entitled to a clear finding by the lower Court on the question whether in its opinion they are or are not possessed of means sufficient to pay the requisite Court-fee. A mere finding that they are jointly interested in the property held by their joint father Raibhan would not suffice. It would simply show that they are entitled to property but not that they are possessed of means.

In this connexion I may draw the attention of the learned Judge to the lucid exposition of the law of Mitakshara on this point to be found in *Baldeo Das* v. *Sham Lal* (4). I may usefully quote the observations of the learned Chief Justice.

Sons who are members of an undivided Hindu family acquire by birth an interest in the paternal as well as the ancestral estate. and are entitled in certain events to interfere to prevent waste or to enforce partition in the lifetime and without the consent of their father ; but while their interest is proprietary, it lacks the incident of dominion. 'They have not independent dominion, although they have a proprietary right.' Colebrooke's Digest of Hindu Law, Bk. v. Ch. vii, 433, vol. ii, p. 562, 3rd Edn.

In the reported case, the son had taken possession of a house as soon as it was vacated by the tenant to whom the father had rented. The father, therefore, sued to eject the son. The defence was that plaintiff had no right to eject as the property being ancestral the parties had equal rights therein. The first Court decreed the claim, but the appellate Court dismissed it; on appeal to the High Court the father was given a decree on the ground that he had independent dominion over the property though the son had a proprietary interest therein. This would show that it cannot be presumed that every undivided Mitakshara son possesses the property over which his father has independent dominion. The soundness of this view has been accepted in the following cases: *Jallidar Singh* v. *Ram Lal* (5), *Dharma Das Kundu* v. *Amulyadhan Kundu* (6) and *Ganpat* v. *Sundri* (7).

The case is, therefore, remanded to the lower Court for a fresh decision of the petition with advertence to the above remarks and in accordance with law. In the circumstances of the case I make no order as to costs of this revision, each party being made to suffer his own.

R.K. *Case remanded.*

(1) A. I. R. 1922 All. 1=44 All. 248.
(2) A. I. R. 1921 Nag. 44=19 N. L. R. 165.
(3) A. I. R. 1925 Nag. 438=21 N. L. R. 98.
(4) [1876] 1 All. 77.
(5) [1879] 4 Cal. 723.
(6) [1906] 33 Cal. 1119=3 C. L. J. 616=10 C. W. N. 765.
(7) [1914] 12 A. L. J. 1039=25 I. C. 112.

A. I R. 1928 Nagpur 27

MACNAIR, A. J. C.

Tribeniprasad—Plaintiff.

v.

Ramdas—Defendant.

Civ. Ref. No. 127 of 1927, Decided on 23rd July 1927, made by the Small Cause Court Judge, Murwara, in Civ. Suit No. 5 of 1927, D/- 14th March 1927.

(*a*) *Registration Act, S.* 17—"*year*"

The word "year" in S. 17 (d). Registration Act, means a year according to the Gregorian calendar and if the lease relates to a period for more than one year it is compulsorily registrable under S. 17, Registration Act. [P 28, C 1,2]

(*b*) *Registration Act, S.* 2 (7)—*Agreement to pay rent is a lease.*

A document by which rent is agreed to be paid is a lease as defined in S. 2, Cl. (7), Registration Act. [P 28, C 1]

(c) *Landlord and Tenant—Suit for rent can be changed into one for damages for use and occupation provided plaint is amended and amendment should be granted in proper case.*

Unless an alternative claim is made, no sum can be decreed as damages for use and occupation, where the suit is for rent; but a prayer to amend the plaint by adding an alternative claim should be granted if the omission in the plaint was due to inadvertence or mistake, and the prayer for amendment is made without inexcusable delay: 21 *W. R.* 208 and *A. I. R.* 1925 *Rang.* 282, *Foll.*; 22 *Cal.* 752; 31 *All.* 276; and 27 *Cal.* 239; *Ref.* [P 29 C 2]

S. B. Gokhale—for Plaintiff.

Judgment.—The plaintiff in a Small Cause Court suit alleged that the defendant agreed to occupy his house on a monthly rent of Rs. 25 from Pous badi 1, Sambat 1982, to Aghan sudi 15, Sambat 1983. The plaintiff did not execute a written lease, but the defendant executed an unregistered document, dated 24th November 1925, by which he agreed to pay rent. The defendant made some payment but arrears were due. The plaintiff sued to recover these arrears. The defendant pleaded that, as the period of lease was more than one year according to the English calendar no valid lease of the property had been made. The plaintiff urged that if the lease was invalid he was entitled to compensation for use and occupation of the premises; but the defendant submitted that the suit could not be converted into suit for damages.

The learned Judge has stated that he entertains doubt on three points: (1) whether the document filed by the plaintiff amounted to a lease; (2) whether the agreement for lease was for a year or for more, (3) whether any sum could be decreed as damages for use and occupation, where the suit was for rent and no alternative claim was made. He accordingly made a reference under the provisions of O. 46, R. 1, Sch. 1, Civil P. C.

The learned Small Cause Court Judge has given his opinion that the rent-note or kabuliyat was not a lease-deed under S. 105, Transfer of Property Act. This question does not arise if the document is inadmissible in evidence. The document is clearly a lease as defined in S. 2, Cl. 7, Registration Act. It is admitted that the term mentioned in the document exceeds a year according to the Gregorian calendar. The word "year" in S. 17 (d), Registration Act means a year according to the Gregorian calendar. On the first two questions then, I have to state that the document was a lease for more than one year within the meaning of S. 17, Registration Act, and is, therefore, not admissible in evidence. It is desirable to state, although the point was not expressly mentioned in the order of reference, that the alleged lease was invalid as S. 107, Transfer of Property Act, lays down that such a lease can be made only by a registered instrument.

With regard to the third point the learned Judge has referred to the view taken in *Sheo Karan Singh* v. *Parbhu Narain Singh* (1), that a decree for compensation can be passed in a suit for rent where no alternative claim is made; but he states that he prefers the definite view to the contrary held by the Calcutta High Court. It would have been well if he had cited the rulings of the Calcutta High Court to which he refers. In *Lukhee Kanto Das Chowdhry* v. *Sumeeruddi Lusker* (2) a Full Bench of the Calcutta High Court decided that where a claim for compensation on account of occupation of the land is not made in the plaint, the landlord was not entitled to have the question tried whether any compensation was due. But their Lordships added:

> It is in the discretion of the Court to amend the plaint or the issues and to allow it to be tried, and where the omission to make the claim in the plaint appears to be due to inadvertence or by mistake, it would be proper to do so.

In *Surendra Narain Singh* v. *Bhai Lal Thakur* (3), the plaintiff in second appeal for the first time put forward a claim for compensation for use and occupation; and Princep and Ghose, JJ, remarked that to give him a decree for use and occupation would amount to an amendment of the plaint. They proceeded to consider whether amendment of the plaint was permissible. They cited, as the leading case on the subject, *Lukhee Kanto Das Chowdhry* v. *Sumeeruddi Lusker* (2), and referred to the facts of the case which they were considering. They came to the conclusion that the suit, if tried as one for use and occupation, would raise issues of an entirely different character from those on which the trial as a suit for rent has been held and would necessitate a new trial of the case by the lower Court upon fresh evidence. They refused to allow

(1) [1909] 31 All. 276=2 I. C. 211=6 A. L. J. 167.
(2) 21 W. R. 208=13 B. L. R. 213 (F. B.).
(3) [1895] 22 Cal. 752.

the amendment of the claim with the remark that it was undesirable to allow such amendment in second appeal when the plaintiff had, in two Courts, never contemplated it and had even gone so far as to persistently maintain his case as originally brought. In *Rachhea Singh* v. *Upendra Chandra Singh* (4), it is stated :

> The learned Judges who decided this case *Surendra Narain Singh* v. *Bhai Lal Thakur* (3), declined to allow the plaintiff a decree for damages for use and occupation, as to do so, it was said, would amount to allowing an amendment of the plaint in such a way as to convert a suit of one character into a suit of another and an inconsistent character.

With all respect I express my opinion that this was not the ratio decidendi of *Surendra Narain Singh* v. *Bhai Lal Thakur* (3).

I fully agree with the view of the Calcutta High Court that there must be an alternative claim for compensation before a decree for compensation can be passed in a suit for rent. But the view of the Calcutta High Court is that the alternative claim may be made by an amendment of the plaint. The remarks of Prinsep and Ghose, JJ., suggest that they think that such an amendment might, in exceptional cases, be allowed in second appeal. The practical difference then between the view taken in Bengal and that held by the learned Judges who decided *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh* (1) is not very great.

A Full Bench of the Rangoon High Court has recently decided in *Maung Shwe Myat* v. *Maung Po Sin* (5), that, where a plaintiff sued on a promissory note without adding an alternative cause of action based on the original loan, he may be allowed, if the necessary amendments have been made, to obtain a decree, although he had been unable to prove execution of the note. This supports the view that amendment by addition of an alternative cause of action may be allowed in suitable cases.

In the case under reference the plaintiff had at an early stage asked that if the lease was invalid he should be given a decree for compensation. By so doing he did make a claim in the alternative. The real question which arose was whether amendment of the plaint should be permitted. I consider that, according to the view taken in *Lukhee Kanto Das Chowdhry* v. *Sumeeruddin Lusker* (2), amendment of the plaint should be allowed. The omission to make the claim in the plaint arose from inadvertence or mistake, and the prayer to amend the plaint was made at an early stage. The learned Small Cause Court Judge has pointed out that for a suit between landlord and tenant special Court-fee is provided. Formal amendment of the plaint, then, is necessary in this case, even if it is not in all cases.

My opinion on the third point, then, is that unless an alternative claim is made, no sum can be decreed as damages for use and occupation, where the suit is for rent ; but a prayer to amend the plaint by adding an alternative claim should be granted if the omission in the plaint was due to inadvertence or mistake and the prayer for amendment is made without inexcusable delay.

N.D. *Reference answered.*

(4) [1900] 27 Cal. 239.
(5) A. I. R. 1925 Rang. 282=3 Rang. 183 (F. B.).

A. I. R. 1928 Nagpur 29

MACNAIR, A. J. C,

Govind—Judgment-debtor—Appellant

v.

Laxman—Decree-holder—Respondent.

S. A. No. 353-B of 1925, Decided on 31st January 1927, from the decree of the Special Addl. Dist. Judge, Akola D/- 27th August 1925, in Transfer Civil Appeal No. 74 of 1925.

Civil P. C., O. 21, R. 6—Decree transferred to another Court — Transferring Court can again transfer it to third Court.

Where a decree is transferred to another Court for execution, the transferring Court can again transfer the decree to a third Court. But it is necessary for a Court, after transfer of a decree for execution, to take precaution in complying with a second request for transfer or execution : it may be advisable that the Court should always send orders for stay of execution to the transferee Court before taking such further actions: 13 *C.P.L.R.* 169, *Foll.* [P 30 C 2]

G. G. Hatvalne—for Appellant.

M. B. Niyogi—for Respondent.

Judgment.—The only question raised in this appeal is whether the application dated 15th July 1916 to the Poona Court of Small Causes was made to the proper Court. The Poona Court had previously transferred the decree to the Akola Court

for execution,and the question is whether the Poona Court could subsequently entertain an application for transfer of the decree to a third Court. I remark that it appears to me clear that if a Court has power to send a decree to another Court, it has power to execute the decree itself; for if it has power to take steps towards the attachment of property outside its jurisdiction, it can surely attach property within its jurisdiction. The learned Additional District Judge, relying on *Gorakhram* v. *Sivaiya* (1), a clear decision of this High Court, has answered the question in the affirmative.

The authorities to the contrary are certainly formidable. In *Maharaja of Bobbili* v. *Narasaraju Peda* (2) it was held that in a case such as this the Court which passed the decree had no jurisdiction to entertain an execution application unless concurrent execution had been ordered or proceedings in the Court to which the decree was sent had been stayed for the purpose of executing the decree in the former Court. In *Rangaswami Shetti* v. *Sheshappa* (3) it was held that an application for transfer of a decree again to another Court must be made in the first instance to the Court to which the decree had already been transferred. I add that in Mitra's Limitation Act, 7th edn., p. 569, and in Rustomjee's Limitation Act, 3rd edn., p. 789, the view opposed to that taken in *Gorakhram* v. *Sivaiya* (1) is taken to be the law.

The Madras case, however, was taken in appeal to the Privy Council, and their Lordships of the Privy Council appear to me to have refrained from expressing entire agrement with their Lordships of the Madras High Court. They expressly referred to the fact that the application to the transferring Court was for the sale of property within the jurisdiction of the Court to which the decree had been transferred, and mentioned that this very property had been attached by the latter Court. The proposition which their Lordships of the Privy Council affirmed is that when a decree is transferred to another Court, an application to do something which that other Court can adequately perform cannot be made to the transferring Court.

(1) [1900] 13 C. P. L. R. 169.
(2) [1912] 37 Mad. 231=23 M. L. J. 236=15 I. C. 738=(1912) M. W. N. 721.
(3) A. I. R. 1922 Bom. 359=47 Bom. 56.

I agree with the respectful observations of the lower appellate Court to the effect that the learned Bombay Judges who decided *Rangaswami* v. *Sheshappa* (3) appear to have thought that their Lordships' remarks were of more general application than they really are.

In *Saroda Prosaud Mullick* v. *Lachmee Pul* (4) their Lordships of the Privy Council have clearly held that a decree could be transmitted to three Courts concurrently for the purpose of execution It is not urged before me that alterations in the Civil Procedure Code have affected the validity of this judgment. It appears to me that the later judgment reported in *Maharaja of Bobbili* v. *Narasaraju Peda* (5) is quite consistent with the earlier decision. I do not see why, if a Court can send a decree for execution to two Courts simultaneously, it cannot do so on different dates. It is no doubt necessary for a Court, after transfer of a decree for execution, to take precautions in complying with a second request for transfer or execution: it may be advisable that the Court should alway send orders for stay of execution to the transferee Court before taking such further actions. But the Court is aware of the former transfer, and can take proper action on the later application.

I do not, therefore, see reason to disagree with the reported ruling of this High Court in *Gorakhram* v. *Sivaiya* (1). The appeal, therefore, fails and is dismissed. Costs on the appellant.

G.B. *Appeal dismissed.*

(4) [1871] 14 M. I. A. 529=17 W. R. 289=2 Suther. 560=3 Sar. 77 (P. C.).
(5) A. I. R. 1916 P. C. 16=39 Mad. 640=43 I. A. 238 (P. C.).

* A. I. R. 1928 Nagpur 30

FINDLAY, J. C.

G. I. P. Railway Company—Applicant.

v.

Mahadeo Bari—Non-Applicant.

Civ. Rev. No. 142 of 1925, Decided on 29th September 1925.

* *Railways Act, S. 113—Passenger unable to produce ticket at the gate and hence charged excess and penalty—He is not entitled to refund though tickets are found immediately after and presented to ticket collector.*

The words "with him" in S 113 must be construed as meaning that the tickets are on the passenger's person. Passengers should realize with reference to S. 113 that they must have in

their possession immediately available throughout the journey the tickets, which entitle them to travel. There is no room in the phraseology of the provision in question for a loose interpretation of its terms, and it has obviously been framed with a view to preventing the enormous inconvenience and trouble which would otherwise arise in the matter of checking and collecting tickets from passengers by railway.
[P 32 C 1]

The plaintiff with some 34 other people had booked from D to N. On arrival at the latter station he found that seven tickets were missing. He accordingly was charged with excess fare and penalty. The plaintiff, no sooner he came out into the station yard, on enquiry, from his companions, found the missing tickets and took them back to the ticket collector for refund. The refund was refused. He therefore filed a suit and got a decree for the amount

Held : in revision, that the amount was properly realized from the plaintiff and that the mere fact that he produced or was willing to produce the tickets later does not entitle him to a refund.
[P 32 C 1]

Held : further that the railway company might well have made ex gratia without any sacrifice of principle a refund in the peculiar circumstances of the case : 12 *Cal.* 192, *Dist.*
[P 32 C 1]

K. K. Gandhe—for Applicant.
R. W. Date—for Non-Applicant.

Judgment —This is an application by the defendant G. I. P. Railway Company for revision of the judgment and decree of the Judge, Small Cause Court, Nagpur, dated the 7th February 1925 granting a decree for Rs. 21-10-0 in favour of the non-applicant Mahadeo against the said railway company. On the 11th May 1924, the plaintiff, with some 34 other people who constituted a marriage party, had booked from Dhamangaon railway station to Nagpur. On arrival at the latter station one of his party was sent out with some 28 tickets and their holders to arrange for tongas in the station yard. The plaintiff meanwhile with six others came shortly afterwards to the gate, but he found to his utter surprise that he had not got the seven tickets in question. He accordingly was charged with excess fare and penalty amounting to Rs. 21-10-0, and obtained a receipt therefor.

Plaintiff's case further was that, he no sooner than came out into the station yard on enquiry from his companions, he found the missing tickets and took them back to the ticket collector. The ticket collector, however, referred him to the proper authorities for a refund. Various applications therefor to the higher railway authorities were rejected.

The defendant railway company admitted the realization of the railway fare and penalty in question and pleaded that, as the plaintiff had not the tickets in his possession when he passed out of the wicket gate, he has rightly been charged as above. It was further denied that the plaintiff non-applicant had returned with the tickets a few minutes later, but in any event a plea was taken that, even if this were so, this circumstance would not derogate from the right of the railway company to have recovered the charges in question and to have refused a refund.

It is, first of all, necessary to determine whether the plaintiff, a few minutes later, returned with the missing tickets and offered them to the ticket collector as alleged. The plaintiff has given prima facie satisfactory evidence on the point and he is confirmed so far by the evidence of P. W. 2, Balkrishna, his companion. He (P. W. 2) had the tickets in his possession and he had gone in the station yard to procure tongas. Apart from letters from the Chief Traffic Manager and the like containing a denial that the ticket collector was shortly afterwards shown the misssing tickets by the plaintiff-non-applicant, the defendant railway company produced no evidence whatever on the point. It is obvious that the fact whether plaintiff did or did not produce the tickets within a few minutes after the original episode, may be an important one. On the question of fact involved, therefore, it is perfectly clear that the oral evidence of plaintiff and Balkrishna, in the absence of any rebutting evidence, establishes the fact that, some ten minutes after he had had to pay the penalties, etc., he returned with the tickets to the ticket collector, who in his turn referred the plaintiff to higher authorities for a refund.

The question I have to determine, therefore, is whether, in view of the terms of S. 113, Railways Act, the plaintiff is in the circumstances entitled to a refund of the Rs. 21-10-0 in question, which was levied from him. Reliance has been placed in this connexion on the decision in *Hart* v. *Buskin* (1), but that decision is somewhat inapposite in that therein Ss. 17 and 31, Railways Act, 1879, were concerned whereas, in the present instance, the apposite provision of S. 113 of

(1) [1885] 12 Cal. 192.

the Act of 1890 is concerned. In this connexion it must be noted that the words "with him" occur in S. 113. These words did not occur in S. 31 of the Act of 1879. I think these words must be construed as meaning that the tickets are on the passenger's person. This avowedly the plaintiff non-applicant did not have when he attempted to pass from the station premises. The provision of law in S. 113 is one of a very special nature. which was no doubt enacted by the legislature in view of the difficulties which arise in practice with reference to persons travelling without tickets, and although the case is a somewhat hard one from the point of view of the non-applicant, I feel it my duty, although with regret, to decide that in the circumstances the amount was properly realized from the plaintiff non-applicant, and that the mere fact that he produced or was willing to produce the tickets later does not entitle him to a refund. The risks of fraud upon the railway company which arise if tickets were to be allowed to be produced subsequently are too obvious to require emphasis. In those circumstances I am of opinion that the Judge of the Small Cause Court erred in granting the plaintiff the decree he did.

It is important that passengers should realize with reference to S. 113, Indian Railways Act, that they must have in their possession immediately available throughout the journey the tickets, which entitle them to travel. There is no room in the phraseology of the provision in question for a loose interpretation of its terms, and it has obviously been framed, as it has, with a view to preventing the enormous inconvenience and trouble which would otherwise arise in the matper of checking and collecting tickets from passengers by railway.

The judgment and decree appealed against are accordingly reversed and the plaintiff's suit is dismissed. In the peculiar circumstances of the case, however, the plaintiff has undoubtedly a strong material grievance if not a legal one, and, in view of this fact, I order the parties to bear their own costs both in this Court and in the lower one. It seems to me that the railway company might well have made ex gratia without any sacrifice of principle a refund in the peculiar circumstances of the case if on inquiry it was found, as I believe was the case, that the non-applicant produced the tickets a few minutes later.

D.D. *Decree set aside.*

A. I. R. 1928 Nagpur 32

FINDLAY, J. C.

Ghulba and *others*—Plaintiffs—Appellants.

v.

Maroti and *others*--Respondents.

S. A. No. 391 of 1927, Decided on 17th August 1927.

C. P. Tenancy Act (1920), *S.* 6—*Surrender and transfer by limited holder—No distinction can be drawn.*

There is no distinction between a surrender and a transfer by a limited holder where the limited holder has done all that was required of her under Ss. 5 and 6, C. P. Tenancy Act (1920), before making the transfer: *A. I. R.* 1925 *Nag.* 306 and *A. I. R.* 1927 *Nag.* 129, *Foll.*

R. N. Padhey —for Appellant.

Judgment.—I have heard the pleader for the appellants in this case but can see no reason for interference. The distinction which he has attempted to draw between the decision in *Bikram* v. *Thakur Ganesh Singh* (1), where a surrender was concerned, and the present case, where a transfer is concerned, seems to me utterly inapposite in view of the reasoning in paras. 7 to 12 of the decision just quoted. We are not here concerned with the devolution of the interest of an absolute occupancy tenant after his death, but with the transfer made during the lifetime of defendant 4. As has been shown in para. 6 of the lower appellate Court's judgment, Mt Bindi did all that was repuired of her under Ss. 5 and 6. C. P. Tenancy Act 1920, before making the transfer in question. Decisions like those in *Vithu* v. *Mt. Mendri* (2), and *Bhura* v. *Ramrao* (3) have been sufficiently dealt with by Hallifax, A J.C., in his comments on ratio decidendi in *Vasudeo* v. *Bhiwa* (4). As at present advised, I can see no reason for differing from the view taken by Hallifax, A. J. C., in the last case quoted and I find myself in full agreement with the judgment and decree of the learned District Judge.

The appeal accordingly fails and is dismissed without notice to the respondents.

D.D. *Appeal dismissed.*

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(1) A. I. R. 1927 Nag. 129=23 N. L. R. 1.
(2) [1909] 5 N. L. R. 172=4 I. C. 792.
(3) [1912] 8 N. L. R. 154=17 I. C. 366.
(4) A. I. R. 1925 Nag. 306=21 N. L. R. 62.

A. I. R. 1928 Nagpur 33

KINKHEDE, A. J. C.

Waman—Plaintiff—Appellant.

v.

N. M. Mitra—Defendant—Respondent.

S. A. No. 380 of 1926, Decided on 1st August 1927, from the decree of the Dist. Judge, Nimar, D/- 16th April 1926, in Civil Appeal No. 18 of 1926.

Civil P. C., S. 80—A Government schoolmaster though his services are lent to the municipality is a public officer and is entitled to the notice under the section.

A schoolmaster who was originallyin Government service, but whose services are only lent to the municipality and part of whose allowance is payable by Government and who bas a lien on the Government post he held, must be deemed to be a public officer and as such entitled to a notice of suit under the section.

[P 33 C 2]

H. S. Gour and *W. R. Puranik*—for Appellant.

V. Bose and *P. N. Rudra*—for Respondent.

Judgment.—This second appeal by the plaintiff challenges the correctness of the findings recorded by the lower appellate Court on the following two points:

(1) Whether the defendant-respondent was entitled to a notice of suit under S. 80, Civil P. C, and this suit is, therefore, not maintainable without such notice.

(2) Whether the beating which the plaintiff received at the hands of the defendant was within the discretion of the defendant in his capacity of the head of the school, and whether the exceeding, if any, of the powers given by S. 65, C. P. Educational Manual, is a matter which at the most can be dealt with departmentally and not form the subject of investigation or adjudication in a civil Court.

The learned counsel for the appellant argues with reference to point (1), that the defendant is not a public officer and that the act complained of cannot be looked upon as one done by him in official capacity. On the other hand it is argued that inasmuch as the defendant was in the service of the Government and his services were only lent to the municipality, and part of his leave allowance is payable by Government, and he has a lien on the Government post he held, he must be deemed to be a public officer and as such entitled to a notice of suit under S. 80, Civil P.C. The decision of the Court of first appeal on the first point gives effect to this contention of the respondent. I think this contention is sound and must prevail. The respondent, though on deputation and in receipt of salary debitable to municipal funds, for the time being, retained his lien on his original service under the Government, and had the animus revertendi to his old master, Government, whenever he wished, or whenever his new employer desired to dispense with his services. The best test is: Who could have dismissed him from service; surely the municipality could not have; although it could have refused to avail itself of his services and even stopped the remuneration payable to him. It could have under certain conditions also asked the Government to take him back, if it was not satisfied with his work. I am not, therefore, prepared to treat him as having lost his protection as a public officer and the consequent immunity from a civil suit except upon a notice, merely, because his master thought fit to accede to the request of the local body to lend his services to it temporarily. The decision of the learned District Judge on this point is, therefore, entitled to be maintained in second appeal.

The second question involves considerable difficulty, as it deals with the extent of corporal punishment which the defendant, in his capacity of the head of the educational institution, could have, under the powers vested in him by the Educational Manual, legally inflicted on a student in whom he suspected a spirit of so-called insubordination; how far his action cannot come up for treatment in a civil Court as an infringement of the civil right of a subject of the Crown is a question of great or vital importance to the public as the view taken by the District Judge raises a very complicated question of law, and requires thorough discussion, of the law of guardianship and parental authority, in the matter, of inflicting corporal punishment on their children or wards, and, of the extent to which it is or can be delegated to the schoolmaster, for purposes of maintaining discipline in schools under their charge. Inasmuch as the lower appellate Court's judgment is a dissenting judgment, it would have been all the more necessary for me to examine the matter very thoroughly with a view to see whether the learned District Judge

applied the law to the facts correctly. But whereas I agree with him on the first point and hold that the suit is not maintainable without notice, it is unnecessary for me to examine the matter raised in the second point set forth above.

I may, however, observe that in the view he took of the first point he should not have hazarded any expression of opinion on the second point. While, therefore, maintaining the dismissal of the suit for want of notice I expressly declare the District Judge's findings on the other point as wholly unnecessary and out of place in the present suit as framed, and, therefore, not binding on the parties in the subsequent litigation, if any, on this point.

The appeal fails and is dismissed. As the suit fails on a technical point, I direct that the parties bear their own costs throughout.

N.D. *Appeal dismissed.*

A. I. R. 1928 Nagpur 34

MACNAIR, A. J. C.

Shanker Rao Chitnavis—Defendant 4—Appellant.

v.

Ganpat Rao Pande and *others*—Plaintiffs and Defendants—Respondents.

F. A. No. 37 of 1923, Decided on 6th July 1927, from the order of the Addl. Dist. Judge, Bhandara, D/- 12th January 1923, in Civil Suit No. 7 of 1920.

(*a*) *Execution sale—Setting aside* (*Prideaux, A. J. C.*).

The fact that one sale took place in execution of two decrees against the same person, is obviously no good reason for setting aside the sale. [P 35, C 1]

(*b*) *Transfer of Property Act, S. 74—Sale under prior mortgage decree—Surplus sale proceeds go not to owner or transferee of his rights but to puisne mortgagee* (*Macnair, A. J. C.*)

G held a mortgage on a certain property of which *S* was the next mortgagee. The mortgagors, after mortgaging with *S*, lost their title to the property which was sold in execution of a simple money decree and again sold in execution of *G's* mortgages. [P 35, C 2]

Held; that the surplus remaining after satisfying *G's* mortgage would go to the next mortgagee and not to purchaser under money decree. [P 35, C 2]

It is open to the owner or his transferee to file a suit for some portion of the sale proceeds on the ground that the debt to puisne mortgagee charged on these proceeds has been satisfied or that the amount of his debt is less than the sale proceeds. [P 36, C 2]

M. R. Bobde—for Appellant.

S. A. Ghadgay, Y. V. Jakatdar and *V. M. Jakatdar*—for Respondents.

The original judgment was as follows :

Prideaux, A. J. C.—This judgment also disposes of first appeal No. 20 of 1923.

It seems that in civil suit No. 7 of 1920 on the file of the District Judge Ganpatrao Pande obtained a mortgage decree against Raoji and others, defendant 4 in that suit being Shankar Rao Chitnavis, the present appellant, and defendant 3 Samsherkhan was held entitled to redeem because of a decree in a redemption suit obtained by him on 2nd August 1913. In that suit the mortgagors sued to redeem but failed to do so, and Samsherkhan, who was in possession as a possessory mortgagee, is said to have retained possession as owner from the date of that decree. Then in civil suit No. 8 of 1920 Ganpatrao Pande got a decree against Raoji and others, Samsherkhan being defendant 3 and Shankar Rao Chitnavis being defendant 4. This decree was for Rs. 10,124-2-3. In the first case, in which the final decree was passed on 3rd February 1922, the property concerned was an 8-annas share of mauza Garada with cultivating rights in *sir* and houses situated therein, the whole of mauza Nawegaon with the cultivating rights in *sir* and houses therein, and mango trees in four villages, viz. Jangli, Garada, Chandori and Salepati. In the second suit, No. 8 of 1920, the property mortgaged consisted of an 8 annas share of mauza Garada with all rights except cultivating rights in *sir* land, and 16-annas share of Nawegaon without cultivating rights in *sir*. The execution of the decrees was sent to the Collector who sold the property which fetched Rs. 16,000 at the sale, and the surplus proceeds transferred to the civil Court came to Rs. 1,554·2--11. That surplus the executing Court has given to Samsherkhan, and against that order the present two appeals have been filed.

I will first deal with first appeal No. 20 of 1923. It is filed by the original mortgagor. It seems that Shankar Rao Chitnavis' claim to the village Nawegaon rests on a sale of 28th September 1908 when the village was sold in execution of a simple money decree against the owners. He never got possession as

Samsherkhan was then in possession as a usufructuary mortgagee. In his appeal Raoji the original mortgagor contends that the sale should be set aside, because one sale took place in execution of two decrees. But this is obviously no good reason for setting aside the sale. That fact does not vitiate the sale and it stands. But in any case it is difficult to see how any surplus could possibly go to the mortgagor who has lost all right to the property. It must go either to Chitnavis or to Samsherkhan.

Another ground on which it is contended that the sale should be set aside is that the decree in suit No. 7 of 1920 covered only 56 acres of *sir*, while the whole had been sold. But the decree covers the whole of the *sir*, and if Raoji was not satisfied with that decree his business was to appeal against it. It is too late to do so now. This disposes of first appeal No. 20 of 1923. It is dismissed with costs, and the appellant will pay respondent's costs.

I now come to the other appeal ; first appeal No. 37 of 1923. The argument there is that by his purchase of 28th September 1908 Shankar Rao Chitnavis became the owner of a part of the mortgage property, viz. the village of Nawegaon, and has still the right to sue Samsherkhan for redemption and accounts ; that he has never been foreclosed and that the mortgagors now cease to be owners. For the appellant here, the contention that the sale should be set aside is given up, and his case is that the surplus should be paid to him. It is argued that as regards this appellant Samsherkhan is a mortgagee and his foreclosure is of no use against the appellant as he was the owner subject to Samsherkhan's and Ganpatrao's mortgages.

For Samsherkhan it is argued that the lower Court is right in giving him the surplus, for he was the prior mortgagee, the date of his mortgage being 17th June 1904 when the interest was created in his favour ; that after Ganpatrao's mortgage had been satisfied he comes next ; that Shankar Rao Chitnavis may claim to redeem in a separate suit but that matter does not affect Samsherkhan's right to claim the surplus proceeds of the sale ; that on the date of the last auction-sale Samsherkhan was in possession as a prior mortgagee as far as Chitnavis was concerned ; and that as the latter could not dispossess Samsherkhan without redeeming him, he cannot claim any surplus. Then a mistake is pointed out in the sale proceedings. The property was to be sold subject to Samsherkhan's mortgage, but this was not done, and this mistake is said to give Samsherkhan an additional right to the surplus.

It seems to me that the facts in this case are not difficult. The original owners or mortgagors, after mortgaging with Samsherkhan, lost their title to the villages which were sold in execution of a simple money decree and again sold in execution of Ganpatrao's mortgages. Though the latter's sale is without the express order that the sale was subject to Samsherkhan's mortgage yet the result would be that the purchaser at the auction-sale would become owner subject to that mortgage, and that the person really entitled to the surplus is the purchaser from the original mortgagors, because Samsherkhan's rights as a mortgagee are in no way affected by the sale, and remain intact, and the surplus ought to go to the person on whom the burden of Samsherkhan's mortgage would eventually fall to lighten his burden of paying that mortgage : Samsherkhan's right in his mortgage subsists in its entirety, and that right not having been taken away he has no right to the surplus.

Another reason for not giving it to him is that his mortgage was a possessory one, and it is yet to be seen whether anything is due on that mortgage. He has yet to render accounts, and his possession against the present appellant is that of a mortgagee.

For these reasons I set aside the order of the lower Court and direct that the surplus in the sale be paid to Shankar Rao Chitnavis. His appeal succeeds and he will get his costs from the contesting defendant Samsherkhan. There will be only one set of pleader's costs in both appeals.

The Judgment on review was as follows:

Macnair, A. J. C.—This appeal was decided by my predecessor on 18th August 1924. The facts which I have to consider are not very numerous. The property concerned consists of an eight-anna share in mouza Garada and a sixteen-annas share in mouza Nawegaon. The original owners of this property mortgaged it on three occasions, first in 1900, next in 1904 to

Shamsherkhan and lastly to Ganpatrao Pande. Then mouza Nawegaon was sold on 28th September 1908 in execution of a simple money decree to Sir Shankar Rao Chitnavis. The mortgage effected in 1900 has been assigned to Ganpat Rao Pande and the property has now been sold for the satisfaction of the first and third mortgages. The price obtained was sufficient to satisfy these mortgages and the appeal refers to the distribution of the surplus proceeds, Rs. 1,554-2-11. The learned Additional District Judge, in his judgment dated 12th January 1923. held that as Shamsherkhan was impleaded as a puisne mortgagee he was entitled to receive the surplus amount towards the discharge of the interest and principal money due on his mortgage. My predecessor held that Sir Shanker Rao Chitnavis, the purchaser from the original mortgagors, was entitled to the surplus, as he represented the original owners and Shamsherkhan's rights as a mortgagee were not affected by the sale. He added that as Shamsherkhan's mortgage was a possessory one it was not clear that anyting was still due on his mortgage. My predecessor entertained an application for review, and I have, for reasons stated in my order dated 30th March 1927, granted that application. Both parties desired that the whole appeal should be considered afresh.

The first point which is urged is that the learned Additional District Judge was wrong in deciding that the balance of the sale-proceeds should be paid to the puisne mortgagee rather than to the representative of the owner. It is not urged before me that Shamsherkhan is a prior mortgagee and thus retains any rights in the property after sale and it is clear that as the sale was effected in order to satisfy a mortgage executed in 1900 it concludes Shamsherkhan's rights in the property comprised in that mortgage. It is urged by the appellant that the whole or at least some part should be paid to the owner.

In my opinion the decision of the lower Court is correct. I take the case in its simplest form : *A* borrows Rs. 10,000 on certain property from *B*, and later Rs. 5,000 on the same property from *C*. *B* forecloses, and the property is sold for Rs. 12,000. It seems obvious that *C* must get his Rs. 2000 in part payment of the Rs. 5000 advanced, and that *A*, who has got the full value of his property by effecting two mortgages should get nothing more. To put it in another way : *A* has merely a right of redemption on payment of the two debts he has incurred. *C* has a right to the property until *A* redeems him. If the property is sold by *B*, *C's* right is transferred to the surplus sale proceeds, and *A* can get nothing out of these proceeds until he has satisfied *C's* debt.

I next deal with the argument that Shamsherkhan has been in possession of the mortgaged property as usufructuary mortgagee and that his mortgage may be satisfied. Shamsherkhan had a right to retain the property until it was redeemed by the holder of the right of redemption or his successor in title. The property was taken out of his possession and sold owing to the prior claim of Ganpatrao Pande. It seems clear that he should retain possession of any balance left after satisfying Ganpatrao's claim until a suit for redemption or its equivalent is filed. I see nothing to prevent Sir Shanker Rao Chitnavis filing a suit for some portion of the sale proceeds on the ground that the debt charged on these proceeds has been satisfied or that the amount of his debt is less than the sale proceeds. It seems obvious, however, that the person who would have continued to enjoy possession of the village but for Ganpatrao Pande's charge on the village, should remain in possession of whatever is left after Ganpatrao Pande's charge is satisfied, until a suit of the nature of a suit for redemption is filed.

It is not then really necessary to decide the point, misapprehension about which led to the application for review. I remark, however, that my predecessor was under a misapprehension in thinking that Sir Shanker Rao Chitnavis was the representative of the original mortgagor. The original owner got a redemption decree against Shamsherkhan in 1913 but failed to redeem and thus lost his right of redemption. Meanwhile, however, the original owner had sold his right of redemption in one village to Chitnavis, and Chitnavis was not impleaded in the redemption suit. What happened in 1913 was then that, while two persons owned the right of redemption, the mortgagee acquired the rights of one. Under the proviso to S. 60, Transfer of Property Act, Sir Shankar Rao Chitnavis became

entitled to redeem his own share on payment of a proportionate part of the amount remaining due on the mortgage. But Shamsherkhan, who in the language of S. 60, Transfer of Property Act, acquired whole or in part the share of the mortgagor, became entitled to share in anything which was due to the original holder of the right of redemption.

For the reasons I have given, the appeal fails and is dismissed with costs on the appellant. As I have pointed out, the appellant may, if so advised, file a suit for the whole or part of the money on the allegation that Shamsherkhan's mortgage debt has been satisfied. The sum is not very large and it is not necessary for Shamsherkhan to give any security that it will be available if such a suit is successful.

D.D. *Appeal dismissed.*

A. I. R. 1928 Nagpur 37

KINKHEDE, A. J. C.

Mamuji—Plaintiff—Appellant.

v.

Dalpat and *others*—Defendants—Respondents.

S. A. No. 184-B of 1926, Decided on 18th July 1927, from a decree of the Dist. J., Amraoti, D/- 24th February 1926, in Civil Appeal No. 99 of 1925.

(a) *Hindu Law—Alienation by father—Sum not justified by legal necessity—One-fifth of sale is invalid.*

Where the proportion of the consideration not required for necessity was about one-fifth, the validity of the sale by father was not upheld: *A. I. R.* 1924 *Nag.* 109, *Dist.* [P 38 C 2]

(b) *Hindu Law — Co-parcenary—A transferee has no right to separate possession of his purchase except by a partition of the whole estate.*

A transferee of an undivided interest of a member of a co-parcenary has no right to separate possession of his purchase except by a partition of the whole estate belonging to the family claimed in a properly constituted suit for partition to which all proper persons are impleaded as parties. [P 38 C 2]

In the absence of anything on record to show that the array of parties is complete in the sense that there are no other members in the family for whom any provision either by way of maintenance or marriage portions has not to be made in the event of partition, and in the absence of any material to show that all the equities and right of all persons interested can be settled, the request for a grant of a decree for separate possession after the partition of the entire estate cannot be granted in a suit for possession by the purchaser : 9 *N. L. R.* 18, *Foll.* [P 38 C 2, P 39 C 1]

A. V. Khare—for Appellant.

Judgment.—Respondent Dalpat is the father of respondents 2, 3 and 4, who are minors. They form a joint Hindu family. The family possessed amongst other property field Survey 125, pot hissa 3 and some other fields. Dalpat sold his three fields to Akaji on 21st April 1919, for Rs. 3,999. Later on Akaji re-conveyed field Survey 125, pot hissa 3 to Dalpat by a sale-deed dated 4th June 1920. Thereupon the present appellant Mamuji in his capacity of a co-sharer in the survey number sued Dalpat for pre-emption and obtained a pre-emption decree against him for possession of the said field subject to payment of Rs. 2,000. That decree was dated 21st October 1921. The decree-holder got formal possession through Court on 26th March 1922. He thereafter leased the field to Gangaram and others who were obstructed in their possession by Dalpat and his sons. Hence the present suit for possession against Dalpat ; later on his sons have also been impleaded as co-defendants 2 to 4.

The first Court found that the sale dated 21st April 1919, to Akaji in respect of all the three fields for a consideration of Rs. 3,999 could bind defendants 2 to 4 to the extent of Rs. 3,128-6 the amount paid to Nathusa Pasusa in satisfaction of an antecedent decretal debt. It accordingly granted to the plaintiff a decree for unconditional possession of the 1/4th share of Dalpat and held that defendants 2 to 4 were liable to pay Rs. 1,173-2-3 and interest on account of their share of the valid consideration, and that defendant 1, was liable for Rs. 400 on account of mesne profits, and passed a decree directing defendants 2 to 4, to pay the above sum within six months failing which they were to forfeit their 3/4th share to plaintiff. Neither party was satisfied with this decree. Plaintiff preferred an appeal and defendants 2 to 4, filed cross-objections to the Court of the District Judge, Amraoti, who, allowing the cross-objections of the defendants 2 to 4, dismissed the suit. Plaintiff has, therefore, come up in second appeal.

According to the findings of both the Courts below, out of the consideration of Rs, 3,999 only Rs. 3,128 represented antecedent debt binding on all the members of the family ; as to the balance of Rs. 871, they are agreed that its purpose was not established. The appellant

challenges the correctness of the finding so far as it relates to the balance of Rs. 871 on the ground that it is vitiated by reason of the first Court's improper refusal to grant a further opportunity to enforce the attendance of one Tukaram as his witness in the case for proving the payment of about Rs. 450 to him in satisfaction of a decree held by him against Dalpat. It is also urged that there is evidence on record which, if believed, went to show that Rs. 200 were required for agricultural bullocks and the remainder for family expenditure. If Tukaram really held a decree against Dalpat and the same was satisfied by payment, the matter was easy of proof, but whereas plaintiff did not care to produce certified copies of the decree or of an entry in the register of civil suits to prove even the existence of the decree and its satisfaction so as to make his story plausible, I think, he has no reason for complaint, because the oral evidence of Tukaram did not come on the record owing to his own default in getting him served. The other evidence was not regarded as believable by both the Courts below and consequently the finding is no longer open to challenge.

It is next contended that the finding that the property was sold for its proper price arrived at in the suit for pre-emption to which Dalpat alone was a party, should be held binding as against the latter's sons, although they were not parties to it. I think the District Judge has given very sound reasons for holding that Dalpat could not represent his sons in that suit, in so far as the determination of questions, which were personal to the sons, was concerned, as their personal defence could not be set up by their father. Dalpat could not in the nature of things represent them in respect of all matters which could be urged by the sons in respect of their special plea that the sale dated 21st April 1919, to Akaji did not affect their interest. Inasmuch as the question, that the property was sold in 1919 at an undervalue and even the re-transfer in 1920 was at an undervalue, had a very material bearing on their 'plea that the sale to Akaji was not binding on them, the District Judge was right in holding that the decision against Dalpat in the pre-emption suit, as regards the proper value of the property, was not a bar to that question being re-agitated in the present suit by defendants 2 to 4, and his decision, that the property was sold and part of it re-purchased at an undervalue being supported by evidence proper for consideration, cannot be impeached in second appeal.

The conclusions then arrived at by the learned District Judge are that a much more valuable property was sold away for a small consideration of Rs. 3,999 and that the only binding portion of the consideration of the first sale was Rs. 3,128, and that the balance of Rs. 871 was not an insignificant sum in proportion to the whole. On these findings there is no scope for the application of the rule enunciated in *Bhadaji* v. *Ganeshrao* (1). There the proportion of the sum not justified by legal necessity was 1/8th where as here it is 1/5th approximately.

The necessary result of the legal position thus arrived at was that plaintiff-appellant got what Dalpat acquired by the re-purchase from Akaji, and Akaji could give back to Dalpat only what Dalpat could sell to him in his own right, without affecting the shares of defendants 2 to 4 In other words Akaji's sale could operate only as against Dalpat's individual share, and, therefore, the plaintiff's pre-emption decree gave him only that much and nothing more. The ruling of this Court in *Mohanlal* v. *Tek Chand* (2), clearly negatives the right of a transferee of an undivided interest of a member of a co-parcenary to separate possession of his purchase except by a partition of the whole estate belonging to the family claimed in a properly constituted suit for partition to which all proper persons are impleaded as parties.

Pressed by these findings the plaintiff argues that this being a suit to which all the male co-parceners have been joined as parties, the Courts below ought to have worked out the rights of the plaintiff in this very suit and given him separate possession of his purchase on partition. There is, however, nothing on record to show that the array of parties here is complete in the sense that there are no other members in the family for whom any provision either by way of maintenance or marriage portions has not to be made in the event of partition. In the absence of any material to show that all the equities and the rights of all persons

(1) A. I. R. 1924 Nag. 109=20 N. L. R. 4.
(2) [1913] 9 N. L. R. 18=18 I. C. 826.

interested can be settled in this suit, I am not prepared to grant this request of the appellant. The appeal, therefore, fails and is dismisssd with costs.

N.D. *Appeal dismissed.*

A. I. R. 1928 Nagpur 39 (1)

FINDLAY, J. C., AND KOTWAL, A. J. C.

Mt. Baribahu

v.

Ganeshsingh

S. R. No. 251 of 1925, Decided on 16th July 1927, from the decision of the Dist. Judge, Saugor, D/- 6th February 1924, in Civil Appeal No. 103 of 1924.

C. P. Tenancy Act (1920), *S.* 49—*Ex-proprietary occupancy tenant is not a tenant of the proprietary body.*

An ex-proprietor becoming an occupancy tenant of *sir* held by him in severalty is the tenant of his vendee and the vendee is entitled to claim the rent and not the lambardar.

[P. 39, C. 2]

Opinion

The question referred to the Bench is :

Whether a co-proprietor of a village selling his share to a third party and becoming an occupancy tenant of *sir* held in severalty becomes a tenant of the vendee or of the whole proprietary body, liable to pay rent to the vendee or to the lambardar ?

The material facts are as follows. Mt. Bari Bahu the defendant was an eight annas co-sharer in Mouza Gamhiria Puranapani. The other eight annas share is owned by Ganeshsingh the plaintiff and two others. Ganeshsingh is the lambardar. In 1923 Mt. Bari Bahu sold her share to one Mohansingh and became occupancy tenant of the sir held by her in severalty. Ganeshsingh sues to recover the rent of the holding from Mt. Bari Bahu. The latter pleads that Mohansingh is her landlord and that she has paid the rent to him.

Looking to the definitions of "landlord" and "tenant" in the Tenancy Act, S. 2, Cl. (7) and (11) it must be held that Mohansingh is the landlord and Bari Bahu his tenant in respect of the land of which the rent is in dispute. It is Mohansingh and not the proprietary body represented by Ganeshsingh as the lambardar, of whom Bari Bahu holds the land.

Mohansingh as the landlord has the right to claim the rent from Bari Bahu. It is contended that sub-Cl. (a) and (c) of Cl. (2) of S. 188, Land Revenue Act 1917 make the lambardar the landlord within the meaning of the Central Provinces Tenancy Act 1918 and give him the right to collect the rent from all tenants in the village. The Act makes the lambardar the landlord only in respect of such land as the body of proprietors whom he represents is the landlord of. The body of proprietors is not the landlord in respect of Bari Bahu's holding and the rent of the holding does not form part of the village profits of which an account is renderable to the body of proprietors. Ganesh singh is therefore, not entitled to claim the rent.

Our opinion is that the ex-proprietor becoming an occupancy tenant of *sir* held by him in severalty is the tenant of his vendee and that the vendee is entitled to claim the rent and not the lambardar.

N.D. *Order accordingly.*

A. I. R. 1928 Nagpur 39 (2)

KINKHEDE, A. J. C.

Shridhar and *another*— Defendants — Appellants.

v.

Rajabhau and *others*—Plaintiffs—Respondents.

S. A. No. 476 of 1926, Decided on 28th July 1927, from the decree of the First Addl. Dist. J., Nimar, D/- 25th August 1926, in Civil Appeal No. 19 of 1926.

(*a*) *Civil P. C., O.* 1, *R.* 8—*Permission to sue may be granted even after suit is filed*

As the rule does not preclude the Court from granting the permission to sue even after suit in which more than one person have interest, it follows that the permission need not necessarily be obtained before the suit is filed : 44 *Cal.* 258 ; 21 *Bom.* 784 (*F. B.*) ; 22 *All.* 269 ; 23 *Mad.* 28 and 25 *Mad.* 399, *Foll.* [P. 40, C. 1, 2]

(*b*) *Practice — New plea — Appeal— Plea of want of sanction under Civil P. C., S.* 91 *cannot be raised in the appellate Court for the first time—Civil P. C., S.* 91.

Where the contention that the suit is not maintainable for want of sanction of the Advocate General under S. 91, Civil P. C., was not made the subject of any pleading in the trial Court, but was raised for the first time in the lower appellate Court and that Court refused to enteratin it.

Held : that it was perfectly within its rights in doing so, as it raised questions of fact, and, as, on principle, a defeated litigant should not be allowed to take the successful party by surprise and expose him to the brunt of a new attack at the stage of appeal. 33 *Bom.* 35, *Ref.*

[P. 40, C. 2]

(c) *Easements Act, S.* 18—*Right by custom and right by prescription—Distinction between.*

Rights which are in the nature of customary rights which exist for the common benefit of certain communities or inhabitants of particular localities, and to establish which the law does not lay down any fixed period must be distinguished from prescriptive easements which can be acquired by 20 years user by specific individuals who alone can exercise them as against servient owners for the beneficial enjoyment of their own dominant heritages: 20 *Mad.* 389; 17 *All.* 87 and *A. I. R.* 1924 *Mad.* 197, *Foll.* [P. 41, C. 1]

W. R. Puranik—for Appellants.

A. V. Khare and *W. B. Pendharkar*—for Respondents.

Judgment.—The suit out of which this appeal arises was filed, as a representative suit, by certain inhabitants of a locality for the establishment of their right to use the land in suit for the enjoyment of certain civil rights as members of the village community which forms the public of that place, viz., a right of way and a right to hoist up a Jhenda or flag etc. in plot No 112 of mouza Badgaon Gujar. The plaintiffs denied that the defendants were occupancy tenants of the land, but the Courts below have held that they are the occupancy tenants thereof. The position, therefore, is that the tenant-right vests in the defendants, but that it is burdened with an obligation to let the public of the place use the plot for the exercise of their public rights as members of the village community to which the plaintiffs also belong.

In second appeal it is contended that this representative suit should have been thrown out as not maintainable or not validly instituted, as, admittedly, no permission of the Court contemplated by O. 1, R. 8, Civil P. C., was obtained before its institution. No doubt such a view prevailed once in the Calcutta High Court; but I think that the view taken by the Allahabad, Bombay and Madras High Courts is sounder and preferable; even the Calcutta High Court itself subsequently thought fit to dissent from the view taken in earlier days in *Oriental Bank Corporation* v. *Gobind Lall* (1), as the report of the case of *Ahmed Ali* v. *Abdul Majid* (2) shows. As there is nothing in the provisions of O. 1, R. 8, Civil P. C., which precludes the Court from granting the permission even after suit, it follows that the permission need not necessarily be obtained before the suit is filed. The cases reported in *Fernandez* v. *Rodrigues* (3), *Baldeo Bharthi* v. *Bir Gir* (4), *Srinivasa Chariar* v. *Raghava Chariar* (5) and *Chennu Menon* v. *Krishnan* (6), fully support this view. In this state of the law the objection fails and is disallowed.

The second legal objection taken is as regards the maintainability of the suit for want of sanction of the Advocate General under S. 91, Civil P. C. This contention was not made the subject of any pleading in the trial Court, but was raised for the first time in the lower appellate Court; that Court refused to entertain it, and I think, it was perfectly within its rights in doing so, as it raised questions of fact, and, as, on principle, a defeated litigant should not be allowed to take the successful party by surprise and expose him to the brunt of a new attack at the stage of appeal: cf. *Nathu Piraji* v. *Umedmal Gadumal* (7).

Even assuming that the objection was one which could have been entertained at that late stage, I am not prepared to dissent from the view taken by the learned Judge as regards the inapplicability of S. 91, Civil P. C., to the facts of this case as disclosed or found. The several cases cited by the Court of appeal below do substantially support the view taken by it, and I may say that the case of *Kalicharan* v. *Ram Kumar* (8), in particular, justifies the view so taken. The distinction between a public high way and a road over which a section of the public e. g., the inhabitants of any particular locality have a right of way pointed out there is worthy of note and cannot be lost sight of.

Thirdly, it is contended that the lower appellate Court has wrongly treated the right of way enjoyed by the inhabitants of this locality in question, as a prescriptive right of way acquired by 20 years's user, even though that was not the plaintiffs' case. There is nothing in the judgment under appeal which justifies the remark beyond the stray observation that the enjoyment of the right exceeds

(1) [1883] 9 Cal. 604=13 C. L. R. 142.
(2) [1917] 44 Cal. 258=39 I. C. 773=21 C. W. N. 1144.
(3) [1897] 21 Bom. 784 (F. B.).
(4) [1900] 22 All. 269=(1900) A. W. N. 69.
(5) [1900] 23 Mad. 28=7 M. L. J. 281.
(6) [1902] 25 Mad. 399.
(7) [1909] 33 Bom. 35=1 I. C. 456=10 Bom. L. R. 768.
(8) [1913] 17 C. W. N. 73=18 I. C. 67.

20 years. Suffice it to say that rights such as those asserted in this suit are in the nature of customary rights which exist for the common benefit of certain communities or inhabitants of particular localities, and to establish which the law does not lay down any fixed period ; they must be distinguished from prescriptive easements which can be acquired by 20 year's user by specific individuals who alone can exercise them as against servient owners for the beneficial enjoyment of their own dominent heritages : cf. *Palaniandi Tevan* v. *Puthirangonda Nadan* (9), *Kuar Sen* v. *Mamman* (10), and the *Taluk Board, Dindigul* v. *Venkatramier* (11).

I am not prepared to accept the further contention that though the right of passage and the right to hoist up the Jhenda etc. found specific mention in the papers of the earliest settlement, of the sixties, all reference thereto has been omitted in the papers of the more recent ones, because they were abandoned. There is no room for basing any such adverse inference on the mere absence of such entries, as would tend to show that it must have been omitted because the right was either abandoned or lost by disuse, as, the overwhelming evidence of the continued user and enjoyment of these rights of such long standing, down to the present day, adduced in the case, which the Courts below saw no ground to disbelieve, points to a conclusion just to the other way. The finding of fact, thus arrived at by the Courts below on the basis of evidence proper for consideration, cannot be disturbed in second appeal. The appeal fails and is dismissed with costs.

N.D. *Appeal dismissed.*

(9) [1897] 20 Mad. 389.
(10) [1895] 17 All. 87=(1895) A. W. N. 10.
(11) A. I. R. 1924 Mad. 197=46 Mad. 866.

A. I. R. 1928 Nagpur 41

FINDLAY, J. C.

Narayan and *another* — Plaintiffs—Appellants.

v.

Mahadeo and *others*—Defendants—Respondents.

S. A. No. 403 of 1926, Decided on 25th July 1927, from the decree of the District Judge, Nagpur, D/- 6th April 1926, in Civil Appeal No. 260 of 1925.

C. P. Tenancy Act (1920), *S.* 12 (4)—(1898) *S.* 46 (5)—*The provision does not prohibit registration merely for inclusion of trees standing on occupancy land.*

Where a mortgage deed draws an explicit distinction between the land and the trees thereon and implies that trees are held under a different title from the land held under occupancy right and are, unlike the land, capable of being validly mortgaged, then the mortgage deed does not come within the prohibition laid down in sub-S. 5 of S. 46: 7 *C. P. L. R.* 7; 7 *N. L. R.* 63; *A. I. R.* 1925 *Nag.* 277 and 13 *N. L. R.* 165, *Dist.* [P 43 C 1]

B. K. Bose, S. C. Datta Chaudhri and *P. N. Rudra*—for Appellants.

M. R. Bobde—for Respondents.

Judgment.—The plaintiffs' suit on a mortgage, dated the 19th June 1912, has failed in both the lower Courts. Many pleas offered by the defendants, including the common and often reprehensible one that the ancestor of the defendants, in this instance, defendant 1's father, was a man of vicious habits, have been found against the defendants. The suit, however, was dismissed on the sole ground that amongst the property mortgaged were some 13 trees in the occupancy field No. 43/1. The Subordinate Judge held that the trees in question were immovable property for the purpose of registration, and following *Fakira* v. *Ramkisan* (1) and *Nilkant* v. *Ghulya* (2), he was of opinion that the registration of the mortgage deed was invalid and, the personal remedy being barred by time, the suit was liable to dismissal.

The plaintiffs appealed to the Court of the District Judge, Nagpur, who upheld the decision of the Subordinate Judge. His view was that registration of the trees was prohibited and that the mortgage, therefore, cannot operate in respect of any of the property included in the deed in suit. On this and connected findings, the learned District Judge dismissed the appeal and the plaintiffs have now filed the present second appeal in this Court.

The mortgage deed in suit was executed on 19th June 1912, and the provisions of the Tenancy Act of 1898 are admittedly applicable. It is pertinent to have some close regard to the actual terms of the mortgage deed. Amongst the property mortgaged was the crop of the occupancy field 43/1, but it is explicitly stated in the deed that only the crop, and not the land, is mortgaged. Further on

(1) A. I. R. 1925 Nag. 277=21 N. L. R. 25.
(2) [1917] 13 N. L. R. 165=12 I. C. 384.

in the deed, the 13 trees we are concerned with were specifically included.

It has been urged on behalf of the plaintiff-appellants that there may be distinct titles in the land and in the trees; the former may belong to *A* and the latter to *B*. A tenant may acquire land from the landlord without acquiring property in the trees. Whether the trees formed part as such is, it has been urged, a matter for investigation and decision on questions of fact. In the present case, it is urged, the mortgage deed drew a clear distinction between the land and the trees, the land being specifically excluded from the mortgage and the trees included therein. Some attempt has been made to urge that the language of the deed used in connexion with the trees implies that the soil on which they stood was also mortgaged. I can find no ground to support this allegation on my reading of the mortgage deed. It has been admitted on behalf of the appellants that, in the ordinary event, there would be a question for investigation and decision as to whether the parties to the deed averred and intended that the trees and the land were capable of being held on separate titles, but it is urged that, in the circumstances of the present case, wherein the mortgagor explicitly excluded the land from the scope of the mortgage and equally explicitly included the trees therein, they are now estopped from avoiding any further investigation into the question of fact concerned being carried through.

The argument further offered on behalf of the plaintiff-appellants is that S. 46 (5), Tenancy Act, 1898, only excludes from registration documents which purport to transfer the right of an occupancy tenant in his holding and I have been referred to the definition of "holding" contained in S. 2 (3), Tenancy Act, 1898, in this connexion where "holding" is defined as

> a parcel of land held by a tenant of a landlord under one lease or one set of condition.

It is urged, in short, that in the present case we are solely concerned with the peculiar incidents laid down in the Tenancy Act, 1898, and the argument of the counsel for the appellants has been that sub-S. (5) of S. 46 only prohibits the registration of documents which purport to transfer the right of an occupancy tenant in his holding. It is admitted that the Tenancy Law lays down that the right of a tenant shall be the same in the trees as in the land and it has been urged that the provisions contained in Ss. 95 and 96, Tenancy Act, 1920, have made no change in the law but only crystallised what was already the law beforehand. It is admitted, in short, on behalf of the appellants that the mortgage of the trees was invalid and null and void, but it is urged that their mere inclusion in the mortgage deed does not bring them within the purview of S. 46 (5), Tenancy Act, 1898. If the trees necessarily formed a part of the holding, it would now have been unnecessary for the Legislature to declare that the rights in the trees are the same as in the holding. Inalienability and unregistrability are, in short, it has been urged, quite distinct and as S. 46 (5), Act of 1898 only relates to the alienation of a holding, it is urged that the mortgage as a whole is good, although the trees must necessarily be excluded from its operation.

On behalf of the respondents, reliance has been placed on the decisions in *Raghunath Parsad* v. *Dhanraj Seth* (3), *Sukhnandan* v. *Manakchand* (4) and *Fakira* v. *Ramkisan* (1). The first decision quoted, however, obviously admits the possibility of the trees being held under different conditions from the holding. The decision in *Sukhnandan* v. *Manakchand* (4) is not helpful, for there Stanyon, A. J. C., had in view the question whether when land is attached and sold, the trees standing thereon also pass. In that connexion, the definition of "immovable property" applicable is to be found in S. 3 (25) General Clauses Act, of 1897. I am aware of the decision in *Fakira* v. *Ramkisan* (1) by Kinkhede, A. J. C., but even that decision admitted the possibility of cases occurring where the property in trees standing on the agricultural holding has been expressly served from the property in the soil on which they stand.

It has been urged on behalf of the respondents that, in any event, a non-transferable item was involved in the mortgage and that, therefore, the whole mortgage was bad. Ordinarily, I should have been prepared to assent to this proposition as laid down in *Nilkant* v.

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(3) [1894] 7 C. P. L. R. 7.
(4) [1911] 7 N. L. R. 63=10 I. C. 473.

Ghulya (2), *Omrao* v. *Ramdhur* (5) and *Mt. Kesar Bai* v. *Jamadar* (6), but on the peculiar facts of the present case, I am forced to the conclusion that the present mortgage deed drew an explicit distinction between the land and the trees and that it implied that the trees were held under a different title from the land and were, unlike the land, capable of being validly mortgaged. This being so, it does not seem to me, for the reasons stated above, that the present mortgage deed came within the prohibition laid down sub-S. (5), S. 46, Tenancy Act, 1898; that provision only prohibits registration of transfer of the right of an occupancy tenant in a holding. As I have already shown, the mere fact that the law lays down that the rights of the tenant in trees shall be analogous to those in the holding does not necessarily imply that the trees are in every instance part and parcel of the holding. The law, in fact, regards the trees and the land for certain purposes as entirely separate entities; were that not so, a provision like S. 97, Tenancy Act of 1920) would not, have found a place in the statute book.

I am of opinion, therefore, that the decrees and judgments of the two lower Courts are incorrect and that the plaintiffs are entitled to a decree on the other findings arrived at by them. A decree of foreclosure will be drawn up accordingly and from this amount of Rs. 150 principal, which the Subordinate Judge has held the defendants are not liable for, will be excluded. Similarly, the 13 trees, I have been concerned with, will be excluded from the mortgaged property. I allow interest pendente lite and future interest at eight annas per cent. per mensem. Six months time from the date of this decree will be allowed for payment. The defendants will bear the plaintiff-appellants' costs in all three Courts in proportion to the latter's success. Other costs will be borne by the parties as incurred.

N.D. *Appeal allowed.*

(5) A. I. R. 1925 Nag. 130.
(6) A. I. R. 1925 Nag. 125=20 N. L. R. 162.

A. I. R. 1928 Nagpur 43

FINDLAY, J. C., AND PRIDEAUX, A. J. C.

Maroti — Auction-purchaser — Applicant.

v.

Vithoba and *another*—Judgment-debtor and Decree-holder—Non-applicants.

Civ. Revn. No. 252 of 1925, Decided on 20th Novemer 1926, from the order of the Dist. Judge, Nagpur, D/- 25th June 1925, in Civil Appeal No. 24 of 1924.

Execution sale—Parties to decree settling their claim before confirmation of sale—Sale cannot thereafter be confirmed.

Where the judgment-debtor and the decree-holder come to a settlement before the sale has been confirmed, there is no decree left capable of execution and executing Court is functus officio, and cannot thereafter confirm the sale. The position would be very different if the sale has been confirmed and the parties to the decree come to a settlement while legal proceedings for the reversal of the order of confirmation are in progress: *S. A. No.* 405 *of* 1923, *Foll.* [P 44-C 1]

G. G. Hatwalne—for Applicant.

W. R. Puranik—for Non-applicants.

Order.—The facts of this case are not in dispute and are sufficiently clear from the application. The learned District Judge, as he was bound to do, dismissed the appeal of the applicant in his Court on the strength of the decision in *Nilkanth* v. *Yeshwant* (1). It has, however, been urged before us that the said decision of Kotval A. J. C., is an incorrect one and did not take into account the question of the rights of third parties which might meanwhile have arisen.

For our own part, we do not find it necessary, in the circumstances of the present case, to consider at length the propriety or otherwise of the reported case in question. In the present instance, at the time the judgment-debtor and the decree-holder came to a settlement between themselves, the sale had not been confirmed. It is no doubt true, as has been urged on behalf of the applicant, that he had at the moment an inchoate right which had again come into being as a consequence of his appeal pending in the Court of the District Judge, Nagpur, but we are of opinion that the filing of the said appeal could not detract from the inherent right of the decree-holder and the judgment-debtor to settle the matter between themselves in view of the fact that the sale had not at the moment been

(1) A. I. R. 1922 Nag. 248=18 N. L. R. 134.

confirmed: cf. *Ram Prasad Rai* v. *Mahesh Kant Chowdhury* (2). We are aware of the decision of Hallifax, A. J. C., in *Ramchandra* v. *Lakshman* (3) but for our own part the present case seems to us practically on all fours with the decision of Baker, J. C., in *Ramchandra* v. *Sadashiv* (Second Appeal No. 405 of 1923, decided on 30th August 1924), and following the latter decision we are of opinion that the present application must fail.

We desire to add that the view we take on the legal point involved also squares with the equities of the case. All that the auction-purchaser loses in a case like the present is the interest on the money which has been locked up in deposit, and this is, in the circumstances, no great hardship. In our view, however, the judgment-debtor and the decree-holder having come to a settlement before the sale had been confirmed, there was no decree left capable of execution and the executing Court was functus officio. The position would, needless to say, have been very different if the sale had been confirmed and the parties to the decree had come to a settlement while legal proceedings were in being for the reversal of the order of confirmation.

So far as the present case is concerned, we do not find it necessary to consider at length whether the rule laid down by Kotval, A. J. C., in *Nilkant* v. *Yeshwant* (1) is too widely expressed or not.

For the above reasons the present application fails and is dismissed. The applicant must bear the non-applicants' costs. We fix Rs. 50 as pleader's fee.

D.D. *Application dismissed.*

(2) A. I. R. 1922 Pat. 525=1 Pat. 232.
(3) A. I. R. 1926 Nag. 298.

A. I. R. 1928 Nagpur 44

FINDLAY, J. C., AND MACNAIR, A. J. C.

(*Moulvi Syed*) *Mahebub Hussain* and *others*—Plaintiffs—Appellants.

v.

Nasiruddin and *others*—Defendants—Respondents.

F. A. No. 63 of 1925, Decided on 12th July 1927, from the decree of the Addl. Dist. Judge, Nagpur, D/- 31st January 1925, in Civil Suit No. 34 of 1921.

(a) *Mohammadan Law—Gift—Conditions derogating from gift are void.*

According to the Hanafi Law any derogation from the completeness of the gift is null, and, if the intention to give to the donee the entire subject-matter of the gift be clear, subsequent conditions derogating from or limiting the extent of the right would be null and void. [P 47 C 1]

(b) *Mohammadan Law—Wakf—A Sunni can create by will.*

A Sunni Mohammaden can create a valid wakf by a will: 25 *All* 236 (*P. C.*) *Foll.* [P 48 C 1]

D. W. Kathalay—for Appellants.

V. Y. Jakatdar and *M. K. Padhay*—for Respondent 1.

Judgment.—The suit out of which this appeal arises was instituted by Moulvi Mahebub Husain as mutawalli and trustee of a wakf alleged to have been created by Mt. Kulsambi the widow of a Sunni Mohammdan. Certain other persons alleged by the defendant to be co-trustees were subsequently joined as plaintiffs. Admittedly the property claimed, valued at Rs. 40,700, belonged to Mt. Kulsambi who died on 9th September 1919. The plaint alleges that on 19th July 1912, she executed a deed styled a wasiyatnama by which the property became the wakf property and Mt. Kulsambi, the mutawalli: by a subsequent deed dated 27th May 1915, styled an amanatnama, she entrusted her property to the plaintiff, directing that he should consult certain other persons; a list was given of the property, and it was directed that the income should be utilised in accordance with the prior wasiyatnama and in other suitable works. This later deed constituted the plaintiff the mutawalli and trustee of the wakf. The plaint makes mention of four deeds of gift, dated 5th May 1913, 5th March 1918, 20th June 1919 and 20th June 1919. It is urged that as a wakf was created on 19th July 1912, Mt. Kulsambi had no power to give away the property after that deed. The execution of the deeds is also challenged, and it is alleged that the deeds are invalid as they were not accompanied by delivery of possession. It is stated that the three last deeds were obtained by undue influence, and that Mt. Kulsambi was not in her senses on 20th June 1919. It is alleged that Mt. Kulsambi died, leaving no heirs.

There are three sets of defendants (1) representatives of Aliuddin, who claimed certain property under three of the gift deeds, one dated 5th March 1918 and the others dated 20th June 1919; (2) representatives of Mt. Kamarunnissa Begum, who claimed possession of other property

under the gift deed, dated 5th May 1913 and one of the deeds dated 20th June 1919; (3) persons (with their representatives) who took possession of the remaining property of Mt. Kulsambi at her death, claiming to be her heirs.

The main defences were as follows: (1). The deeds dated 19th July 1912 and 27th May 1915 were not duly executed or attested. (2) In any case, the deed dated 19th July 1912 is merely a will, and the deed dated 27th May 1915 refers only to the management of the property. Mt. Kulsambi then had full power to make gifts of the property and did make the gifts to which the plaint makes reference. (3) Defendants 4 and 5 claimed to be the heirs of Mt. Kulsambi; in the presence of heirs a will could have only a limited effect. (4) Defendants 4 and 5 also urged that Mt. Kulsambi had lost her memory and intelligence, and all documents executed subsequent to 1908 were obtained from her by false representation and influence.

The findings of the learned Additional District Judge are as follows: (1) The deeds dated 19th July 1912 and 27th May 1915 were duly executed and attested and Mt. Kulsambi executed them of her free will when in full possession of her senses. (2) The deed dated 19th July 1912 is a will, and the deed dated 27th May 1915 merely gives certain persons authority to act as Kulsambi's agent and managers during her lifetime, and modifies the directions in the will. (3) Mt. Kulsambi thus retained power to give away her property, She did effectively give away the property by the deeds dated 5th May 1913 and 5th March 1918. (4) The two deeds dated 20th June 1919 are of no effect. It is difficult to say that the necessary formalties regarding execution and attestation were duly observed or that Kulsambi clearly understood the substance of the deeds. Apart from this no possession was delivered. (5) Mt. Kulsambi left no heirs and, therefore, was competent to dispose of all her property by will.

On these findings the plaintiffs were given a decree for possession of the property mentioned in the deed dated 27th May 1915 except the property mentioned in the gift deed, dated 5th March 1918.

Against this decree four appeals have been filed. In F. A. No 44 of 1925 the appellants are the heirs of Mt. Kulsambi and a person who purchased from an heir during the pendency of the suit. F. A. No. 64 of 1925 is filed by Nasiruddin, a successor in title of Alimuddin, one of the donees. F. A. No. 65 of 1925 is filed by Mt. Kumarannissa, the other donee. In F. A. No. 63 of 1925 the appellants are the plaintiffs. This judgment governs the disposal of all these four appeals.

We first deal with the plaintiffs' appeal. It is first urged that the deed dated 3rd July 1912 is not a will but a wakf inter vivos. The deed is termed a wasiyatnama or will. It contains a clause:

> The entire property shall, however, remain in my possession during my lifetime and I am the owner of it.

There is a post-script added and some days after the will was executed (19th July 1912), which is evidently intended to remove any possible doubt regarding the nature of the deed. The post-script is translated:

> The conditions mentioned above will be given effect to after my death.

We fully agree with the conclusions of the trial Judge stated in paras. 12 and 13 of his judgment. The deed was clearly a will. The motive which induced Mt. Kulsambi to execute the will would probably induce her to spend money during her lifetime on the objects to which the income of her property after her death was to be devoted, but that there was no need for her to divest herself of her property during her lifetime when she herself could devote such income as she pleased to the objects mentioned in the will. The terms of the document are clear and she did not divest herself of the property.

It is next urged that even if the deed dated 19th July 1912 was a will, Mt. Kulsambi divested herself of the ownership of the property by means of the deed (Ex. P. 24) dated 27th May 1915. The finding of the learned Additional District Judge on this point is contained in paras. 14 to 17 of the judgment. We have little to add to the reasoning contained in these paras.. The deed is termed amanatnama and was intended to provide for the management of her property. She was a Mahomedan lady, and had she wished to part with her property, she would have spoken of creating a wakf. The deed begins by saying:

> I have now grown too old. It is not known when I might breathe my last. I, therefore, desire that all the property that I hold should

be properly managed during my-lifetime as well as after my death. It is on this account that I entrust from this date, of my free will and consent, all of my property to Janab Moulana Moulvi Syed.

Later, after describing the property, the document states that the income would be utilized in accordance with the will dated the 31st July 1912. Towards the close of the document there is another sentence:

The amount of income whatever it may be from the property mentioned above shall remain with me and I shall personally make payments from it towards expenses and other items.

We agree with the learned Judge that this document entrusts the plaintiff with the management of the old lady's property and directs him to utilise the income for the objects mentioned in the previous will; but the document makes it clear that the property and income continued to belong to the executant. Plaintiff 1 was, as the learned Judge states, appointed a manager. It is true that the word mutawalli is used in one clause but the executant meant to provide for the management of her property after her death as well as during her life. After her death plaintiff 1 would be rightly termed a mutawalli.

It is next urged that Ex. 3 D. 6, a deed of gift dated 5th May 1913 in favour of Mt. Kamarunnissa Begum, was not duly executed and was not accompanied by delivery of possession. These points are discussed in para 21 of the judgment of the lower Court. Mt. Kulsambi, though an old lady appears to have been at this time perfectly capable of managing her property. The deed gives an adequate reason for the gift: the father of the donee had been brought up by the donor's husband and the donee had been treated like a member of the household and it was proposed that she should marry Alimuddin who had been brought up by the donor. There is evidence which has been believed that the deed was duly executed by Mt. Kulsambi, and we see no reason to disagree on this point. The gift was followed by mutation in the name of the donee, and when the amanatnama was prepared two years later, the property mentioned in the gift was excluded from the property entrusted to plaintiff 1. Ex. 3 D. 6 was validly executed and was followed by such delivery of possession as was possible, namely, mutuation of names.

It is urged that the deed was conditional on the marriage of the donee to Alimuddin, but the deed does not purport to be conditional and it was followed after an interval by mutuation of names. Although the donee did not marry Alimuddin, and the donor continued to manage her property for a number of years, the donee's name was allowed to remain in the mutation register. We agree, therefore, that this deed was valid and operative.

The next point raised is with regard to the deed Ex. 1 D. 26 dated 5th March 1918. This is a deed of gift in favour of Alimuddin. Execution of the deed is not challenged before us. It is first urged that Alimuddin occupied a position of active confidence towards Mt. Kulsambi and obtained execution of this deed through misrepresentation and undue influence. Alimuddin, though the agent of Mt. Kulsambi, was little more than a boy while Kulsambi appears to have been a very capable old lady. As the learned Judge of the lower Court has remarked, it was quite natural that Mt. Kulsambi should make a gift of the property to Alimuddin. When she made a gift to Kamarunnissa in 1913, she gave as one of her reasons for doing so that Kamarunnissa was to be married to Alimuddin. When the marriage did not take place, it seems very natural that she should make a gift to Alimuddin himself. We do not think that, on the date on which this document was executed, the relations between Mt. Kulsambi and Alimuddin were such that the latter was in a position to dominate the will of the former. There is no evidence of any value that Alimuddin did exercise undue influence. There is evidence that Alimuddin entered into possession about the time the gift was made. Mt. Kulsambi lived for 18 months after the execution of the deed and appears to have been quite capable of taking steps to recover possession. We agree, therefore, that the deed was not obtained by undue influence or misrepresentation.

It is next urged that the deed Ex. 1. D. 26 merely conveys a restricted estate to Alimuddin and any direct descendants which he might have. The deed contains a clause which is translated:

You and your descendants will enioy it. You may do so. Your near and distant relatives have no right to and interest in the property mentioned,

But the deed does not prohibit the donee from disposing of the property, nor

does it contain a clear statement that the property will revert to the donor if the donee dies without heirs. According to the Hanafi Law

> Any derogation from the completeness of the gift is null; and, if the intention to give to the donee the entire subject-matter of the gift be clear, subsequent conditions derogating from or limiting the extent of the of the right would be null and void (Ameer Ali's Mahomedan Law, 4th edition, Vol. I, p. 134.)

As the learned author subsequently states, where there is a clear intention to make to *A* a gift of the corpus of a thing, and it is conditioned that he should take a limited interest in it or take it only for his life, the condition would be void and the gift would take effect absolutely. In the present case, even if the clause.

> your near and distant relatives have no right to and interest in the property mentioned

was meant to detract from the completeness of the gift, the condition is void.

The next point urged in appeal is that the plaintiffs should have been given a decree for mouza Kharbi. The learned Additional District Judge has stated that the deed dated 27th May 1915, modified the will dated 19th July 1912, specifying the property which was to become the wakf property. We do not agree with this interpretation. The will dated 3rd July 1912, clearly dedicated all Mt. Kulsambi's property to charitable works. Ex. P. 24, dated 27th May 1915, refers very largely to the management of the property during the executant's life. It is not quite clear, but it may mean that only a part of the executant's property is to be under the management of Mahebub Husain. But there is no indication that the clear provisions in the former document, that all the property should at the lady's death be kept intact, the income being appropriated for charity, are modified in any way. Had this been intended, the old lady, who had no heirs, would almost certainly have given directions regarding the enjoyment of the remaining property after her death. We are of opinion, then, that, in spite of the fact that mouza Kharbi does not appear in the list of property given in the deed Ex. P. 24, it is governed by the provisions of the will, dated 3rd July 1912.

The only point which remains to be considered in this appeal is the allegation that the lower Court's orders regarding costs are against law and principle. We agree that as defendants 4 to 6 and 8 were entirely unsuccessful, they should have been directed to bear the costs of the plaintiffs which were incurred owing to their defence. A direction will be entered in the decree that these defendants should pay Rs. 510 to the plaintiffs on account of costs. These defendants must pay costs in this Court, calculated on Rs. 510, to the plaintiffs-appellants. The remaining costs incurred by the appellants in this appeal will be divided in proportion to the value of the reliefs claimed in the appeal against the 1st and 2nd sets of defendants respectively; the costs incurred by each set will be calculated by allowing counsel's fee on the value of the relief claimed against that set: the costs so calculated will be borne in proportion to success and failure. The order of the first Court regarding costs is not varied except as directed at the beginning of this paragraph.

We next deal with F. A. No. 44 of 1925. The deed dated 19th July 1912, is attacked for various reasons. We accept the finding of the lower Court contained in para. 11 of its judgment that loss of the original has been proved. There is no reason whatever to doubt the evidence that this deed was duly executed although the witnesses, who depose to an event which took place many years ago, are to some extent discrepant. There is very strong evidence that Mt. Kulsambi was in 1912 and subsequent years in full possession of her senses; in 1915, three years later, she executed a document which refers to the document dated 19th July 1912; she was later examined by an Extra Assistant Commissioner, and appeared to him a perfectly capable old lady: we may refer to paras. 16 to 18 of the lower Court's judgment on this point. There is no reason whatever for suspecting that she acted under undue influence when she executed the will: she was still of the same mind when she executed the deed dated 27th May 1915 and when she was subsequently examined by the Extra Assistant Commissioner.

The considerations we have mentioned show that the later deed dated 27th May 1915, was freely executed with full understanding.

It is urged that the deed dated 19th July 1912, was inoperative as a will but it is well known law that a Sunni Mahomedan can create a valid wakf by a will:

Baqar Ali Khan v. *Anjuman Ara Begam* (1).

No argument has been led before us on ground No. 7 of the appeal which asserts that Mt. Kulsambi is proved to have left heirs. No defect in the examination of parties and in the framing of issues is pointed out to us. The remaining grounds of appeal do not require discussion. As Mt. Kulsambi left no heirs, she was competent to dispose of all her property by a will. F. A. No. 44 of 1925, therefore, fails and is dismissed with costs on the appellants.

We next deal with F. A. No. 64 of 1925, filed by Nasiruddin, the heir of Alimuddin. We have already held that the deeds dated 19th July 1912 and 27th May 1915 are valid. There is no such contradiction between the terms of the deeds as would prevent effect being given to their provisions. As Mt. Kulsambi left no heirs, she had power to will away the whole of her property.

Grounds Nos. 7 to 10 of this appeal refer to the deeds of gifts dated 20th June 1919. We remark that the finding of the lower Court regarding the validity of these deeds (Exs. 1 D 28 and 1 D-29) is not very clear. The Sub-Registrar was summoned to the house of Mt. Kulsambi, and she admitted execution before him. We see no reason to doubt that the deeds were properly executed and attested, and that Mt. Kulsambi understood them. But Mt. Kulsambi was an old lady and was extremely ill. Alimuddin and Kamarunissa were the inmates of her house and were in a position to exercise influence over the old lady. The documents themselves are suspicious. Ex. 1 D-29 makes a gift to Alimuddin and Mt. Kamarunnissa as a present on their approaching marriage. The document does not mention that a substantial gift had been made six years before in prospect of this marriage. It is clear that, Mt. Kulsambi had for many years proposed to leave the property sufficient to provide for specified charitable works: after the very valuable property detailed in Exs. 1 D-28, 21 and 29 had been given, there was little left for the charities mentioned in the will. It, therefore, appears to us that the old lady, who was probably weak both in body and mind, executed these documents as a result of undue influence.

(1) [1903] 25 All. 236=30 I. A. 94=8 Sar. 397 (P. C.).

We also agree with the learned Additional District Judge that there is no evidence of any value regarding delivery of possession. Mt. Kulsambi was too weak to take any steps for such delivery. The gifts are, therefore. invalid for this reason. F. A. No. 64 of 1925, therefore, fails and is dismissed with costs on the appellant.

F. A. No. 65 of 1925 raises no points other than those already discussed. It is, therefore, dismissed with costs on the appellant.

R.K. *Appeal No.* 63 *partly allowed.*
Other appeals dismissed.

A. I. R. 1928 Nagpur 43
Full Bench

HALLIFAX, KINKHEDE AND MACNAIR A. J. C.S.

Govinda and *others*—Applicants.

v.

Murlidhar and *others*—Non-applicants.

Civ. Revn. No. 183 of 1926, Decided on 21st July 1927, against the order of the Sub-Judge, 1st Cl., Chanda, D/- 16th April 1926 in Execution Case No. 7 of 1924.

C. P. Land Revenue Act (1917), *S.* 151—*Claim to pre-empt.*

A claim to pre-empt under S. 151 is enforceable in execution proceedings, and not by separate suit: **A. I. R. 1926 Nag. 193 and 21 N. L. R. 157 Overruled.** [P 49 C 2]

Atmaram Bhagwant and *S. A. Ghadgay*—for Applicants.

A. V. Khare and *W. B. Pendharkar*—for Non-Applicants.

Order of Reference

Hallifax, A. J. C.—The applicants for revision are recorded co-sharers in the village of Bormala and Saotala in the Chanda District. They say their share is four annas in each village, but even if that was so they have lost five pies out of each four annas by the proceedings in this case, and each share now is three annas seven pies only. All that matters in this case, however, is that they still have a share in each village; with the extent of the share we are not concerned.

The opposite party in these proceedings held a decree against the owners of the whole of the rest of both villages and attached a twelve-annas five-pie share in each village in execution of it. These

shares were put to auction on the 26th March 1926 and knocked down for Rs. 1000 and Rs. 500 to the decree-holders, who had the permission of the Court to bid. The date fixed for the confirmation of the sale was the 19th June, the long adjournment being due to the vacation intervening. On the 12th April the present applicants for revision put in a petition claiming, under S. 151, Land Revenue Act, 1917, to take both shares at the sums last bid.

The learned Judge of the lower Court followed the ruling in *Sitaram* v. *Kaniram* (1), as he was bound to do, and rejected the petition on the 16th April. With most unusual promptitude, the petitioners applied to this Court on the 29th of the same month for revision of that order. That saves them from being barred from getting revision by the consideration mentioned at the end of the judgment cited, that an appeal would lie from the order confirming the sale, as that order was not passed till the 19th June. It is also open to question whether an appeal by them would lie against the order confirming the sale, as they were not interested in it except as claimants of a right of pre-emption.

The effect of the judgment in *Sitaram* v. *Kaniram* is this. A Collector acting in execution of a decree, with the powers granted to him under S. 68, Civil P. C, could in those execution proceedings enquire into a claim to pre-empt made under S. 151, Land Revenue Act 1917 and could grant it, but in doing so he was acting as a Revenue Officer. A civil Court as such, never had that power, and as it ceased to exist in the Collector in April 1923, there is no way of enforcing that right now except by suit; it cannot be enforced in execution proceedings.

It can hardly be correct to say that a Collector acting under the rules in Sch. 3 or any part of the Civil Procedure Code was acting as a Revenue Officer, and that when the powers he held were taken from him they ceased to exist. The powers he held were those of a civil Court, which were transferred to him, and when they were taken from him they reverted to the civil Court.

But anyhow it was always the civil Court itself which dealt with an application under S. 151, Land Revenue Act, even before April 1923. The powers conferred on the Collector by the Local Government were only those which the civil Court had "in execution of the decree", and under Cl. (b), S. 70 (1), Civil P. C., no wider powers could be conferred on him. The Collector had no power to enquire into objections to the execution or claims to the property, and a claim such as one under S. 151, Land Revenue Act, was made to the civil Court itself, which disposed of it. It would probably be presented in the first place to the Collector, but he could do nothing with it but forward it to the civil Court, which would deal with it, the execution proceedings being transferred back from the Collector till it was decided.

There is no necessity to translate S. 151, 'Land Revenue Act, from its surroundings to make it applicable to a civil Court, because it has always been so applicable, but I can see no difficulty in doing so if it were necessary. Nor is there anything to prevent an Act of the Imperial Legislature being modified by a local Act; 'instances of this being done directly are common.

With all due respect, I am of opinion that the application made to the executing Court in this case ought to have been accepted by that Court and granted, unless any reason to the contrary appeared, and none has ever been alleged. Accordingly I refer to a Bench the question whether the decision in *Sitaram* v. *Kaniram* (1), is correct or not.

Opinion.

In the officially published judgment of this Court in *Sitaram* v. *Kaniram* (1), it was held that the right of pre-emption created by S. 151, Land Revenue Act, 1917, could not be enforced by a civil Court in the execution of a decree; it could be enforced only by a Collector exercising powers conferred on him under S. 70, Civil P. C., and as there are now no such Collectors that can no longer be done; the claimant must file a regular suit. The correctness of this decision has been doubted in three cases, of which this is one, and they have come before a Full Bench.

From that view we feel bound, with all respect, to dissent. It seems mainly based on a misconception of the position of a Collector in the execution of a decree. In such a proceeding he did not act as a Revenue Officer but as a Judge of a civil Court to which execution of the decree

(1) A. I. R. 1926 Nag. 193=21 N. L. R. 157.

had been transferred and any powers he had were the powers of the civil Court primarily executing the decree, which were delegated to him. They could not be delegated unless the civil Court had them, and now that they are not delegated, they still remain in the civil Court and are not extinguished.

But as a matter of fact, the particular power in question here was never delegated at all; it remained all the time in the civil Court which transferred the decree to the civil Court of the Collector. It was always the civil Court itself which dealt with an application under S. 151, Land Revenue Act, even before April 1923. The powers conferred on the Collector by the Local Government were only those which the civil Court had " in execution of the decree'', and under Cl. (b), S. 70 (1), Civil P. C., no wider powers could be conferred on him.

The Collector, therefore, had no power to enquire into objections to the execution or claims to the property, and a claim such as one under S. 151, Land Revenue Act was made to the civil Court itself, which disposed of it. It would probably be presented in the first place to the Collector, but he could do nothing with it but forward it to the civil Court, which would deal with it, the execution proceedings being transferred back from the Collector till it was decided.

The learned Judicial Commissioner was unable to hold that :

> the provision under S. 151, Land Revenue Act, can, so to speak, be translated from its ble to a civil Court executing a decree under the provisions of the Civil Procedure Code.

It is true that Chap. 10, Land Revenue Act, 1917, is headed 'Collection of Land-Revenue', and the provisions contained in that chapter except the one under consideration dealt with matters connected with recovery of land-revenue. But this provision refers in specific terms to the execution of a decree of a civil Court, a matter which has nothing to do with the collection of land-revenue. It was as foreign to its surroundings when a Collector acting as a Judge of a civil Court possessed certain powers relating to the execution of a decree as it is at present.

The learned Judge's own difficulty in this matter seems to have arisen out of the view that so to hold would be, in effect, to allow an Act of the Imperial Legislature like the Civil Procedure Code to be modified by a local Act like the Central Provinces Land Revenue Act, 1917.

This at one stage of the present case was regarded as raising an important question of constitutional law.

The question is answered by the preamble to the Land Revenue Act, 1917 and sub-Ss. (2) and (5), S. 79, Government of India Act, 1915.

As this is an application in revision it is necessary to mention also the additional reason stated at the end of the judgment under consideration for rejecting the similar application in that case. It is that an appeal would lie against the order confirming the sale and, therefore, no application for revision could be entertained An appeal would certainly lie against an order of confirmation, but not by a claimant of pre-emption under S. 151, Land Revenue Act.

There are further matters which make the enforcement of such a claim by a separate suit practically impossible. S. 151, provides that the claim is to be made before the sale is confirmed and the claimant must undertake to fulfil all the conditions of the sale binding on the purchaser. In the view taken, that would fix a period of limitation for the suit of thirty days from the date of the sale, and the undertaking would have to be made, presumably, in the plaint. Further S. 152, the next following section, says that

> if a right of pre-emption is exercised under S. 151, any amount deposited by the original purchaser shall be repaid to him.

That could not be done till after the decision of the separate suit, which would be long after the sale had been confirmed and the money had been taken out of deposit and given to the decree-holder.

The finding of the Bench is that a claim to pre-emption under S. 151, Land Revenue Act, is enforceable in execution proceedings, and not by separate suit. With this answer the records will be returned to the Court that made the reference.

D.D. *Order accordingly.*

* A. I. R. 1928 Nagpur 51

MACNAIR, A. J. C.

Mt. Surjubai and *another*—Defendants—Appellants.

v.

Moropant—Plaintiff—Respondent.

S. A. No. 10 of 1927, Decided on 17th June 1927, from the decree of the 2nd Addl. Dist. Judge, Wardha, D/- 8th Dec. 1926.

* *Civil P. C., O. 23, R. 3—Terms of compromise need not be set out in the order.*

Order 23, Rule 3, directs the Court to order a compromise to be recorded and to pass a decree in accordance therewith. The order then takes the place of a judgment. The rule does not state that the terms of the compromise must be set out in the order. The order must contain words showing that a compromise in terms indicated with sufficient clearness is accepted by the Court as a valid basis for a decree : 43 *Cal.* 85, *Diss. from.* [P 51 C 2]

N. R. Deopujari—for Appellants.

Judgment.—The respondent Moropant alleging that the appellants had encroached on his land sued for possession of a small plot in the town of Wardha. On the 29th July 1926 the pleaders for the parties stated that the claim had been compromised in a particular manner, and the Judge took down their statements regarding the terms of the compromise. The parties desired that the judgment should not be delivered until certain terms had been carried out and time was, therefore, given for this purpose. When this period had elapsed, defendants said that they were under some misapprehension when they came to the agreement and desired to resile from the agreement. The Judge passed an order rejecting this application. He then delivered a "judgment," the substance of which is that the parties have compromised the case in terms which appear in statements recorded on the 29th July 1926 and that a decree will be passed in accordance with these terms.

I shall deal subsequently with the points pressed in the first appeal. Before me for the first time it is urged that as the trial Court has not recorded the agreement in the manner required by O. 23, R. 3, Civil P. C., the decree of the first Court must be set aside. Reliance is placed on *Paban Sardar* v. *Bhupendra Nath Nag* (1). In that case there was a "judgment" which contained the words:

(1) [1915] 43 Cal. 85=33 I. C. 769.

The rejection of the application of the 4th May 1912 makes the application of the 25th April inoperative

The application of the 25th April was an application consented to by the defendant made by the plaintiff asking that the decree should pass in a particular way: the defendant acceded to this application. Jenkins, C. J., and Chatterji, J., held that as there was no order directing that the compromise should be recorded, there could be no decree, and the case was accordingly remanded. They remarked that as there was no appeal from the decree, there must be an order against which an appeal lay under O. 43, R. 1 (m), Civil P. C.

With due respect to the learned Judges who decided that case, I state my opinion that they were under a misapprehension regarding the meaning of O. 23, R. 3. That rule directs the Court to order a compromise to be recorded and to pass a decree in accordance therewith. The order then takes the place of a judgment. The rule does not state that the terms of the compromise must be set out in the order. The order must contain words showing that a compromise in terms indicated with sufficient clearness is accepted by the Court as a valid basis for a decree. Now the application, dated the 25th April 1912, consented to by the defendant, was clearly a compromise. A statement that it was operative is surely equivalent to an order that it should be recorded as a valid basis for the decision of the suit. The "judgment" could be attacked in appeal.

In the case under appeal what the Judge has termed a judgment is clearly an order directing that the compromise should be recorded. It does not contain the matter mentioned in O. 20, R. 4 (2), Civil P. C. The heading should be 'Order' as O. 43, R. 1 (m) terms the decision an 'Order.' It does contain a statement that the parties have compromised the case on terms which appear on the record. The decree then is not defective because of the absence of an order that the compromise should be recorded.

In first appeal it was urged that the statements of the appellants were admissions and could be amended and that the lower Court should have seen that there was a misunderstanding at the time these statements were recorded. Later on an additional ground was added that Saiurjub had not given authority to anyone to

compromise on her behalf. The lower appellate Court found that the parties had come to a compromise after they had had full opportunity to grasp the whole situation. He also found that Surjubai's husband Devideen must be considered to have full authority to enter into a compromise on behalf of his wife. He, therefore, dismissed the appeal. The appeal should of course have been treated as a miscellaneous appeal against the order.

It is urged before me that Surjubai did not give authority to her husband to compromise the case. Before the lower appellate Court, in the original grounds of appeal, the statement of the pleader is stated to be the statement of the appellants. This is an admission that the pleader was instructed by both appellants. There is ample ground for the conclusion that Surjubai authorized her husband to instruct the pleader on her behalf.

It is next urged that there is difficulty in interpreting the decree. This was not urged in the lower Court or in the ground of appeal before me. I see no reason to think that the decree is ambiguous. The appeal is dismissed without notice to the opposite party. I remark that as the lower appellate Court has treated the appeal as a regular one, I consider that I should treat this as a second appeal.

D.D. *Appeal dismissed.*

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* A. I. R. 1928 Nagpur 52

HALLIFAX, A. J. C.

Secretary of State (G. I. P. Ry. Co.)—Defendant—Applicant.

v.

Nandlal—Plaintiff—Non-applicant.

Civ. Revn. No. 64 of 1927, Decided on 19th August 1927, from the decree of the Small Cause Court Judge, Hoshangabad, D/- 22nd December 1926, in Civil Suit No. 763 of 1926.

✲ (a) *Railways Act* (9 *of* 1890), *S.* 72—*Goods booked at owner's risk rate at station of dispatch—Freight re-calculated at first class rate at station of destination—Excess charged by the company is liable to be refunded.*

Plaintiff consigned a quantity of charcoal at one station on the Great Indian Peninsula Railway for conveyance to another station on the same railway at reduced rate under which goods were carried at owner's risk though it ought to have been sent only at the first class rate or maund-rate which entailed its going at railway risk. On arrival at the station of destination the charcoal was weighed and the freight was re-calculated at the maund-rate with the result that the plaintiff had to pay excess of a large amount. In a suit by plaintiff to recover that amount :

Held : that the Company was bound to refund the excess amount as the Company itself intended to carry the goods at owner's risk in spite of their general rule to the contrary and so accepted the agreement made by the Station Master to carry them at the lower rate for that consideration. If the goods had been lost the Rly. Co., would have in common course pleaded that goods were at owner's risk. The lower rate was, therefore, a part of the original contract, and the re-calculation at the second station had accordingly to be made at that rate, so that the amount paid at the first station was correct. [P 54 C 2]

(b) *Practice — Precedents — Any report of Privy Council or High Court officially published must be taken as correct—Other judgments are relevant only for reasoning contained therein.*

The conclusions in any judgment of the Privy Council or in a judgment of the High Court which is officially published must be accepted as correct. Any other judgment is relevant, though usually of the greatest use, only as an exposition of reasons for coming to the conclusion arrived at therein. [P 53 C 1]

(c) *Evidence Act, S.* 114—*'Common' course—Meaning explained.*

The course of conduct which S. 114, Evidence Act, calls "common" can be only that which is most common in the experience of the Judge who has to decide the point. [P 54 C 1]

W. B. Pendharkar—for Applicant.

N. R. Alekar—for Non-applicant.

Order.—On the 25th March 1925 the first plaintiff, who opposes this application for revision, consigned a quantity of charcoal at the Byaora station on the Great Indian Peninsula Railway for conveyance to Byculla on the same railway. The Station Master informed him that the charcoal could be sent at what is called the "Q rate", which in this case is a wagon-rate and worked out at Rs. 126. That is a reduced rate and goods sent under it are carried at owner's risk. As a matter of fact, however, charcoal had not been allowed to be booked at that station at the wagon-rate since 1923 ; it could be sent only at the first class rate or maund-rate, which entailed its going at railway risk.

On arrival at Byculla the charcoal was weighed and the freight was re-calculated at the maund-rate, with the result that the proper charge was found to be Rupees 305-7-0 in excess of the Rs 126 paid at Byaora. This the plaintiff paid after some delay, which resulted in a further charge of Rs. 11 for demurrage. He then filed the suit out of which these proceed-

ings have arisen in the Small Cause Court claiming a refund of the Rs. 316-7-0 he had paid with interest. He was given a decree for the Rs. 370 he claimed and the defendant Company has applied for revision of the judgment.

The learned Judge of the Small Cause Court has taken the usual short cut of deciding the case according to rulings, that is to say, he has not decided it at all. The conclusions in any judgment of the Privy Council or in a judgment of this Court which is officially published must be accepted as correct. A conclusion in in any other judgment, taken by itself and apart from the reasons for it, is not even relevant, and much less is it to be accepted blindly, though the judgment will usually be of the greatest use as an exposition of reasons for coming to the same conclusion. Of the five judgments which the learned Judge mentions, only two are to be found in the Indian Law Reports, and only one gives reasons for the view taken.

The contract between the parties is embodied in two documents which are on the file, one executed by each of them. The first is a consignment note signed by the sender. In it he requests the Company to receive the goods specified by him and to send them to a certain station. At the bottom of the document these words are printed:

N. B.—The attention of the Sender or the Deliverer of the goods is invited to the principal terms and conditions applying to the carriage of goods by Railway, as set forth in the public notice printed on the back of the Railway Receipt.

The other document, which is the counterpart of the consignment note, is the railway receipt executed by the Company It is an acknowledgment of the receipt of the goods, a statement of the sum paid by the consignor and the way in which that sum has been calculated, and an agreement to convey them to the destination stated and deliver them as directed, subject to certain conditions. A few of these are printed at the bottom of the front of the sheet, and among them are the words, underlined for emphasis : "Special attention is drawn to the notes on the back, which form a legal contract". On the back is a statement that the Railway Company gives public notice of eleven different matters of which the sixth is as follows :

The Railway have the right of re-measurement,re-weighment, re-classification and re-calculationof rates, terminals and other charges at the place of destination, and of collecting before the goods are delivered, any amount that may have been omitted or undercharged.

The plaintiff then undoubtedly did agree that the Railway Company was entitled to re-calculate the rates at Byculla, and that he would have to pay any amount that was then found to have been undercharged or allow the Company to realize it by selling the goods. It has been suggested on his behalf in this Court that the calculation at Byculla could only be made on the same basis as that at Byaora, for the sole purpose of discovering arithmetical errors in it ; it could not be made on a different basis or at different rates. To limit the meaning of the word in that way would hardly be possible even if it stood alone, but it is quite impossible when it stands alongside the word "re-classification," nor with that limitation would the words "re-measurement" and re-weighment" have much meaning.

In *Chunni Lal* v. *Nizam's Guaranteed State Ry. Co.* (1). Stanley, C. J., said that in his opinion the exacting of maundage instead of wagon rates in circumstances similar to those of this case could not be considered to be covered by any of the words "re measurement, re-weighment, re-calculation or re-classification of rates." This is a casual remark at the end of the judgment, not a part of the basis of the decision of the case, and for the reasons stated I am unable, with all respect, to concur in the opinion expressed.

Three Allahabad cases have been cited in support of the plaintiff's contention that the Station Master as the Company's agent having once agreed, by mistake or otherwise, to carry his goods at the wagon rate, the Company could not go back on the contract and charge the maund-rate. They are *Chunni Lal* v. *The Nizam's Guaranteed State Ry. Co.* (1), *Alla-ud-din* v. *G. I. P. Ry. Co.* (2), and *B. B. & C. I. Ry. Co.* v. *Budh Sen, Pusp Chand* (3). The last two merely follow the first, which was decided by a Full Bench in 1906, and they carry the matter no further. In all three cases the basis of the decision was that the right

(1) [1907] 29 All. 228=4 A. L. J. 80=(1907) A. W. N. 21.
(2) [1916] 14 A. L. J. 494=34 I. C. 104.
(3) A. I. R. 1924 All. 180=46 All. 55.

of recalculaction of rates was not reserved to the company by the written contract, but by a separate rule, of which notice was given to all persons who wished to send goods by the railway.

On those facts there can be no doubt of the correctness of the decision in all three cases that, as the original contract was to carry the goods at the lower rate, the Company was not entitled to charge the higher rate by virtue only of their rule. But it is equally beyond doubt that in this case the sixth item printed on the back of the railway receipt was a part of the original contract, not a separate rule. That contract was that the Company would carry the goods for Rs. 126 or such greater sum as might be found due on re-classification or re-calculation according to the rates that should have been charged under the Company's rules, and that the plaintiff would pay any excess that might be so found due or allow the Company to sell his goods to realize it.

But there is the further consideration that the Company itself intended to carry the goods at "owner's risk" and not at "railway risk," that is to say, if the goods had been lost in transit, the Company would have refused to pay the difference between the damages and the higher rate, but would have pleaded that the sending of the goods at "owner's risk" was a part of the original contract, for which the consignor had received consideration in the reduction of the rate. That this would have been done as a matter of course is not denied, and anyhow it is an inevitable finding of fact, based on the common course of the conduct of railway companies in such circumstances.

The course of conduct which S. 114, Evidence Act, calls "common" can be only that which is most common in the experience of the Judge who has to decide the point. Now at least two cases have occurred within my own experience in which goods, booked mistakenly at "owner's risk" as here, were lost in transit, and the plea was taken by the owner that the extra charge for "railway risk" ought to be deducted from the damages that would be due to him if they had been booked at the higher rate and the balance paid to him. In each case the plea was successfully taken by the Company (which in one, if not both, was the defendant Company here) that the contract was to carry the goods at "owner's risk."

If it were denied that this plea would have been taken in the present case, if the goods had been lost or damaged on the journey, the denial would be met by reference to the nature of the pleas taken by other railway companies in *E. I. Ry. Co.* v. *Ram Lakhan Lal* (4), *Agent, B. N. Ry.* v. *Behari Lal Dutt* (5) and *Radhe Lal* v. *E. I. Ry. Co., Ltd.* (6), and by this Company in *Deorao* v. *G. I. P. Ry. Co.* (7). No reprobation of the taking of such pleas is implied in this reference to them; they are mentioned as further proof of the certainty that if the goods had been lost in this case the defendant Company would have pleaded that they were carried at "owner's risk."

It is proved then that the Company itself intended to carry the goods at "owner's risk," in spite of their general rule to the contrary, and so accepted the agreement made by the Station Master to carry them at the lower rate for that consideration. The lower rate was, therefore, a part of the original contract, and the re-calculation at Byculla had accordingly to be made at that rate, so that the amount paid at Byaora was correct. As the Company intended to insist on the goods being at "owner's risk" if any damage or loss did occur on the journey, the contract with the consignor suggested by the claim for the higher rate the risk had ended is in effect: "Heads I win, tails you lose."

The decision of the lower Court is correct, though the reasons for it are not. The application for revision is rejected and the Company is ordered to pay the plaintiff Rs. 30 as his costs in this Court.

N.D. *Revision rejected.*

(4) A. I. R. 1925 Pat. 37=3 Pat. 230.
(5) A. I. R. 1925 Cal. 716=52 Cal. 783.
(6) A. I. R 1926 Pat. 40=5 Pat. 128.
(7) [1912] 8 N. L. R. 34=14 I. C. 684.

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KOTVAL, A. J. C.

Vishnu—Plaintiff—Applicant.

v.

Achut—Defendant—Non-applicant.

Civ. Revn. No. 1-B of 1927, Decided on 30th August 1927, against the decree of the Small Cause Court Judge, Buldana, D/- 19th November 1926, in S. C. Suit No. 856 of 1926.

Negotiable Instruments Act (26 *of* 1881), *Ss.* 8, 78, 82 (*c*)—*Promissory note not payable to bearer—"Holder," meaning of—Person who is not an endorsee cannot claim payment under it.*

Where the plaintiff claimed payment of the amount due on the promissory note which was not indorsed to him, alleging that the money advanced thereon was his and was advanced on his behalf.

Held : that the plaintiff could not claim payment as in a promissory note not payable to the bearer "the person entitled in his own name" can only mean the person named in the note, that is the payee or the indorsee. The doctrine of benami cannot be applied in a case like this where the law by clear implication excludes its application. The application of the doctrine to negotiable instruments would introduce an element of uncertainty into them and hamper commerce : 28 *Mad.* 205 ; 30 *Mad.* 88 and *A. I. R.* 1922 *All.* 70, *Foll.* [P 55 C 1, 2]

W. R. Puranik—for Applicant.

G.G. Hatvalne—for Non-applicant.

Order.—The defendant executed a promissory note in favour of Pralhad Ganesh, the brother of the plaintiff. The plaintiff claimed payment of the amount due on the promissory note which was not indorsed to him, alleging that the money advanced thereon was his and was advanced on his behalf by Pralhad. The defence was that the plaintiff not being the payee had no right to claim payment and was not entitled to maintain the suit. The defence having succeeded the plaintiff seeks revision of the decree of the lower Court.

Section 78, Negotiable Instruments Act 26, 1881, provides that, subject to the provisions of S. 82, Cl. (c), payment of the amount due on a promissory note, bill of exchange or cheque must, in order to discharge the maker or acceptor, be made to the holder of the instrument. The provisions of S. 82 (c) have no application in this case. Applying S. 78 to the present case the defendant will not be discharged from liability on the note unless he has paid the sum due on it to the holder. The question, therefore, remains whether the plaintiff is the holder for he has no right to claim the sum if by payment to him the liability cannot be discharged.

Under S. 8 the holder of a promissory note means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. In the case of a promissory note not payable to the bearer "the person entitled in his own name" can only mean the person named in the note, that is the payee or the indorsee : see *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (1), *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (2) and *Reoti Lal* v. *Manna Kunwar* (3). The holder in the present case then is Pralhad and not the plaintiff, and Pralhad alone can claim the amount, for by payment to him alone can the defendant's liability be discharged.

The doctrine of benami cannot be applied in a case like this where the law by clear implication excludes its application. The application of the doctrine to negotiable instruments would, by introducing an element of uncertainty into them, hamper commerce, for facility of which they are largely used. On the other hand, the property in the instruments being transferable by mere indorsement the benamiship may easily be eliminated.

As to the prayer to be allowed to amend the plaint by adding Pralhad as a party it is clear that the object of the joinder of Pralhad was not to enable a decree to be passed in his favour but to enable one to be passed in the plaintiff's favour. That object could not have been gained by the joinder of Pralhad.

The suit was rightly dismissed. This application is dismissed with costs.

N.D. *Application dismissed.*

(1) [1905] 28 Mad. 205=15 M. L. J. 249.
(2) [1906] 30 Mad. 88=16 M. L. J. 508 (F. B.)
(3) A. I. R. 1922 All. 70=44 All. 290.

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MACNAIR, A. J. C.

Govind and *others*—Defendants—Appellants.

v.

Chintaman and *another*—Plaintiff and Defendant 4—Respondents.

S. A. No. 309-B of 1926, Decided on 5th September 1927, against the decree of the Addl. Dist. Judge, Yeotmal, D/- 16th April 1926, in Civil Appeal No. 126 of 1925.

(*a*) *Hindu Law—Stridhan—Berar—Father bequeathing estate to daughter—She is presumed to receive it as her stridhan.*

In the absence of restricting clauses the estate conveyed to a daughter by a man governed by the Berar Personal Law is non-restricted estate and the property received is her stridhan: *A. I. R.* 1924 *Nag.* 88, *Diss. from A. I. R.* 1925 *Nag.* 329, (*F. B.*), *Foll.*

[P 56 C

(b) *Hindu Law—Mitakshara law is paramount in Berar.*

The Mitakshara Law is paramount and the Mayukha is of secondary consideration in Berar. [P 56, C 2]

(c) *Evidence Act, S. 92—Will—Execution,*

Evidence of statements made at the time of execution of will cannot be admitted for the purpose of varying the terms of the will. [P 56, C 2]

(d) *Berar Alienated Village Tenancy Law, S. 47—Stridhan—Son in possession in the presence of daughter is trespasser.*

Sons, in the presence of a daughter, cannot be legal heirs of their mother to her stridhan property and their possession of that property must be considered as that of a trespasser. [P 56. C 2]

(e) *Hindu Law—Will—Law applicable.*

Where a testator in Berar bequeaths his property in favour of his daughter, who is married in Central Provinces, the daughter takes the property as stridhan i. e. according to Berar law. [P 56, C 2]

M. R. Bobde—for Appellants.

R. R. Jayavant—for Respondents.

Judgment. — The appellate Court considered that accepting the statements of the defendant it must be held that the defendant had not by himself and his predecessors-in title held the fields in suit continuously from a date previous to 1895. The defendant's story was that one Laxman was in possession of the fields, after his death his daughter Mathura obtained the property through a will executed by Laxman, and after the death of Mathura the defendants who are her sons were in possession, although they had a sister. The learned Additional District Judge held that according to this story the property became stridhan of Mathura and at her death was inherited by her daughter : the appellants not being the heirs of Mathura could not tack the period of Mathura's possession to their own.

In second appeal it was first urged that S. 47, Berar Alienated Villages Tenancy Law, did not require continuity through a pedigree of legal heirs of the original holders. But the appellants if not legal heirs of their mother must be considered to have come in possession as trespassers. It cannot be said that their mother was their predecessor-in-title. This ground therefore fails.

It is next urged that the question whether the plaintiff was the heir of their mother could not be decided on the materials on record. The defendants have pleaded that at the time of the will there was an agreement that on the demise of Mathura the fields should go to her male issue. The defendants' father came to the Central Provinces and they may be governed by the personal law of these provinces. Again, there is no presumption that a devise to a daughter conveys more than the estate of a Hindu widow.

But evidence of statements made at the time of execution cannot be admitted for the purpose of varying the terms of the will. The testator was a native of Berar and was governed by the personal law of Berar : the personal law of the husband of the beneficiary can have nothing to do with the interpretation of the will : there is a presumption that in the absence of restricting phrases the estate conveyed to a daughter by a man governed by the Berar Personal Law is non-restricted estate and the property received is her stridhan.

I am next referred to *Shriram* v. *Rajaram* (1) but in *Narain* v. *Tulsiram* (2), a Full Bench of this province dissented from that ruling : the Mitakshara is paramount and the Mayukha is of secondary consideration in Berar. The stridhan of Mathura, therefore, descended to her daughter, if Mathura's personal law was that prevalent in Berar it would of course do the same if she had on the marriage adopted the personal law of the Central Provinces. The appeal, therefore, fails and is dismissed costs on the appellants.

S.D. *Appeal dismissed.*

(1) A. I. R. 1924 Nag. 83=19 N. L. R. 193.
(2) A. I. R. 1925 Nag. 329=22 N. L. R. 183 (F. B.).

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* A. I. R. 1928 Nagpur 56

MACNAIR, A. J. C.

Yadao Ghirnikar — Plaintiff — Appellant.

v.

Krishnaji Dorle—Defendant—Respondent.

Misc. Appeal No. 2-B of 1925, Decided on 12th September 1927, from the order of the 1st Sub-Judge, Khamgaon, D/- 30th September 1924, in Civil Suit No. 9 of 1924.

* *Civil P. C., S. 10—Suit in respect of property out of British India pending in appeal—Defendant residing in British India—Suit for mesne profits lies in British India but should be stayed till the dispute is subsisting out of British India—Civil P. C., S. 10.*

A British Indian Court will not adjudicate on questions relating to the title to, or the right to

the possession of, immovable property out of British India. But the Civil Procedure Code does not forbid the institution of a suit for mesne profits even if the decision in the suit involves adjudication regarding the plaintiff's title to immovable property outside British India, where the decree of the Court for mesne profits can effectively be enforced by the personal obedience of the defendant within the jurisdiction : *A. I. R.* 1927 *Cal.* 768, *Full.*

[P 57 C 1 & P 58 C 1]

M. B. Nigogi—for Appellant.

S. B. Gokhale and *V. N. Bapat*—for Respondent.

Judgment. — The plaintiff-appellant sued the defendant for the recovery of mesne profits in respect of certain immovable property in Gwalior State. He stated that his right to the property had been decided by a judgment of that State and that the defendant resided within the jurisdiction of the Khamgaon Court.

The main defence was that an appeal was pending against the Gwalior decision, so that under the explanation to S. 10, Civil P. C., the Courts in British India would still have to decide the question of the plaintiff's title to the property. The learned Judge held that, as it would be necessary to go into the question of the plaintiff's title to lands situate outside British India, he had no jurisdiction to try the case and returned the plaint for presentation to the proper Court.

The plaintiff has appealed against this order. The respondent admits that the plaintiff's title to the property has been finally upheld by the Gwalior Court, and does not contend that the order was incorrect because the state of affairs was different when it was passed. It is then not disputed that the suit should have been kept pending till the final decision of the title suit in Gwalior, if that final decision gives the plaintiff a right to sue in the British Courts.

Section 20, Civil P. C., permits, subject to the limitations contained in the preceding sections, a plaintiff to sue in a Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides. Section 16 has no application to this case, for the explanation states that in this section "property" means "property situate in British India." The Civil Procedure Code then does not forbid the institution of the suit such as the present even if the decision in the suit involves adjudication regarding the plaintiff's title to immovable property outside British India.

There is, however, a general principle which prevents the trial of a suit involving such adjudication. In *Goculdas* v. *Chagandal* (1), Page, J., was considering the interpretation of a clause of the Letters Patent (1865), but passage cited by him shows that Indian Courts are, apart from specific provisions limiting their jurisdiction, under the necessity of avoiding the insuperable difficulties which would result from an attempt to found a jurisdiction over immovable property situate in another country.

The following passages show the nature of the principle :

(Foote's Private International Law, page 223). —"The defendant's Judge" wrote Vattel, "is the Judge of the place where the defendant has his settled abode or the Judge of the place where the defendant is when any sudden difficulty arises, provided it does not relate to an estate in land, or to a right annexed to such an estate. In such a case, as property of this kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the State in which it depends."—(B 2 Ch. 8 S. 103.)

Story lays down that :

in respect to immovable property, every attempt of any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory and its decree must be for ever incapable of execution in rem. We have seen, indeed, that by the Roman law a suit might in many cases be brought either where the property was situate or where the party had his domicile. This might well be done within any of the vast domains over which the Roman Empire extended ; for the judgments of its tribunals would be everywhere respected and obeyed. But among the independent nations of modern times there would be insuperable difficulties in such a course. And hence even in countries acknowledging the Roman law it has become a very general principle that suits in rem should be brought where the property is situate: and this principle is applied with almost universal approbation in regard to immovable property. The same rule is applied to mixed actions, and to all suits which touch the realty.

Following this principle District Courts in British India must refuse to entertain suits in which an estate in land in a foreign country, or a right annexed to such an estate is claimed.

But every suit for mesne profits is not affected by this principle. While Courts of equity have never claimed to act directly upon land situate abroad they have purported to act upon the conscience of persons living here (per Lord Herschell in *British South Africa Co.* v. *Campanhia*

(1) A. I. R. 1927 Cal. 768 : 51 Cal. 655.

DeMocambique (2), quoted at p. 662 [of 54 *Cal.*] in *Goculdas* v. *Chaganlal* (1). The general rule is that the Court will not adjudicate on questions relating to the title to, or the right to the possession of, immovable property out of the jurisdiction : *Deschamps* v. *Miller* (3), quoted at p. 664 [of 54 *Cal.*] *Goculdas* v. *Chaganlal* (1). But if no question of title is involved and the decree can effectively be enforced by the personal obedience of the defendant within the jurisdiction, a claim for mesne profits may be entertained and a decree may be passed on such a claim.

The lower Court was then correct in entertaining the plaintiff's case as the plaint stated that there was no subsisting dispute regarding title of land in the Gwalior State, and was right in thinking that when the defendant showed there was an existing dispute, it was necessary either to stay the suit or to put an end to the proceedings. But I accept the contention that the suit should have been stayed. There is now no subsisting dispute regarding title to the land, and it is not contended that there is any other obstacle to the trial of the claim for mesne profits by the lower Court.

The order of the lower appellate Court is, therefore, set aside and the learned Judge is directed to proceed with the trial. Costs in this Court will, in the circumstances, be borne as incurred. Pleader's fee Rs. 75.

S.D. *Order set aside.*

(2) [1893] A. C. 602=6 R. 1=63 L. J. Q. B. 70=69 L. T. 604.

(3) [1908] 1 Ch. 856=77 L. J. Ch. 416=98 L. T. 564.

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* A. I. R. 1928 Nagpur 58

KINKHEDE, A. J. C.

Surajmal—Accused—Applicant.

v.

Ramnath—Complainant — Non-applicant.

Cri. Revn. No. 170 of 1927, Decided on 11th October 1927, from the judgment of Sess. Judge Bhandara, in Cri. App. No. 22 of 1927, D/- 23rd April 1927.

* (a) *Criminal P. C., S. 198—Whether complainant is person "aggrieved" must be decided on facts of each case—Adopted son is a person aggrieved by the defamation of his adoptive mother.*

The question whether complainant is a person aggrieved within the meaning of S. 198 must be determined in each case on its own facts. The party "aggrieved" is not necessarily limited to the person directly defamed, but includes also other persons injured such as the husband and even the other relatives. [P 60 C 1,2]

Where the complaint was lodged by the adopted son with whom the person defamed, the adoptive mother, was residing.

Held : that the adopted son was a person "aggrieved" within S. 198 : 32 *Cal.* 425 ; *A. I. R.* 1924 *Lah.* 559 ; 25 *Bom.* 151 (*F. B.*) ; 14 *Mad.* 379, *Foll.* [P 60 C 2]

(b) *Penal Code, S. 500—Witness actuated by malicious motives making voluntary and irrelevant statement not elicited by questions put to him, is guilty under S. 500—He cannot claim privilege under Evidence Act, S. 132.*

A witness, who being actuated by malicious motives makes a voluntary and irrelevant statement, not elicited by any question put to him while under examination, to injure the reputation of another, commits an offence punishable under S. 500, I. P. C., and he cannot claim the privilege allowed to a witness by S. 132, Evidence Act : 21 *Cal.* 392 ; 32 *Cal.* 756 ; 40 *Cal.* 433, *Rel. on.* [P 61 C 2]

(c) *Evidence Act, S. 132—Motive of the witness claiming privilege under S. 132 should also be considered to determine the criminal responsibility of his statement.*

Not only the status of the witness claiming privilege under S. 132 and his capacity to realize the risk and take objection to the question at the time of giving the answers but also the motive with which he gives his evidence, go a great way to determine his criminal responsibility or otherwise for the statement. [P 62 C 1]

(d) *Evidence Act, S. 132—Protection under, must be claimed at the time of making the statement and must be proved by him in prosecution under Penal Code S. 500.*

Ordinarily, it is for the witness to claim protection under S. 132 at the time of giving his self-criminating answer, and to prove it as a defence to a prosecution for defamation. [P 62 C 1]

* (e) *Evidence Act, S. 132—In C. P. mere record of deposition is not by itself sufficient to show compulsory or voluntary nature of a witness's statement.*

Where the Judges are permitted to simply make notes of the deposition of a witness it is difficult to know whether a witness voluntarily made a statement or was "compelled" to make it in answer to a relevant question. So the mere record of a deposition is not by itself sufficient evidence of compulsory or voluntary nature of the statement of a witness. [P 62 C 1]

* (f) *Penal Code, S. 499—English law—Doctrine of absolute privilege does not apply in mofussil in India—Defamatory statement not falling within exceptions is not privileged.*

The English common law doctrine of absolute previlege does not obtain in the moffussil in India. S. 499 is exhaustive and if a defamatory statement does not fall within the specified exceptions it is not privileged : 40 *Bom.* 162 ; 40 *Cal.* 433 and *A. I. R.* 1921 *Cal.* 1 (*S. B.*), *Foll.* [P 62 C 2]

(g) Penal Code, S. 499—Prosecution must make out a case for conviction but the accused must prove that his case comes within exceptions under Evidence Act, S. 105.

Although it is for the prosecution to make out a case for conviction, the accused person has under S. 105, Evidence Act, to prove the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or in cases of defamation under the special exceptions of S. 499, I. P. C. : *A. I. R.* 1924 *All.* 299, *Diss. from.* [P 62 C 2]

(h) Criminal P. C., S. 439—Proposal for enhancement must be supported by Government Pleader—If prosecuting authorities think that sentence should be deterrent, matter should be submitted to trying Magistrate.

Enhancement of sentence is a very serious proceeding, and where there is a proposal to that effect it must be supported by the Government Pleader under instructions which would enable him to put before the High Court cogent reasons why there should be an enhancement of the sentence. The matter should be submitted to the trying Court where the prosecuting authorities think that the sentence ought to be deterrent. They cannot merely trust exclusively to the powers of the High Court of correcting sentences of the lower Courts where the sentences ought to be deterrent : 16 *Bom.* L. *R.* 202 and 203, *Foll.* [P 63 C 1,2]

M. R. Bobde—for Applicant.

A. V. Khare—for Non-applicant.

G. P. Dick—for the Crown.

Order.—Bansi, Ramnath and the applicant, Surajmal, were real brothers, but all of them were adopted by other persons Bansi was adopted by Gorelal of Gondia, Ramnath by Rampratap and Surajmal by Ramchandra ; the adoptive fathers were also related inter se as brothers. This Gorelal was indebted to one Hazarimal of Saugor. The latter obtained a decree against him for debts due to him some time in 1922. In execution of that decree, some malik makbuza fields of Gorelal were sold by auction in 1924, and Ramnath became the auction purchaser. Gorelal died a few months after the auction. Bansi, the adopted son of Gorelal thereafter laid claim to the property purchased by Ramnath on the groundt hat the sale having been held in execution of a decree obtained for the immoral debts of his adoptive father, Gorelal, was void and inoperative as against the property. He attempted to secure possession by dispossessing the auction purchaser, but in the proceedings under S. 145, Criminal P. C., the latter's possession was confirmed. Hence Bansi instituted Civil Suit No. 43 of 1925 in the Court of Senior Subordinate Judge, Gondia, for possession of the fields.

The allegations in the plaint regarding Gorelal's immorality being, however, considered vague and indefinite, the defendant, Ramnath, apparently moved the Court to call for a further and better statement for the plaintiff. The Court on 2nd January 1926 ordered plaintiff Bansi to file a detailed statement setting forth his allegations about Gorelal's immorality more specifically. He accordingly filed one, mentioning even the name of the woman with whom Gorelal was said to be carrying on his intrigues. That woman is Mt. Kokli, the widow of Rampratap, the adoptive father of the aforesaid auction purchaser, Ramnath. The said written statement was dated 13th January 1926 and is Ex. D-3 in this case. The defendant Ramnath at once took exception to the reference to the intrigues between Gorelal and Mt. Kokli as irrelevant and scandalous, as his application dated 19th January 1926 (Ex. D-2) will show. The Court, however, did not strike out that matter on that score. Of the issues framed in the case on 9th February 1926, the following are material to the present case :

(5) Whether the decrees mentioned in the plaintiff's written statement dated 13th January 1926, para. 1, were obtained for debts incurred by Gorelal for illegal and immoral purposes as alleged by plaintiff in the said written statement, paras. 1 to 3 ? If so,

(6) Whether the sale of the malik makbuza land in suit was held under decrees for debts incurred by Gorelal for illegal or immoral purposes to the knowledge of the defendant and the sale is not binding on the plaintiff ? If so, to what extent ?

In support of his allegations Bansi examined, amongst other witnesses, the applicant Surajmal as P. W. 6 on 19th April 1926 : Ex. P-1 is a copy of his deposition. The applicant, Surajmal, uttered, in the course of this deposition, wantonly defamatory statements with regard to Gorelal having been seen by him to have had sexual intercourse with Mt. Kokli. Ramnath felt himself aggrieved by this defamatory statement and lodged a complaint under S. 500, I. P. C. against the applicant Surajmal on 14th August 1926.

The applicant was said to have also made another defamatory statement, of more or less the same nature, in June 1926, on the road near his house, in the presence of one Hamirsingh (P. W. 6). So the prosecution was really for two statements. After holding the necessary

trial the Magistrate found the applicant guilty under S. 500, I. P. C., for making both the defamatory statements and fined him Rs. 100 for each. The applicant went up in appeal to the Sessions Judge, Bhandara, who, however, quashed the conviction and sentence in so far as it related to the second .statement, but upheld the same as regards the earlier defamatory .statement made while giving evidence in Court on 9th April 1926.

The applicant has come up to this Court in revision against the conviction and sentence so upheld on several grounds ; the complainant, in his turn, has latterly applied for enhancement of the sentence. Though the trying Magistrate's judgment was delivered on 22nd February 1927 and the Sessions Judge partially upheld it on 23rd April 1927, and the applicant's revision petition was made on 10th June 1927, the complainant's application for enhancement was not put in till 22nd August 1927 the day when the revision came up for hearing .As the applicant claimed a separate hearing in regard to the motion for enhancement, the arguments heard on 22nd August 1927 were confined to the points raised in the revision petition, and those heard on 12th September 1927 were in connexion with the petition for enhancement.

The applicant on 13th July 1927 applied for permission of this Court to urge an additional ground of law to the following effect :

The complainant not being the person defamed or aggrieved and no leave having been taken by him for making the complaint, the lower Courts ought to have held that the trial and the conviction of the accused for an offence under S. 500 was incompetent and invalid.

I think it will be more convenient to dispose of this additional ground first.

Reliance is placed by the applicant on S. 198, Criminal P. C. (as amended by Act 18 of 1923). The question whether the complainant is a person aggrieved within the meaning of this section must be determined in each case on its own facts. The ordinary rule is that the person aggrieved is the person directly affected and injured. In *Thakur Das* v. *Adhar Chandra* (1), where the person defamed was one Soudamini Debi, sister of the complainant, an objection was raised that a brother was not a person aggrieved by the imputation of unchastity to his widowed sister within the meaning of S. 198. That objection was overruled, and it was held that the brother with whom the defamed sister was residing at the time was competent to lodge the complaint. The principle appears to be that a Hindu lady residing with her father, her brother, or her son is a member of his family; and her reputation is bound up with the reputation of the person in whose house and under whose charge she is living. If any imputation is made against her character, that would affect as much the relative with whom she is living as herself. In the cases of defamation of Indian women their social life is especially taken into consideration in this country, and, therefore, the party " aggrieved " is not necessarily limited to the person directly defamed, but includes also other persons injured such as the husband, and, according to some views, even the other relatives.

In *Gurdit Singh* v. *Emperor* (2) a complaint was made by the husband in regard to defamation of his wife by a witness. Following the view taken in *Chhotalal Lallubhai* v. *Nathabhai Bechar* (3) and *Chellam Naidu* v. *Ramasami* (4), it was held that when a married woman is defamed by the imputation of unchastity, her husband is a person aggrieved, upon whose complaint the Magistrate can take cognizance of a complaint, under S. 198, Criminal P. C. In the present case the complaint was lodged by the adopted son with whom the person defamed, Mt. Kokli, was residing. The case was, therefore, covered by the decision in *Thakur Das* v. *Adhar Chandra* (1). I, therefore, overrule the contention raised in the additional ground.

With regard to the defamatory character of the statement made while giving evidence on 19th April 1926, the applicant has taken up a twofold stand. Firstly, it is contended on his behalf that in view of the proviso to S. 132, Evidence Act, the statement he made in the course of his deposition on 19th April 1926 cannot be proved against him by the prosecution; and secondly, that the matter was absolutely privileged or at any rate there was a qualified privilege in

(1) [1905] 32 Cal. 425=8 C. W. N. 515.

(2) A. I. R. 1924 Lah. 559=5 Lah. 301.

(3) [1901] 25 Bom. 151=2 Bom. L. R. 665 (F. B.).

(4) [1891] 14 Mad. 379=1 M. L. J. 242.

the sense that the occasion was privileged.

The learned Sessions Judge has discussed both, the inadmissibility of the statement, and the absolute or qualified privilege, in a very succint manner in his judgment. He has pointed out that if an accused person claims protection under S. 132, Evidence Act, he must show that he was "compelled" to make the statement in spite of his objection. The case of *Emperor* v. *Ganga Sahai* (5) is an authority for the proposition that ordinarily the fact that a witness answered question put to him by the Judge shows that there was compulsion on the witness. But the same High Court held in *Emperor* v. *Chatur Singh* (6) that a distinction exists between a voluntary statement made by a witness and a statement made by him in answer to the question put to him either by the Judge or by counsel, whether of the party citing him or of his opponent on a point which is relevant to the case; and that in the latter case the witness is entitled to the protection afforded by S. 132, Indian Evidence Act, whether or not he objected to the question asked him. This shows that a protest is not necessary and a witness who answers a question by Court or counsel specially on a point relevant to the issue comes under the protection, but that no protection is claimable in regard to statements voluntarily made.

The following observations at pp. 94 and 95 of 43 *All.* are very pertinent:

> A voluntary statement by a witness may stand on a totally different footing to an answer given by him as a witness on oath to a question put to him either by the Court or c unsel on either side, specially when the question is on a point which is relevant to the case.

The reason for this distinction appears to be thus stated by the learned Judge, Tudball, J., at p. 95 [of 43 *All.*]

> It would be too much to ask of an ordinary layman that he should show all the terms of S. 132, Indian Evidence Act, and that he should be prepared to protest against every question put to him in order to protect himself under that section. I think, if a common-sense meaning be given to the word "compelled" in S. 132, it is clear that in the present case these five persons were compelled to answer. They wers under the direct compulsion of the law and of the Court and in my opinion they were protected by that section.

(5) [1920] 42 All. 257=54 I. C. 890=18 A. L. J. 112.
(6) A. I. R. 1921 All. 362=43 All. 92.

In this view of the case the conviction was set aside.

The matter came up before a Bench of the same High Court in the case of *Emperor* v. *Banarsi* (7), where the previous cases were considered, and it was held that, whether or not a witness is "compelled" within the meaning of S. 132, Indian Evidence Act, to answer any particular question put to him, while in the witness-box, is, in each case, a question of fact, although it may be said that, in the case of an ordinary layman unacquainted with the technical terms of this section, he is "compelled" to answer on oath questions put either by the Court or by counsel, especially when they are relevant to the case. In that reported case there was no evidence of any compulsion at all, and it was considered highly unlikely that the deponent acted under any compulsion; even the probabilities of that case pointed to the conclusion that the deponent was a voluntary, if not an enthusiastic, witness making statements which he thought would satisfy the Court's conscience. Under such circumstances, it was held that the statement was not excluded by S. 132 and the appeal of the Crown was allowed and the deponent convicted by the High Court.

In a recent case of *Shanta Bai* v. *Umrao Amir* (8) it was held that relevant statements made by a witness on oath or solemn affirmation in a judicial proceeding cannot be held to be protected by the proviso to S. 132, Indian Evidence Act, in cases where the witness has not objected to answering the question put to him.

The opinion of the Calcutta High Court is not in favour of absolute privilege. It has been held that a witness, who being actuated by malicious motives makes a voluntary and irrelevant statement not elicited by any question put to him while under examination to injure the reputation of another, commits an offence punishable under S. 500, I. P. C. He cannot claim the privilege allowed to witness by S. 132, Indian Evidence Act; *Moher Sheikh* v. *Queen-Empress* (9); *Haidar Ali* v. *Abru Mia* (10), *Kari Singh* v. *Emperor* (11).

(7) A. I. R. 1924 All. 381=46 All. 251.
(8) A.I.R. 1926 Bom. 141=50 Bom. 162 (F.B.).
(9) [1894] 21 Cal. 392.
(10) [1905] 32 Cal. 756=2 C. L. J. 105=9 C. W. N. 911.
(11) [1913] 40 Cal. 433=18 I. C. 660=17 C. W. N. 297.

It will thus be seen that not only the status of the witness and his capacity to realize the risk and take objection to the question at the time of giving the answers, but also the motive with which he gives his evidence, go a great way to determine his criminal responsibility or otherwise, for the statement. Without going to the length to which the Bombay High Court has gone, I may say that, ordinarily, it is for the witness to claim protection at the very time of giving his self-criminating answer, and to prove it as a defence to a prosecution for defamation. In these Provinces, where the Judges are permitted to simply make notes of the deposition of a witness, it is difficult to know whether a witness voluntarily made a statement or was " compelled " to make it in answer to a relevant question. So the mere record of a deposition is not by itself sufficient evidence of compulsory or voluntary nature of the statement of a witness. Moreover, Ss. 147 and 148, Evidence Act, give ample power to the Court to disallow irrelevant questions and even to warn the witness to give answer thereto. The fact that such a power was or was not exercised in any case is a relevant factor in the consideration of the question whether protection was claimed or not. Then again, the circumstance that the applicant is not an ordinary layman, but is an influential man of business and holds the position of an Honorary Magistrate cannot be lost sight of. As such he was expected to know the provisions of S. 132, Indian Evidence Act, and even to claim protection thereunder if he chose. If in spite of this he ommitted to claim it at the time, then that is a circumstance which may count against his present claim for protection under the proviso to that section.

In the present case it is perfectly clear from the judgment of the trying Magistrate that the applicant was actuated by malicious motive against Ramnath in giving the evidence in the manner he did in the civil case. So then, on the evidence on record there was in the opinion of the trying Magistrate, enough material to justify him in inferring that private malice was present in the deponent's mind when he gave evidence and that he wantonly seized that opportunity to vent it. Even the Sessions Judge has given sufficiently cogent reasons for suspecting that the applicant, Surajmal, was very much interested in the success of Bansi in the civil litigation against the complainant, Ramnath, and that he was thus an enthusiastic supporter of Bansi. It was, therefore, open to him to draw the inference that the statement in question was made by the applicant voluntarily, like an enthusiastic witness, and that he made the same under no compulsion either from the Court or from the counsel of either side, and that as such he was not entitled to claim protection under S. 132 of the Act. As at present inclined I am not prepared to differ from the view of law taken by the learned Sessions Judge on the facts held proved by him in this case, and consequently his decision on this point must stand.

With regard to the absolute privilege claimed, I need only refer to the aforesaid Bombay case reported in *Bai Shanta* v. *Umrao Amir Malek* (8) and Calcutta decisions in *Kori Singh* v. *Emperor* (11) and *Satish Chandra* v. *Ram Doyal* (12) for the proposition that the English common law doctrine of absolute privilege does not obtain in the mofussil in India and that S. 499, Penal Code is exhaustive and if a defamatory statement does not fall within the specified exceptions it is not privileged.

With regard to the claim for protection in the sense that the occasion was one of a qualified privilege, the applicant's advocate relying on the ruling in *Emperor* v. *Umed Singh* (13) contends that the learned Sessions Judge approached the case from a wrong standpoint, as if the accused had the burden of proving his innocence by bringing his case under the exceptions to S. 499, I. P. C., I may say that, although it is for the prosecution to make out a case for conviction, the accused person has under S. 105, Indian Evidence Act, to prove the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or in cases of defamation, under the special exceptions to S. 499, I. P. C. With due deference to the view of Walsh, J., in the case relied on, I think the view is not sound in view of the clear statute which lays down that the Court shall presume the absence of such circumstances. I may also point out here that the learned

(12) A. I. R. 1921 Cal. 1=48 Cal. 388 (S. B).
(13) A. I. R. 1924 All. 299=46 All. 64.

Judge in the Allahabad case does not seem to have at all considered the case from the point of view of the statutory presumption permissible under S. 105, Evidence Act.

In the present case the Sessions Judge observes that the circumstances proved in the case tend to negative the existence of good faith; and that no satisfactory and convincing proof has been adduced by the accused to establish the truth of the defamatory statement. Under these circumstances the Court was bound to assume the absence of privilege till privilege was pleaded and proved, and, therefore, the protection afforded by Exceptions 1 to 9, S. 499, I. P. C., could not be available to the present applicant. His conviction must, therefore, stand.

The question of sentence was not separately argued in the applicant's revision, so the conviction being upheld the sentence of fine must also stand good. The application for revision is, therefore, dismissed.

With regard to the complainant's application for enhancement of sentence, suffice it to say that it does not appear to be made in a bona fide spirit of bringing a guilty person to justice, but to me it appears to be a sort of counter-move against the petition for revision. The complainant was apparently satisfied with the sentence as passed by the trying Magistrate and even as upheld by the Sessions Judge. There is also no appeal or motion by the Crown for enhancement of sentence, nor did the Sessions Judge consider that the sentence passed by the trying Magistrate was inadequate, because he could have in that view referred the case for enhancement. The Standing Counsel for the Crown, who appeared to show cause against the petition for revision, was apparently not instructed, nor was he himself desirous, in the interest of justice, to press and support the complainant's application for enhancement. In *Emperor* v. *Shamji Ramchandra* (14), Heaton and Shah, JJ., held that enhancement of sentence is a very serious proceeding, and where there is a proposal to that effect it must be supported by the Government Pleader under instructions which would enable him to put before the High Court cogent reasons why there should be an enhancement of the sentence. In the case of *Emperor* v. *Shivcar Birsha* (15), also it was pointed out that the matter should be submitted to the trying Court where the prosecuting authorities think that the sentence ought to be deterrent. They cannot merely trust exclusively to the powers of the High Court of correcting sentences of the lower Courts where the sentences ought to be deterrent. In the absence of any similar steps having been taken by the complainant, or by the Crown in the case either before the trying Magistrate, or before the Sessions Judge, I think I would not be justified in interfering with the sentence. The complainant's application also stands rejected.

R.D. *Revision dismissed.*

(14) [1914] 16 Bom. L. R. 202=23 I. C. 733=15 Cr. L. J. 365.

(15) [1914] 16 Bom. L. R. 203=23 I. C. 735=15 Cr. L. J. 367.

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* A I. R. 1928 Nagpur 63

FINDLAY, J. C., AND KINKHEDE, A. J. C.

Gulabchandji and *another*—Applicants.

v.

Rao Gulabsingh—Non-applicant.

Misc. Petn. No. 12 of 1927, Decided on 12th August 1927, for leave to appeal to the Privy Council against the decree by the Bench of J. C's Court, Nagpur, in F. A. No. 103 of 1923, D/- 16th Dec. 1926.

* *Limitation Act, S. 12 (2)—Application for leave to appeal to P. C.—Time for obtaining copies should be excluded — Limitation Act, Art. 179.*

The time requisite for obtaining a copy of the decree should be excluded in computing the time prescribed for presenting an application for leave to appeal to Privy Council. Such petition after 90 days is not barred if in support of exclusion of copying time, the copy of decree is filed by applicant. [P 64 C 1, 2]

P. C. Dutt, and *S. K. Ghosh*—for Applicants.

H. S. Gour and *W. R. Puranik* — for Non-applicant.

Order.—The amount or value of the subject-matter of the suit out of which this application for leave to appeal to His Majesty in Council arises is over ten thousand rupees and the amount or value of the subject-matter in dispute in appeal to His Majesty in Council is also over ten thousand rupees. This Court did not affirm the decision of the Court of first instance. The case, therefore, fulfils the requirements of S. 110, Civil P. C.

But the non-applicant raises a question of limitation. Only two dates are mate-

rial to understand the relevancy of this objection. The judgment of this Court was delivered on 16th December 1926. The present petition for leave to appeal was filed on 28th March 1927, i. e., on the 102nd day. As Art. 179, Sch. 2, Lim. Act prescribes a period of 90 days for such a petition, it is contended that the petition is barred by time by 12 days. The applicants explain that the provisions of Art. 179 must be read subject to the provisions of S. 12 (2), Lim. Act, which directs that the time requisite for obtaining a copy of the decree appealed from shall be excluded. The applicants have filed a copy of the decree in support of this claim for exclusion of 12 days in the computation of the prescribed period of limitation. It is clear from the copy of the decree filed with the petition that 12 days were required for obtaining it. The sole question, therefore, is whether the provisions of Art. 179 should be read as divorced from or controlled by the provisions of S. 12 (2), Lim. Act. It is argued on behalf of the non-applicant that as the Civil Procedure Code does not lay down that a petition for leave to appeal to the Privy Council to be valid should be accompanied by a copy of the decree or judgment, as in the case of a memorandum of first or second appeal, the applicants are not entitled to any deduction on account of copying time.

We think that question of limitation must be decided with reference to the provisions of the Lim. Act alone and not of the Civil Procedure Code, as the validity of the petition for leave, for purposes of limitation, does not depend upon its validity for purposes of the Civil Procedure Code. It, therefore, follows that Art. 179 cannot be read divorced from the imperative provisions S. 12 (2), Lim. Act. In the majority of cases a petition for leave to appeal to His Majesty in Council is made within 90 days and so no question of limitation ordinarily arises, but, if it is made after 90 days, the question of exclusion of copying time under S. 12 (2), becomes material. Since the statute is clear, there is no need to look to the practice of the Court. But we are glad to state that the practice of our Court is in consonance with the statute. It is, to treat such petitions presented after 90 days as not barred by time, if in support of the claim for exclusion of copying time, the copy of the decree is filed by the applicant : cf *Syed Azizuddin* v. *Karamatullah* Misc. Petn. 50-B of 1925, decided on 6th August 1926 and *Jaiwanti Bai* v. *Nath*, Misc. Petn. 11-B of 1927, decided on 10th August 1927. This view is in accord with that taken by the other High Courts in similar cases, reported in *Ram Sarup* v. *Jaswant Rai* (1), *Eastern Mortgage and Agency Co., Ld.* v. *Purna Chandra* (2), and *Abdullah Hossein Chowdhury* v. *Ananda Chandra Roy* (3) in all of which the time requisite for obtaining a copy of the decree was excluded under S. 12 (2). *Mahabir Prasad Tewari* v. *Jamuna Singh* (4) and *In re Secretary of State* (5) were cases in which the time requisite for obtaining a copy of the judgment also was excluded under S. 12 (3), Lim. Act, and the one *Wilayati Begam* v. *Jhandu Mal* (6) was a case in which a contrary view was taken by the Allahabad High Court. We need not consider the question of the exclusion of the time required for obtaining a copy of the judgment, as it does not directly arise in the case before us.

There is no substance in the argument of the learned counsel for the non-applicant whereas O. 45, Rr. 2 and 3, Civil P. C., contemplate a petition for leave to appeal S. 12 (2), Lim. Act speaks of an application for leave to appeal, and that, consequently, S. 12 (2), Lim. Act does not help the applicant. If this argument were to prevail, the position would be that the limitation prescribed by Art. 179, Lim. Act, would not govern the petition for leave to appeal to Privy Council prescribed by O. 45, Rr. 2 and 3, therefore there would be no bar of time. This is nothing but a quibble in words. We, therefore, overrule the non-applicant's objection on the point of limitation and direct that the certificate applied for shall issue. The non-applicant will pay Rs. 50 as costs of this petition to the applicants.

D.D. *Petition allowed.*

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(1) [1916] 38 All. 82 = 31 I. C. 906 = 13 A. L. J. 1114.
(2) [1912] 39 Cal. 510=15 I. C. 497.
(3) [1915] 42 Cal. 35 = 24 I. C. 273 = 18 C. W. N. 1066.
(4) A. I. R. 1922 Pat. 255=1 Pat. 429.
(5) A. I. R. 1925 Mad. 1241=48 Mad. 939.
(6) A. I. R. 1926 All. 286.

A. I. R. 1928 Nagpur 65 (1)

FINDLAY, J. C.

Budhilal—Defendant—Appellant.

v.

Mokhamchand and *another*—Plaintiffs—Respondents.

Second Appeal No. 412 of 1927, Decided on 24th August 1927, against decree of Addl. Dist. Judge, Seoni, D/- 31st July 1927 in Civil Appeal No. 4 of 1927.

(a) *Limitation Act, Art. 120 — Co-tenant—Ousting others — Suit for mesne profits — Art. 120 is applicable.*

Where a person prevents his co-tenants from obtaining from the field such profits as it is capable of yielding and takes possession of the whole field as his own he is liable to account for the mesne profits. Article applicable to such a suit is Art. 120 and not Art. 109: 32 *Cal.* 837; *A. I. R.* 1922 *Mad.* 150 (*F.B.*), *Foll.* [P 65 C 2]

(b) *Civil P. C., O. 2, R 2—Previous suit does not bar a subsequent suit on a fresh cause of action.*

A subsequent suit for mesne profits is not barred by reason of a previous suit for partition if cause of action of the subsequent suit had not arisen when partition suit was brought. [P 65 C 2]

S. A. Ghadgay—for Appellant.

Judgment.—The facts of this case are sufficiently clear from the two lower Courts judgments. Even accepting the findings of fact arrived at by the lower appellate Court, two contentions have been urged on behalf of the appellant Budhilal. The first of these is that, as the possession of the appellant was not permissive and was not on behalf of his co-owners, the limitation applicable to the case was to be found in Art. 109 and not in Art. 120, Limitation Act.

For my own part, it seems to me perfectly clear that in the present case the appellant prevented his co-tenants from obtaining from the field such profits as it was capable of yielding and took possession of the whole field as his own. This being so, on the principle laid down by Mookerjee, J., in *Mohesh Narain* v. *Nowbat Pathak* (1), I am of opinion that the appellant was liable to account for the mesne profits in question, and the decision in *Yerukola* v. *Yerukola* (2), with which I respectfully agree, is ample authority for the view that Art. 120 is applicable.

The second point urged is that, in view of the previous suit for partition, it was not open to the plaintiffs-respondents to bring the present suit with respect to the profits of only a portion of the family property. I am at a loss to understand what applicability O. 9, R. 9, Civil P. C., has to the present case, as urged in ground 4 of appeal. The cause of action for the present suit had not arisen when the previous partition suit was filed. I know of no bar to the present suit being brought in the form it is.

These findings govern the appeal which is dismissed without notice to the respondents.

N.K. *Appeal dismissed.*

(1) [1905] 32 Cal. 837 = [illegible]

(2) A. I. R. 1922 Mad. 150=45 Mad. 643 (F. B.).

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* A. I. R. 1928 Nagpur 65 (2)

KOTVAL, A. J. C.

Bhola Sunar — Defendant 1—Appellant.

v.

Madho Prasadsao and *others*—Plaintiff and Defendants 2 & 3—Respondents.

Second Appeal No. 338 of 1926, Decided on 21st September 1927, from decree of Addl. Dist. Judge, Bilaspur, D/- 26th Mar. 1926, in Civil Appeal No. 15 of 1926.

* (a) *Civil P. C., O. 21, R. 55—Instalment decree—Attachment for instalment due—Payment of instalment — Attachment ceases—"Amount decreed" meaning of.*

In the case of an instalment decree the instalment which has become due and in respect of which attachment has been made is the "amount decreed," in R. 55. Where property is attached for amount due under an instalment, the attachment must be deemed to be withdrawn when the payment of instalment, in respect of which the attachment was effected, is made. It cannot enure in respect of the instalment which had not then become due. [P 65 C 2]

(b) *Civil P. C., O. 1, R. 1—Suit by unsuccessful objector under O. 21, R. 63 — Auction purchaser in possession—Decree-holder is not a necessary party—Civil P. C., O. 21, R. 63.*

The decree-holder is not a necessary party to a suit by an unsuccessful objector for establishing his right as required by R. 63, O. 21, Civil P. C., where the auction purchaser has obtained possession of property sold and is in possession : 7 *Cal.* 608, *Ref.* [P 66 C 2]

M. R. Bobde—for Appellant.

M. B. Niyogi—for Respondents.

Judgment.—Munda, defendant 2, and his son Ramji, who is not a party to this suit, obtained a money decree payable by four instalments against Lachman, defendant 3, and in execution for the last instalment had his house attached. The plaintiff Madho Prasad's objection to the

attachment was dismissed and the house was auctioned and purchased by Bhola, defendant 1. Madho Prasad brought the suit out of which this appeal arises for a declaration that the house was not liable to attachment and sale and for possession.

The following tabular statement of events in chronological order will be more useful than one in a narrative form :

11-4-22—Decree against Lachman.

13-9-23—Application for execution in respect of the second instalment.

28-9-23—Attachment of the house in suit.

24-3-24—Private sale to the plaintiff by Lachman.

5-4-24—Date (fixed for sale in execution) on which the plaintiff paid the amount sought to be realized to the sale officer.

15-4-24—Fourth instalment fell due.

17-4-24—Application for execution in respect of the fourth instalment (the third was satisfied in the interval).

23-4-24—Attachment in respect of the fourth instalment ordered.

9-5-24—Execution case in respect of second instalment struck off as fully satisfied and the house released.

20-8-24—The plaintiff's objection to the attachment, dated 28th April 1924 in respect of the fourth instalment disallowed.

28-11-24—House sold in auction.

25-7-25—The present suit was filed.

Three points were raised in this Court by the defendants against whom the decision went in the lower Courts :

(1) that the sale to the plaintiff was not a genuine transfer but was intended to defraud Lachman's creditors ;

(2) that the sale was void as the house was under attachment at its date ;

(3) that Ramji not having been joined as a party the suit should have been dismissed.

On the first point no sufficient reason for interference with the lower Court's finding is shown It is urged that the lower appellate Court's judgment does not seriously grapple with the point. It is, however, a confirming judgment and I think it has sufficiently dealt with the question. It is not suggested that though payment of consideration was made and possession was taken, as found by the lower Courts, the real object of the transaction was to defraud the creditors.

As to the second point : it is admitted that if the attachment of 28th September 1923 had terminated before the 17th April 1924, when the application for execution of the decree in respect of the fourth instalment was made, it would not have helped the appellant, but it is urged that the attachment of the 28th September 1923 continued at least till its withdrawal on the 9th May 1924, and that the second application was no more than an application to continue that attachment. Under O. 21, R. 55, Civil P. C., however, the attachment must be deemed to be withdrawn on the 5th April 1924 when the payment in respect of which the attachment was effected was made. It could not enure in respect of the fourth instalment which had not then become due.

It is argued that under O. 21, R. 55, the condition on which the attachment is to be deemed to be withdrawn is the payment into Court of the amount decreed, that is, the whole of the amount decreed, and consequently the attachment of the 28th September 1923 enured till all the instalments were paid into Court. In my opinion, in the case of an instalment decree the instalment which has become due and in respect of which attachment has been made is the "amount decreed," in R. 55. The claim in respect of the fourth instalment was not a claim enforceable under the attachment of the 28th September 1923, and the transfer to the plaintiff of the property attached is not void under S. 64, Civil P. C., as against it. I am moreover satisfied from defendant 1's conduct on 9th May 1924 and subsequently that he intended to put an end to that attachment and not to continue it.

The last contention is that the suit should have been dismissed for non-joinder of Ramji. The auction purchaser now claims to be the owner and is in possession. The plaintiff seeks possession from him on a claim of title. To such a suit the decree-holder is not a necessary party. The substantial relief is that of possession and the plaintiff claims no relief in respect of it against the decree-holders. The auction purchaser may plead the order under O. 21, R. 63, but it would help him only so far as the questions of limitation and burden of proof are concerned. The order would not prevent the defeated objector from establishing his right as required by R. 63

without joining the decree-holders. There is therefore no ground for dismissing the suit : see *Shiboo Narain Singh* v. *Mudden Ally* (1).

The appeal fails and is dismissed with costs.

N K. *Appeal dismissed.*

(1) [1881] 7 Cal. 608=9 C. L. R. 8.

* A. I. R. 1928 Nagpur 67

MACNAIR, A. J. C.

Asaram—Plaintiff—Appellant.

v.

Dnanoba and *another*—Defendants—Respondents.

First Appeal No. 14 of 1927, Decided on 1st September 1927, against decree of Addl. Dist Judge, Chanda, D/- 26th October 1926, in Civil Suit No. 2 of 1925.

* *Mortgage—Interest—Loan on a mortgage payable by yearly instalment with interest—Defaulted instalment to bear compound interest at higher rate—On default of three instalments whole sum to become exigible—Default made—Interest on the exigible sum is simple and not compound.*

Courts do not lean to compound interest nor award it in the absence of stipulation: 28 *Bom.* 371, *Rel. on.*

Where a loan was taken on a mortgage on condition that it should be repaid by annual instalments along with the interest, that if there was a default in the payment of any instalment that instalment was to bear compound interest at a higher rate, and that in default of three instalments the whole sum was to become exigible.

Held: that there was no express stipulation to pay interest after the whole sum became exigible. The condition that defaulted instalments should carry enhanced compound interest was a condition by way of penalty and provided only for the period during which instalments were in arrears but the whole sum was not exigible.

As in the bond there was no express stipulation for compound interest, the stipulation compound being by way of penalty coming into force as soon as there was default, it cannot be a provision for compound interest and only simple interest could therefore be awarded: 28 *Bom.* 371, *Foll.* [P 67 C 2]

M. R. Bobde—for Appellant.

Judgment.—Dnanoba, respondent 1, executed a mortgage-deed in favour of the plaintiff-appellant. The consideration was Rs. 4,000 in cash. The conditions regarding repayments were as follows : The debt was to bear interest at As. 14 per cent per mensem. The principal was to be repaid in annual instalments of Rs. 300 each and a final instalment of Rs. 400. The interest accrued was to be paid with each instalment. If there was default in payment of any instalment, that instalment was to bear compound interest at the rate of Re. 1-3-0 per cent. per mensem. In default of three instalments the whole sum became exigible. No repayment was made. The point which I have to decide in appeal relates to the interest payable on the whole sum after it became exigible.

The learned District Judge allowed simple interest at As. 14 per cent per mensem on the principal together with As. 8 per cent. per mensem, simple interest, on the accumulated sum of interest which had become due when the whole sum became exigible. The plaintiff appealed and his counsel has put forward every possible argument on behalf of his client. I have not found it necessary to issue notice to the respondents, as in my opinion the appeal cannot succeed.

Admittedly, there is no express stipulation to pay interest after the whole sum became exigible. The condition that defaulted instalments should carry enhanced compound interest is a condition by way of penalty and provides only for the period during which instalments were in arrears but the whole sum was not exigible.

After the whole sum becomes exigible the plaintiff is entitled to interest at the rate stipulated for in the bond: *Mahadeo Prasad* v. *Dhiraj Singh* (1). Now in the bond there is no express stipulation for compound interest. There is a stipulation by way of penalty which comes into force as soon as there is a default, but this is not a provision for compound interest. The terms of the main contract were such that it was not necessary to embody any condition for compound interest: as soon as there was a default the parties were governed by special provisions. The Courts do not lean to compound interest, nor award it in the absence of stipulation: *Hari* v. *Lahu Ramji* (2). There is no clear stipulation for compound interest: only simple interest can therefore be awarded.

It is urged that the advance was for cash and the rate of interest was low. But these circumstances by themselves do not justify reading into the bond a stipulation for compound interest. The question whether simple interest at the original rate is reasonable compensation

(1) A. I. R. 1923 All. 7=44 All. 772.
(2) [1904] 28 Bom. 371=6 Bom. L. R. 307.

for breach of the contract does not arise, as mortgage-deeds, such as the one under consideration, are interpreted as evidencing a contract for interest after the breach. The lower Court has passed a decree for some interest in addition to the interest at As. 14 per cent. per mensem on the principal for the period succeeding the date from which the whole amount became exigible. I, therefore, dismiss this appeal without notice to the respondents.

S.J. *Appeal dismissed.*

A. I. R. 1928 Nagpur 68

KINKHEDE, A. J. C.

Harprasad—Defendant—Appellant.

v.

Chhadami and *others*—Plaintiffs—Respondents.

Second Appeal No. 389 of 1926, Decided on 18th August 1927, from decision of Dist. Judge Jubbulpore, D/- 23rd March 1926, in Civil Appeal No. 1 of 1926.

(a) *Civil P. C., O. 41, R. 23—Remanding judgment adjudicating rights with regard to certain matters—It has the force of a decree and is appealable.*

Where the adjudication as embodied in the remanding judgment clearly adjudicates the rights of the parties in regard to certain matters in controversy between them, it has all the force of a decree and is appealable as such. [P 69 C 2]

(b) *Civil P. C., S. 97—Final decree passed after filing an appeal from a preliminary decree—Appeal does not become nugatory.*

Appeal from a preliminary decree filed before passing of the final decree is competent and is not rendered nugatory by reason of a final decree having been passed and not being appealed against : 36 *All* 532, *Foll.* [P 69 C 2]

(c) *C. P. Land Revenue Act* (2 *of* 1917), *S.* 192 *—Lambardar's remuneration.*

In all appointments of lambardars the remuneration of that post, unless fixed by a revenue officer is not recoverable by suit: *A. I. R.* 1926 *Nag.* 274 and 6 *N. L. R.* 27, *Foll.*

Similarly, if such a suit is not maintainable, on the same analogy a defence also may not be available. [P 69 C 1]

K. V. Deoskar—for Appellant.

J. Sen—for Respondents.

Judgment.—The defendant who is admittedly a Sadar Lambardar and Lambardar has come up in second appeal against the remanding judgment of the learned District Judge of Jubbulpore and challenges the correctness of the decision only in so far as it relates to the disallowance of his claim for Lambardari Huqq. It is admitted that his appointment was made in Samat 1975, i. e., after the new Land Revenue Act 1917 came into force and that the revenue officer has not yet fixed the remuneration payable to him in one capacity or the other. The first Court disallowed the claim for Lambardari Huqq and the District Judge has upheld the said decision in this respect. Hence this appeal by him.

In second appeal, the respondent has taken a preliminary objection to the effect that no appeal lies against a mere finding embodied in the remaining judgment and secondly that since the date of remand the Court of first instance passed a final decree which has not been appealed against and that the result, therefore, is that the present appeal is rendered nugatory. The appellant's learned pleader says that on the basis of the remanding judgment the lower appellate Court has passed a decree and that a perusal of para. 8 of the judgment will show that the District Judge intended that certain matters should be treated as finally settled between the parties. The adjudication as embodied in the said judgment clearly adjudicates the rights of the parties in regard to certain matters and the disallowance of Lambardari Huqq is one of the matters finally decided. The decision has, therefore, all the force of a decree and is appealable as such.

I am not prepared to subscribe to the other contention that the present appeal has been rendered nugatory by reason of a final decree having been passed and not being appealed against. That decree was admittedly passed after the present appeal was preferred, and following the view taken in *Kanhaiya Lal* v. *Tirbeenisahai* (1), I hold that the present appeal is competent: cf. *First Appeal* 80-*B of* 1925.

As regards the merits: I think the matter must be considered as concluded by the decision of the Bench of this Court in *Anandrao* v. *Daulat* (2) which lays down that in all appointments of lambardars the remuneration of that post, unless fixed by a revenue officer, is not recoverable by suit. Here the defendant does not sue to recover the remuneration, but he seeks to retain to himself a portion of the income; and, therefore the matter may not be strictly covered by the Bench

(1) [1914] 36 All. 532=24 I. C. 827=12 A. L. J. 876.

(2) A. I. R. 1926 Nag. 274=24 N. L. R. 37.

decision, but if a suit is not maintainable, on the same analogy a defence also may not be available. I am supported in this view by the principle underlying the decision of Bose, A J. C , in *Chatur Bhuj* v. *Chandirmool* (3), where the defence was also held to be barred: see observations at p. 29. The appeal, therefore, fails and is dismissed with costs.

N.K. *Appeal dismissed.*

(3) [1910] 6 N. L. R. 27=5 I. C. 705.

A. I. R. 1928 Nagpur 69

MACNAIR, A. J. C.

Mt. Ranibahu—Appellant.

v.

Rao Narayanrao—Respondent.

Second Appeal No. 47 of 1926, Decided on 15th July 1927, from decree of Dist. Judge, Saugor, D/- 28th October 1925.

(a) *C. P Land Revenue Act, S.* 203 (1) *and* (2)—*Abadi land—House site—Owner of house having no intention of constructing a house for residence there— Landlord is entitled to its possession.*

Sub-section (1), S. 203 means that each person described in it is entitled to a site of reasonable dimensions for his house, his house meaning his residence. Unless, then, there is an intention to construct a house for a residence, there is no right to any site and such a person is liable to ejectment at the will of the landlord: 11 *N. L. R.* 126, *Foll.*

[P 69 C 2, P 70 C 1]

(b) *C. P. Land Revenue Act, S.* 203 (1)—"*Every person*" *includes females but excludes a married female living with her husband.*

"Every person" must include females, but excludes married females living with their husbands as by their doing so they are deemed to have no intention to have separate house for themselves and so they are not entitled to house sites in the abadi land. [P 70 C 1]

(c) *C. P. Land Revenue Act, S.* 203 (2)—*Explained.*

Sub-Section (2) merely lays down that the right to a site is forfeited when certain co tingencies happen: it does not state that a right which exists cannot cease unless one of those contingencies happens. [P 70 C 1]

A. V. Khare and *W. B. Pendharkar*—for Appellant.

G. L Subhedar—for Respondent.

Judgment.—One Duragsingh was a tenant in the village where the house site in suit is situated, and had a house on that site. He died some years ago, and his widow Mt. Ranibahu became tenant of that holding. It has been found that Mt Ranibahu has been for some years the mistress of one Dhokalsingh who has two houses in the village: she has a son four years old by him and has been living with him for over two years. Duragsingh's house has now fallen down and the malguzar sues for possession of the site on the ground that Mt. Ranibahu has permanently ceased to use this site for the purposes of a dwelling house. The first Court found that the house had fallen down from natural causes, such as, want of repairs, but held that Mt. Ranibahu had not permanently abandoned the site at the date of the suit. The decree of that Court allowed her eight months to build a house on the site and directed that if she failed to do so, the plaintiff should obtain possession. The lower appellate Court held that Mt. Ranibahu had abandoned the site on the date of the suit and gave the plaintiff a decree for possession.

This second appeal is filed by Mt. Ranibahu and Dhokalsingh. It is first urged that the reported ruling, *Narayan* v. *Behari* (1), does not apply as Mt. Ranibahu had not on the date of the suit permanently ceased to use the site for the purposes of a dwelling house. This is an attack on a finding of fact and the learned Judge of first appeal has given proper reasons for his finding. Mt. Ranibahu left her house and allowed it to fall down for want of repairs. She and Dhokalsingh removed some of its materials. She and Dhokalsingh stated in the first Court that they were man and wife, and I see no reason to think that they are more likely to separate than a married couple. I agree then that Mt. Ranibahu had ceased to use the site for the purposes of a dwelling house.

It is next urged that, under S. 203 (1) and (2), Land Revenue Act, 1917, Mt. Ranibahu has a subsisting right to the site in suit. S. 203 1) is as follows:

Every person holding land in a mahal for agricultural purposes, otherwise than as a subtenant, or ordinarily working therein as an agricultural artizan or labourer, and the village-watchman are entitled to a house-site of reasonable dimensions in the abadi free of rent.

It is urged that Mt. Ranibahu is under this sub-section entitled to a site in the village abadi apart from the question whether she has any intention of living on that site. In my opinion the sub-section means that each person described is entitled to a site of reasonable dimensions for his house, his house meaning

(1) [1915] 11 N. L. R. 126=31 I. C. 307.

his residence. Unless, then, there is an intention to construct a house for a residence, there is no right to any site. To hold otherwise leads to obvious absurdities. "Every person" must include females (Ranibahu herself is a female) and it could not have been intended that a male and a female labourer married to each other should be entitled to claim two plots in the abadi. It follows that as Mt. Ranibahu does not intend to leave Dhokalsingh's house, she is not now entitled to a plot in the abadi.

It is next urged that S. 203, sub-S. (2), states the conditions under which a person forfeits his right to a house-site: Mt. Ranibahu admittedly was entitled to a house-site and these conditions do not apply to her case. But sub-S. (2) merely lays down that the right to a site is forfeited when certain contingencies happen: it does not state that a right which once exists cannot cease unless one of those contingencies happens.

There has, then, been no change in the law laid down in *Narain* v. *Behari* (1). Where the occupant of an abadi site permanently ceases to use such site for the purposes of a dwelling house, he becames a pure licensee liable to ejectment at the will of the landlord. Mt. Ranibahu had at the date of the suit become such a licensee, and the landlord was entitled to possession. The appeal, therefore, fails and is dismissed with costs on the appellants.

S.J. *Appeal dismissed.*

A. I. R. 1928 Nagpur 70 (1)

KINKHEDE, A. J. C.

Gangaram and *others*—Plaintiffs—Appellants.

v.

Umai and *others* — Defendants—Respondents.

Second Appeal No. 388 of 1926, Decided on 28th June 1927, against decree of Dist. Judge, Bhandara, D/- 31st March 1926 in Civil Appeal No. 11 of 1926.

Transfer of Property Amendment Act (27 *of* 1926)—*Mortgage — Executant's admission of execution—Subsequent attestation is sufficient.*

The executant's admission of the execution of the mortgage-deed to the attesting witnesses and the latter's attesting on the strength of such admission of execution are sufficient proof of the attestation of the mortgage-deed by passing of the Transfer of Property Amendment Act, No. 27 of 1926 : *A. I. R.* 1927 *Mad.* 85, *Foll.*; *A. I. R.* 1927 *All.* 1 (*F. B.*), *Diss.* [P 70 C 2

W. R. Puranik—for Appellants.

D. T. Mangalmurti—for Respondents.

Judgment.—The lower appellate Court has come to a finding that the executants admitted the execution to the attesting witnesses and that the latter attested on the strength of such admission of execution. This kind of proof was held insufficient to prove strictly the attestation of a mortgage-deed. But since the passing of the Transfer of Property Amendment Act, No. 27 of 1926, the matter has been set at rest and it has to be held that even on such evidence the attestation must be held to be duly proved. The Madras High Court has held in *Balaji Singh* v. *C. Gangamma* (1), that the mortgage attested under such circumstances must be held to be duly attested. No doubt, there is a ruling of the Allahabad High Court, reported in *Girja Nandan* v. *Hanuman Das* (2), in which a contrary view has been taken, but that view does not appeal to me as sound. The result is that the appeal succeeds and the plaintiff's claim is decreed to the extent to which it was entertained by the Court of first instance. A fresh preliminary decree for sale with a due date six months hence will he passed under O. 34, R. 4, Civil P. C., with liberty to plaintiff to apply for a personal decree, if not otherwise barred, against the mortgagors. A fresh account will be made allowing interest at the rate granted by the first Court. Appellants' costs of this appeal shall be included in the decretal amount. Respondents will bear their own.

N.K. *Appeal allowed.*

(1) A. I. R. 1927 Mad. 85.
(2) A. I. R. 1927 All. 1=49 All. 25 (F.B.).

A. I. R. 1928 Nagpur 70 (2)

KOTVAL, A. J. C.

Ganpatrao—Plaintiff—Appellant.

v.

Thallua—Defendant—Respondent.

Second Appeal No. 407 of 1925, Decided on 17th August 1927, from decree of Addl. Dist. Judge, Jubbulpore, D/- 4th July 1925, in Civil Appeal No. 23 of 1925.

(a) *C. P. Tenancy Act, S.* 89 (1), *Section is not applicable to a landlord willing to end the tenancy.*

Section 89, provides only for the case where the tenant wishes to put an end to his tenancy

without reference to the wishes of the landlord and has not application to a case where the landlord is willing to end the tenancy.

[P 71 C 2]

(b) *Landlord and Tenant—A tenant not claiming to be a tenant can be ejected as a trespasser.*

Where a person first claimed the fields for himself under a bequest by another person but afterwards changed the plea and contended that he was entitled to hold as a trustee under the will for the son and widow of that person.

***Held*: that on the pleadings the person was not a tenant and was liable to be ejected as a trespasser.** [P 71 C 2]

D. T. Mangalmurti—for Appellant.

J. Sen—for Respondent.

Judgment.—One Mohan, the occupancy tenant of the fields in suit, died in 1922, leaving a son Jethoo and a widow Sarsuti. After Jethoo's death, which took place shortly after Mohan's, Sarsuti surrendered the fields by a deed registered on 4th June 1924 to Ganpatrao, the plaintiff, who is the sixteen annas landlord of the village in which the suit fields are situated. He instituted this suit for possession on 22nd July 1924 against Thallua the defendant, who is the brother of Mohan, and is in possession of the fields since Mohan's death. Thallua claimed title as legatee under an oral will by Mohan which has been held unproved. The suit was dismissed by the trial Court on the ground that it was premature as under Cl. 1, S. 89, Tenancy Act, 1920, Sarsuti did not cease to be the tenant till 1st June 1925, when the agricultural year next following the date of the delivery of the surrender deed commenced. This dismissal has been confirmed by the lower appellate Court.

The question for decision in this Court is whether Cl. 1, S. 89, Tenancy Act, has been rightly applied in this case. The clause provides that an absolute occupancy tenant or an occupancy tenant may by delivering to his landlord, not less than 30 days before the date of commencement of the agricultural year, a registered document executed in favour of the landlord, surrender his holding, and thereupon he shall cease to be a tenant from the agricultural year next following such date.

This clause gives the tenant a right of putting an end to the tenancy and his liability to pay rent without reference to the wishes of the landlord, but provides for an exercise of it in time to enable the landlord to arrange for the cultivation of the holding by a new tenant or personally. The time fixed for exercising the right is not an essential condition of the validity of the surrender, that condition being provided for by Cl. 2, S. 89, viz., that it should be effected by a registered document. The condition as to the time for the exercise of the right being fixed for the protection of the landlord is binding on the tenant if the landlord insists upon it, but there is no reason why the landlord should not be free to waive it and accept the surrender at any other time and put an end to the tenancy and the liability to pay rent if he chooses to do so.

In my opinion, the section provides only for the case where the tenant wishes to put an end to his tenancy without reference to the wishes of the landlord and has no application to a case like the present where the landlord is willing to end the tenancy.

As regards the defendant's plea about his holding under a bequest by Mohan, he does not now claim the fields for himself but contends that he is entitled to hold as a trustee under the will for the son and widow of Mohan. This is entirely opposed to his pleading in which he claimed to be tenant in his own right. On the pleadings the defendant was either a trespasser or a tenant. He does not now claim to be a tenant and is liable to be ejected as a trespasser.

The appeal succeeds. The decrees of the lower Courts are set aside. The plaintiff's claim will be decreed with costs throughout.

N.K. *Appeal allowed.*

A. I. R. 1928 Nagpur 71

KOTVAL, A. J. C.

Mahomed Hamid—Appellant.

v.

Municipal Committee, Drug—Respondent.

Civil Ref. No. 31 of 1927, Decided on 6th September 1927, made by the Dy. Commr., Drug, D/- 20th January 1927.

C. P. Municipalities Act (2 of 1922), S. 66—R. 5 (b)—Haisiyat tax—Payment towards income-tax may be excluded, but those towards insurance premia and house-rent may not be wholly excluded.

In assessing the haisiyat-tax the Municipal Committee should make allowance for income-tax paid by the assessee, but the extent to which

allowance should be made in respect of house-rent and insurance premia is a matter to be decided in connexion with each case by the Municipal Committee or the Deputy Commissioner, Commissioner or other officer hearing the appeal and no principle can be laid down on the point. [P 72 C 2; P 73 C 1]

D. T. Mangalmurti—for Respondent.

Order.—Mr. Mahomed Hamid, Tahsildar, was assessed by the Municipal Committee of Drug to haisiyat-tax for the year 1926—27 on Rs. 3,300, his gross salary for that year. He appealed to the Deputy Commissioner claiming that the amounts paid by him as income-tax, house-rent and life insurance premia should have been deducted from his gross salary and the tax levied on the balance, Rs. 2,469-12-0 "which he is capable of spending at Drug proper." The Deputy Commissioner was of the opinion that deduction on account of income-tax should be allowed, but not on account of house-rent. He was doubtful whether provident fund payments and insurance premia should be deducted, though he was inclined to think that they should to the extent permitted by income-tax rules. He has referred the case to this Court under S. 83 (2), Central Provinces Municipalities Act, 1922 as he considered that a ques ion of liability to and the principle of assessment of the tax was involved.

The points referred are whether in assessing the appellant to the haisiyat-tax the Municipal Committee should have made allowance for house rent, income-tax and insurance premia paid by him and for the contributions made by him to the provident fund. No question as to contributions to the provident fund arises in this case for the record discloses no claim made by the appellant in respect of them. He alleged that he paid Rs 86-4-0 for income-tax, Rs. 240 for house-rent and Rs. 504 for life insurance, and claimed a deduction in respect of these items only. The reference in respect of provident fund contributions is made apparently because in answer to the notice issued to the Municipal Committee, it was alleged that in respect of Government servants the gross annual salary was the basis of assessment, no deduction being allowed on account of house rent, income-tax, provident fund and insurance premia. As the point as to provident fund contributions did not arise in the appeal it must be excluded from the reference which, in my opinion, must be confined to such questions as arise in the particular case in which it is made. In this Court the Municipal Committee has been represented by an advocate, but no appearance has been made by or on behalf of the appellant. In my opinion, no question of liability to the tax within the meaning of S. 83 (2) arises in this case, for that is admitted. The question of liability mentioned in S. 83 (2) is not the question of the amount fixed in respect of the liability, but of a person's liability to pay the tax at all. Mr. Hamid's liability to pay the tax is not denied. He only contests the amount which the Municipal Committee requires him to pay.

As regards the question of the principles of assessment the Municipal Committee has overlooked the rules framed by it and sanctioned by Government by Notification No. 190-617-S-18, dated 31st July 1919. Rule 5 (b) of these rules lays down the principles of assessment applicable to the present case. According to that rule the relative tax paying capacity i. e., the circumstances, social position and the size of the family of each person liable to be taxed must be considered. The measure of the tax-paying capacity of a Government servant, who, we assume, like Mr. Hamid, has no other income or property in the Municipality, does not depend solely upon the amount fixed as his salary. The tax is intended to be elastic and contemplates a greater nicety of adjustment to the means of the payer than is usually possible in the matter of taxation. The possibility of Government servants earning the same salary and having no other income or property paying different amounts as haisiyat-tax is within the contemplation of the rule. The difference in the amount may be due to difference in the circumstances, social position or the size of the family."

It is not possible to define what is included in the terms "circumstances" and "social position," but for the purposes of this case it may be said that the outgoings under the heads referred to above are matters requiring consideration in determining the tax-paying capacity of the appellant. Except in the case of income-tax it cannot be laid down as a rule that in determining the tax-paying capacity these items or any of them must be wholly deducted from the salary.

As far as income-tax is concerned that part of the salary which is paid as such

is as good as never received and cannot be considered to be at all contributing to the occupier's tax-paying capacity. Insurance premia and house-rent are items of expense which depend for their extent on the occupier's choice, and obviously he cannot, as a matter of principle, be allowed to claim deduction for the whole of the amounts paid by him for these purposes, for he might choose to make them so large as to swallow the greater part of his income. The extent to which allowance should be made in respect of these items is a matter to be decided in connexion with each case by the Municipal Committee or the Deputy Commissioner, Commissioner or other officer hearing the appeal and no principle can be laid down on the point.

D.D. *Order accordingly.*

A. I. R. 1928 Nagpur 73

KOTVAL, A. J. C.

Batoolal and *another*—Plaintiffs—Appellants.

v.

G. I. P. Ry. Co., Bombay — Defendant —Respondent.

Second Appeal No. 335 of 1926, Decided on 16th September 1927.

(a) *Railways Act, S. 72—Risk-note Form B—Sending goods in unlocked waggons amounts to wilful neglect.*

When the Railway Company knew that there were frequent thefts between certain stations, its continuing sending goods in unlocked waggons amounts to wilful neglect: 7 *A. L. J.* 833 and *A. I. R.* 1926 *All.* 369 (*F. B.*), *Foll.* [P 73 C 2]

(b) *Railways Act, S. 72—Risk-note Form B—Claim for exemption from liability allowed in the cases of thefts between running trains cannot be allowed merely on proving that at a certain station the goods were on the train in a sealed van and at a later station were missing from the van.*

A Railway Company who accepts goods for carriage in accordance with Risk-note Form B cannot successfully plead that there was a robbery from a running train merely by giving proof of the fact that the goods were on the train at one particular station in a sealed van, and subsequently at a later station were missing from the van, the evidence of the theft being provided by the fact that the seals were broken: 24 *A. L. J.* 825, *Foll.* [P 74 C 1]

(c) *Railways Act, S. 72—Risk-note Form B—Wilful neglect—The burden of proof is on the Railway Company to prove that they took sufficient precautions.*

In cases of thefts in trains where wilful neglect is alleged on the part of the Railway Company it is for the Railway Company to prove that it had taken sufficient precautions to prevent or avert the consequences of such neglect. [P 74 C 1]

N. G. Bose—for Appellants.

Lobo—for Respondent.

Judgment.—In para. 1 (a) of the written statement filed by the plaintiffs after remand they stated:

> That the defendant Company knowing full well that thefts were frequent at Bhusawal and at other stations between Nandgaon and Bhusawal, should have taken special precaution to put sound locks to the waggon, which the defendant Company failed to do.

The allegation as to the frequency of the thefts was not denied by the defendant. All that was said was that locking of waggons was not practicable and was not sufficient as a precaution against running train thefts since in several cases even locks were broken in such thefts.

That there were frequent thefts as stated by the plaintiffs must be taken to be admitted. That being so, it must be held that there was wilful neglect on the part of the railway in sending goods in waggons sealed with paper, string and wax which had to travel long distances, often to slow down, and make frequent stops at stations and sidings: *B. & N. W. Ry. Co.* v. *Haji Mutsaddi* (1) and *Bindraban* v. *G I. P. Ry. Co.* (2).

The defendant pleaded a "running train theft" under circumstances similar to those in the latter of the two cases cited above. The facts pleaded are that the train carrying the goods reached Mhasawad which is to the west of Bhusawal at 9 o'clock in the evening of 24th December 1920, and remained there until 10-45 p. m. when it left for Bhusawal, which place it reached at 12-50 a. m. on 25th December. The seal on one side of the waggon which had contained the missing bales was intact at Mhasawad and found broken at Bhusawal. The doors of the waggon were found closed and the two bales in question missing. The theft is thus alleged to have taken place while the train was running to Bhusawal after leaving Mhasawad.

The goods were consigned under risk-note B and the defendant relies for exemption from liability upon the proviso at the end of the risk-note stating that the term "wilful neglect" will not be held to include robbery from a running train. Merely upon proof of the facts pleaded

(1) [1910] 7 A. L. J. 833=7 I. C. 160.
(2) A. I. R. 1926 All. 369 (F. B.).

the defendant cannot successfully plead that there was a robbery from a running train, the word "robbery" meaning not simple theft, but theft accompanied by violence or show of violence: see *Bindraban* v. *G. I. P. Ry. Co.* (2) in which the reference to the Full Bench was in the following terms and answered in the negative:

Whether a Railway Company who accepts goods for carriage in accordance with Risk-note Form B can successfully plead that there was a robbery from a running train merely by giving proof of the fact that the goods were on the train at one particular station in a sealed van, and subsequently at a later station were missing from the van, the evidence of the theft being provided by the fact that the seals were broken . . . . . Given those conditions, are the Railway Companies covered by the exception of robbery from a running train?

That the question of the practicability or impracticability of providing locks on all railway waggons is irrelevant has been shown in the judgment of Ashworth, J., in the above case. In any case it could not have been impracticable to lock the waggons, for Dwarkanath (D. W. 5) admits that the railway has started locking waggons as a preventive measure and all loaded waggons are now generally locked.

Wilful neglect as above, having been proved, it was for the defendant to show that it took other sufficient precautions which would prevent or avert the consequences of such neglect. This has not been proved. As no question was raised in the lower appellate Court regarding the amount of the damages, I set aside the decree of the lower appellate Court and restore that of the trial Court. Costs in this and the lower appellate Court will be paid by the defendant.

S.J. *Appeal allowed.*

A. I. R. 1928 Nagpur 74

FINDLAY, J. C.

Beharilal—Plaintiff—Appellant.

v.

Asaram and *another*—Defendants—Respondents.

Second Appeal No. 27 of 1926, Decided on 18th August 1927, from decree of District Judge, Bhandara, D/- 20th July 1925, in Civil Appeal No. 53 of 1925.

Contract Act, S. 74—Compound interest—Reasonable compensation, not exceeding the penalty stipulated for, should be given.

Each case has to be judged on its own merits as regards the quantum of interest. The governing provision is S. 74, Contract Act, and what the Court has to do is to see that reasonable compensation, not exceeding the penalty stipulated for, or up to that amount, should be given. [P 74 C 2]

Where the bond was wholly for old debt and the time for repayment was unusually short,

Held: that the rate of 1 per cent. per mensem simple interest was quite a normal one, but the provision for enhanced compound interest at 2 per cent mensem was a highly penal one. [P 75 C 1]

D. T. Mangalmurti and *Y. V. Jakatdar*—for Appellant.

Judgment.—The bond in suit for Rs. 4,000 was executed on 16th July 1922. Repayment was to be made on 15th February 1923, and the original rate of interest fixed was 1 per cent. per mensem simple. If repayment was not made, compound interest was to run at 2 per cent. per mensem, compound yearly. The lower Courts have granted simple interest at Re. 1-8-0 per cent. per mensem from the date fixed for repayment.

It has not been contended here that the lower Courts were incorrect in holding that the provision for compound interest at an enhanced rate was a penal one. What has been urged is that, at the least, the appellant should have been allowed simple interest at 2 per cent. per mensem, or compound interest at 1 per cent. per mensem.

It has been urged on the strength of the decisions in *Sundar Koer* v. *Rai Sham Krishen* (1) and *Dandu* v. *Somnath* (2) that interest, as just stated, should have been at least allowed to the plaintiff. Each case, however, has to be judged on its own merits as regards the quantum of interest to be allowed in a case like the present. The governing provision is S. 74, Contract Act, and what the Court has to do is to see that reasonable compensation, not exceeding the penalty stipulated for, or up to that amount, should be given. In the circumstances of the present case, I am in full agreement with the lower Court as regards the propriety of only simple interest at Re. 1-8-0 per cent. per mensem being granted.

Each and every case has to be judged on its own merits as regards the quantum of compensation so to be given. Here we have the following facts. The bond in suit was wholly for old debt with

(1) [1907] 34 Cal. 150=34 I. A. 9=5 C. L. J. 103=11 C. W. N. 249 (P. C.).
(2) [1910] 6 N. L. R. 109=7 I. C. 547.

the exception that Rs. 400 was added by way of interest on the date of the bond. The time fixed for repayment was unusually short, only seven months being allowed. The rate of 1 per cent. per mensem simple interest was quite a normal one, but the provision for enhanced compound interest at 2 per cent. per mensem was a highly penal one. In those circumstances, it is only too obvious that the plaintiff has received ample compensation, so far as the rate of interest is concerned from the date fixed for repayment, at the hands of the lower Courts.

The next point urged is that future interest at 8 annas per cent. per mensem should be allowed. In view of the extremely onerous terms of the bond, and the amount still due in spite of the repayments amounting to Rs. 3,070-4-0, I see no reason whatever to allow future interest.

Lastly, it has been urged that interest pendente lite should have been allowed. This was, in effect, allowed by the Judge of the first Court in para. 10 of his judgment. It was also explicitly mentioned in the decree, although the amount of pendente lite interest was not actually calculated. The lower appellate Court apparently took the view that it was the duty of the present appellant to have appealed as regards this item also. I cannot agree in this view, but, in order to remove any uncertainty in the matter, a fresh decree will be drawn up in this Court, in which simple interest at Rs. 12 per cent. per annum from 6th February 1925, the date of the institution of the suit to 20th July 1925, the date of the decree, of the principal amount of Rs. 2,048-12 0 will be added to the amount of Rs. 2,372-6-0 already decreed. The respondents have not been represented on appeal and, as the present appeal has, to all intents and purposes, failed, the appellant must bear his own costs in this Court.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 75

KINKHEDE, A. J. C.

Malhar Rao—Defendant—Appellant.

v.

Jagannath—Plaintiff—Respondent.

Misc. Appeal No. 11 of 1927, Decided on 2nd September 1927, from decision of Sub-Judge, 1st Class, Bhandara, D/- 13th Dec. 1926, in Civil Suit No. 34 of 1926.

Civil P. C., O. 9, R. 13—Default in appearance due to agents missing train—There is sufficient cause.

Where a party had engaged a pleader and deputed an agent to go to the place where the hearing of the case was to take place, but the agent missed the train:

Held: that there was a sufficient cause for non-appearance: *A. I. R. 1923 Mad. 63, Foll.* [P 76 C 1]

N. G. Bose—for Appellant.

W. R. Puranik—for Respondent.

Judgment.—I think this case must go back for trial on merits. The allegations on the basis of which the hearing of the suit was sought to be reopened were not denied. The respondent simply denied knowledge which was nothing more than a plea of ignorance. But there was the appellant's agent's affidavit on record which conclusively proved that, but for the missing of the train, the defendant's agent would surely have attended Court and given instructions to the pleader to make the necessary defence. This was the situation in which the pleader already engaged was placed and consequently he could not put in the defence. The plaintiff's claim may have been contestable on ground which may not necessitate summoning any witnesses for the hearing. So the mere circumstance that the suit was fixed for final disposal and the defendant made a further default in failing to summon his witnesses, does not affect the question. For aught we know, his defence on law points or on facts which the parties might admit at the hearing, may not require to be substantiated by any oral testimony of witnesses, or the agent may have been accompanied by the witnesses whom he intended to examine in the case. It is, therefore, not proper to speculate about the further default in summoning witnesses which the respondent's pleader attempted to make much of before me. He even went to the length of calling that default a piece of gross negligence on the appellant's part. It may or may not be so; with that I am not concerned under O. 9, R. 13, Civil P. C., which deals only with a default in appearance and not in the doing of any act.

The default in appearance on 13th December 1926, was clearly attributable to the proved inability of the agent to attend Court, and instruct the pleader retained in the case. The agent's affidavit is clear and there is no counter-affidavit to lead me to think that the excuse was invented for

the purpose of these proceedings. The Court went out of its way to imagine that this was a case similar to the other cases it had in its experience come across of false excuses of missing of trains. The defendant's preparation to defend the suit is clearly established by the fact that a pleader was engaged by him and that he deputed an agent to go to Bhandara to instruct the pleader and that the said agent had actually prepared himself to start for Bhandara, but unfortunately missed the train, and by the further circumstance that he made an application for setting aside the decree the very next day. This case thus comes within the principle enunciated in the case of *Arunachela Ayyar* v. *Subbaramiah* (1). I am satisfied that the appellant had sufficient cause for non-appearance at the hearing and that he is entitled to a hearing on the merits of the suit.

I, therefore, reverse the order refusing to set aside the ex-parte decree and hereby set aside the decree passed ex parte and direct the Court below to rehear and decide the suit on its merits according to law.

The lower Court shall, in order to give effect to this order, fix a fresh date for the further hearing of the suit, and give notice to the parties to appear before it with their respective evidence on that day, and after recording their pleadings and evidence, if any, which they shall produce at that date, decide the suit according to law, if ripe for decision; but if, after a perusal of the pleadings, it frames issues and sees good cause to grant an adjournment for adducing such evidence as may be necessary for its decision upon such issues it may do so under the provisions of O. 15, R 4, Civil P. C. The appeal is allowed, but in the circumstances of the case, I award no costs to the appellant.

S.J. *Appeal allowed.*

(1) A. I. R. 1923 Mad. 63=46 Mad. 60.

A. I. R. 1928 Nagpur 76

FINDLAY, J. C., AND MACNAIR, A. J. C.

Ramlal Lodhi—Defendant—Applicant.

v

R. B. Indraraj Singh—Plaintiff—Non-applicant.

Misc. Petn. No. 37 of 1927, Decided on 12th September 1927, for leave to appeal to Privy Council.

(a) Civil P C., S. 110—"Substantial" question of law means between the parties.

The term "sabstantial question of law" merely means such a question as between the parties in the case involved: *A. I. R. 1927 P. C. 110, Foll.* [P 77 C 1]

(b) Civil P. C., S. 110—Substantial question of law.

Whenever the decision of a certain fact is based to some extent on inferences from other facts it cannot be said that a substantial question of law is involved. [P 78 C 1]

V. Bose and *P. N. Rudra*—for Applicant.

M. V. Abhyankar and *G. R. Bapat*—for Non-applicant.

Order. — The defendant-applicant, Ramlal, has applied for leave to appeal to the Judicial Committee of the Privy Council against the judgment and decree of this Court, dated 1st April 1927, in *Ramlal* v. *Indraraj Singh* (1).

The only question involved in the said judgment was as to whether the gift of mouza Ekodi granted to Harpriabai was one for maintenance only, or was an absolute one. The judgment of this Court affirmed the judgment of the Court below and held that the said grant was merely a maintenance one to Harpriabai and her children. She admittedly had no heirs and, therefore, the village was held to have rightly reverted to the plaintiff-non-applicant. It is not disputed that the value of the subject-matter in dispute both in the Court of first instance and of appeal to His Majesty in Council is above Rs. 10,000. What the defendant-applicant, therefore, has to establish before leave to appeal can be granted, is that a substantial question of law is involved in the case. There has been considerable difference of judicial opinion as to the meaning of the term "substantial question of law" in S. 110, Civil P. C. One school of opinion has been to the effect that the said phrase implies a substantial question of law of general importance and not merely one of substantial importance as between the parties to the suit: cf. *Bishambhar Nath* v. *Muhammad Ubaid-Ullah Khan* (2). This matter has now been set at rest by the decision of their Lordships of the Privy Council in *Raghunath Prasad Singh* v. *Deputy Commissioner of Partabgarh* (3). Their

(1) A. I. R. 1927 Nag. 273.
(2) A. I. R. 1924 All. 559=46 All. 227.
(3) A. I. R. 1927 P. C. 110=2 Luck. 93=54 I. A. 126 (P. C.).

Lordships have therein definitely laid down that the term "substantial question of law" merely means such a question as between the parties in the case involved.

It remains, therefore, to decide whether, in the circumstances of the present case, such a aubstantial question of law can be said to be outstanding. The learned counsel for the defendant-applicant has pointed out that the evidence, on which the Bench of this Court came to the conclusions it did, fell into five sections: (1) certain oral evidence; (2) a will (Ex. D 9); (3) certain evidence of a practice in this zamindari of making provision for unmarried daughters and female relatives by giving them a grant of the profits of a village for maintenance; (4) a statement made by Harpriabai herself; and (5) certain settlement entries referred to in para. 10 of the judgment of this Court.

The oral evidence produced by the defendant and by the plaintiff alike was held by the Bench to be unconvincing. Mr. Bose has urged that the remaining evidence is almost wholly documentary, so that our decision depended upon the right construction of documents. He cites a remark of their Lordships of the Privy Council in *Fateh Chand* v. *Kishan Kunwar* (4) at p. 585:

> The right construction of documents is a question of law which Judges in second appeals are not, by Ss. 584 and 584, Civil P C., precluded from considering by any finding of a lower appellate Court based upon such documents.

But the construction of the passage relied on in the will is of a very minor importance in the present case and forms only one of the number of bases on which our findings stand: and it cannot, in our opinion, be maintained that there is any valid doubt regarding the meaning of Mt. Harpriabai's statements or of the correct interpretation of the settlement entries. We do not consider then, that there is any question regarding the right construction of a document which is of substantial importance as between the parties to the suit.

It is next urged that as we have arrived at a decision on a question of fact namely whether the grant was one for Mt. Harpriabai's life only or in perpetuity by drawing inferences from certain facts which we held to be proved, our findings involve a question of law. In support of this contention, the learned counsel refers us to a number of rulings. In *Nafar Chandra* v. *Shukur Sheikh* (5), where their Lordships of the Privy Council stated:

> Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact.

In *Surendra Nath* v. *Dwarka Nath* (6) Sanderson, C. J., remarked as follows:

> When one remembers that the question which it is desired to argue is this: whether upon certain given facts or data the tenancy is to be regarded as one at will or one of a permanent nature, it seems to me that this is a matter in which a substantial question of law is involved.

And in the same case, Mookerjee, J., made the following observations at p. 129:

> The only other question is, whether the decree appealed against, which is in affirmance of the decree of the Court immediately below, involves a substantial question of law. As already explained by the Chief Justice, the question in controversy relates to the nature of the tenancy held by the defendants under the plaintiffs; was that a permanent tenancy or a tenancy terminable by notice to quit? The District Judge has in effect accepted the findings of the Court of first instance, but he has drawn from these findings a conclusion precisely contrary to that drawn by the trial Court. The question thus is, what inference may legitimately be drawn from the facts found and this clearly is a mixed question of fact and law, as appears from a long line of cases reviewed in *Maharam* v. *Tejamuddin* (7) and *Raja Mukund Deb* v. *Gopi Nath Sahu* (8).

In another case, the facts of which are somewhat apposite to those of the present case, viz., *Satgur Prasad* v. *Kishore Lal* (9), the point involved was the nature and effect of the possession of property by a Hindu widow. There were two alternatives, viz., that her possession was only in lieu of maintenance, and the other that it was adverse possession. Such a question had to be decided by legal inferences drawn from

(4) [1912] 34 All. 579=16 I. C. 67=39 I. A. 247 (P. C.).

(5) A. I. R 1918 P. C. 92=46 Cal. 189=45 I. A 183 (P. C.).

(6) [1917] 44 Cal. 119=24 C. L. J. 350=35 I. C. 605=21 C. W. N. 530

(7) [1912] 15 C. L. J. 220=13 I. C. 606=16 C. W. N. 567.

(8) [1915] 21 C. L. J. 45=25 I. C. 2 6.

(9) A. I. R. 1919 P. C. 60=42 All. 152=47 I. A. 197 (P. C.).

documents. The opinions of the Courts, although concurrent, were held not to be findings of fact; and where wrong conclusions had been drawn from such inferences, their Lordships held it was their duty to interfere.

We are, however, unable to agree that whenever the decision of a certain fact is based to some extent on inferences from other facts it can be said that a substantial question of law is involved. The present defendant-applicant attempted to support the theory of absolute gift by oral evidence and his witnesses have been disbelieved. It was the applicant who urged that it could be inferred from the terms of a will (Ex. D. 9) that the grant was in perpetuity, and the conclusion to which we came was that no such inference could be drawn. We held that the admissions of Mt. Harpriabai could not be reconciled with the position which the defendant is now taking up. We laid some stress on the entries made at the settlement and relied on evidence that there was a practice in this zamindari of giving to daughters and other female relatives grants of villages for maintenance: the existence of this practice, although it did not amount to anything like a custom within the technical meaning of the term, was a fact which supported the position of the plaintiff. Our finding is based, to a very large extent, on the clear admissions of Mt. Harpriabai, applicant's predecessor-in-title. We do not consider that the correctness of our decision depends on the answer given to any substantial question of law. For these reasons we are of opinion that the present appeal cannot be said to involve a substantial question of law as between the parties and we are unable, therefore, to certify the present case as one in which leave to appeal should be granted. The application is accordingly dismissed; the applicant must bear the non-applicant's costs. We fix Rs. 50 as counsel's fees.

D.D. *Application dismissed.*

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* A. I. R. 1928 Nagpur 78

FINDLAY, J. C.

Jago Kalar—Defendant 2—Appellant.

v.

Nilkanth and *another*—Plaintiff and Defendant 1—Respondents.

Second Appeal No. 364 of 1927, Decided on 17th August 1927.

* *Hindu Law—Joint family — Debt by the manager for the construction of new house on old site is a legal necessity though new house is more spacious.*

Where a manager borrows money to construct a new house on old site the mere fact that it was on a larger and more extensive scale, does not make the loan any the less for necessity where there has been no proof that the construction was not a reasonable and natural one in the circumstances and the work had already been commenced and it would have been uneconomic and indeed a disastrous step to have left matters as they were and the net result had been that the family property had been improved and increased in value and was capable of producing a larger income.

[P 78 C 2]

A. V. Wazalwar—for Appellant.

Judgment.—The main point urged in this appeal is that the borrowing of Rs. 1,200 under the mortgage-deed in suit was not justified by legal necessity, having regard to the fact that the house is alleged to have been built on a somewhat extravagant scale, and I have been referred, in support of the appellant's position, to the decision in *Shankar Sahai* v. *Bechu Ram* (1) in this connexion. This decision is to the effect that any act for which the character of legal necessity or benefit to the estate can be claimed must be a defensive act, something undertaken for the protection of the estate already in possession, not an act done with the purpose of bringing fresh property in possession and which may or may not be successful under the chances attending upon litigation. The circumstances of the case just quoted seem to me to be essentially different from those of the present case. The new house has been constructed upon the site of the old one and, even if we assume it is on a larger and more extensive scale, there has been no proof that the construction was not a reasonable and natural one in the circumstances Morever, even if we assume that the original plan of the new house was on a somewhat extravagant scale, which point is indeed largely a matter of surmise it is equally apparent that the work had already been commenced and that some money was required for completing it. It would have been an uneconomic and indeed a disastrous step to have left matters as they were and the net result has been that the family property has been improved and increased in value and is capable of producing a larger income. In those circumstances, I am of opinion

(1) A. I. R. 1925 All. 333=47 All. 381.

that, on the facts proved, it is reasonable to assume that the construction in question, or anyhow the completion of it, which is essentially the matter we are concerned with in the present case, was not only for the benefit of the estate, but was for legal necessity. The third and fourth grounds of appeal, therefore, fail.

The only other point pressed was that there was no proof of sufficient enquiry on the part of the plaintiff. On this point, I think the recitals in the mortgage-deed, combined with the evidence both of the plaintiff and the defendant, amply prove that the plaintiff had reasonable cause to suppose that the amount was borrowed for the purpose stated in the mortgage deed, and that this was so is not seriously disputed. It is difficult to see what further enquiry on the part of the plaintiff could have been made, much less was necessary. As a matter of fact, P. W. 3 Nilkanth's evidence shows that he actually made enquiries from the maistry in charge of the construction in question. The sixth ground of appeal is, therefore, an entirely baseless one and has no chance of success.

The other grounds of appeal were not pressed. The appeal is accordingly dismissed without notice to the respondents.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 79

FINDLAY, J. C.

Habib Musalman — Accused — Applicant.

v.

Emperor — Non-Applicant.

Criminal Revn. No. 181 of 1927, Decided on 27th July 1927, from judgment of 1st Class Magistrate, Chhindwara, D/- 11th May 1927, in Criminal Appeal No. 86 of 1927.

Penal Code, S. 447—Decree-holder trying to get possession of land by arbitrary means commits criminal trespass.

A decree-holder trying to get possession of the land of the judgment-debtor by arbitrary means instead of resorting to the civil Courts, commits criminal trespass. [P 80 C 1]

A. Razak—for Applicant.

Judgment. — The applicant, Habib Musalman, has been convicted of an offence under S. 447, I. P. C., and fined Rs. 15.

The facts of the case are sufficiently clear from the lower Courts' judgments and need not be repeated here. The pleader for the applicant has urged that there is no material on which to impute to the applicant a design to annoy the complainant Chamra by his forcible entry on the field. It is urged that he made such entry under a bona fide belief that he was entitled to enter upon the field and to cultivate it, and the decision in *Emperor* v. *Motilal* (1) has been relied on in this connexion. I may at once point out that an important difference in the facts arises in the latter case. In it the learned Chief Justice and Justice Mukerji held that the complainant Kanhaiyalal was not in actual physical possession of the house at the moment the trespass was committed. Here, the facts are very different. The complainant was in possession as a tenant under a legal lease and had paid nazarana for the land and had duly been paying rent therefor. It is true that formal possession had been given to the decree-holder, now represented by Habib in the present proceeding (vide the receipt, D. 1), but that possession was clearly only proprietary possession, and not possession as a tenant, so long as Chamra's lease stood good.

In the present case, however, there is a definite finding by the First Class Magistrate who tried the appeal that Chaitram had simply been employed by the applicant to get possession from Chamra by arbitrary means instead of by resorting to the civil Courts. This finding I see no cause to disturb. This fact, in itself, is sufficient to distinguish the present case from the Allahabad case quoted above. It seems to me that the principle to be applied in determining a case like the present where criminal trespass has been committed is as follows :

If the applicant entertained a belief in good faith that he was entitled to the possession of the land, his entry on it would constitute a trespass on the land for which, if he failed to prove his title, he would be answerable in a civil suit, but would not be liable to a criminal charge. If, on the other hand, the circumstances were such that he could not have entertained a belief in good faith, that he was entitled to cultivating possession

(1) A. I. R. 1925 All. 540=47 All. 855.

of the land as against the complainant, then it seems to me that the obvious inference is that he intended either to insult, or annoy, or intimidate the complainant. In the latter event, the conviction would be proper.

It is true that the ultimate object of the applicant was to obtain possession of the land either on his own behalf or on behalf of the decree-holder, but in an extreme case like the present, the applicant must be presumed to have intended the obvious intermediate results which he knew would happen in the natural course of events, if he persisted in his main intention. On the finding of fact arrived at by the First Class Magistrate in his appellate judgment, a finding which I see no reason to disturb there can in the present case be no doubt but that the applicant knew he was taking a short and illegal cut towards obtaining cultivating possession of the field instead of the lengthier and more elaborate process of resorting to the civil Court. In those circumstances, I am satisfied that all the elements of criminal trespass were present in this case and I dismiss the application without notice to the Crown.

S.J. *Application dismissed.*

A. I. R. 1928 Nagpur 80

MACNAIR, A. J. C.

Balkisandas—Applicant.

v.

Jainarain and *another* — Non-applicants.

Civil Revn. No. 41-B of 1926, Decided on 29th August 1927, against order of Small Cause Court Judge, Mehkar, D/- 12th Dec. 1926, in Misc. Case No. 37 of 1925.

Civil P. C., O. 5, R. 17 — Report of process-server not containing name of any witness— Service is not according to law — Burden of proof about due service lies on the party alleging that the service was right—Civil P. C., O. 9, R. 13.

The report of a process-server not containing the name of any witness while there must hav been persons present at the time of service cannot be deemed to have been framed in accordance with law and does not furnish prima facie proof of due service The party alleging that the service of the summons was right must prove the legality of the service. An agent is not invariably entitled to refuse summons : 8 *Cal.* 317, *Dist.* [P 80 C 2 ; P 81 C 1]

A. V. Khare—for Applicant.

M. R. Pathak—for Non-Applicants.

Order.—The applicant was the defendant in a Sm. C. C., suit. On the date fixed for hearing he did not appear. There was a report made by the process-server that his agent had refused to accept the summons and that a copy of the summons had then been duly affixed to the applicant's house. It was held that he was duly served and the case proceeded ex parte. The applicant, when he learnt that an ex-parte decree had been passed against him, applied to the trial Court and produced his agent who deposed that the summons had not been offered to him. The learned Judge disbelieved the evidence of the agent and remarked that the applicant should have called the process-server. The Judge refused to set aside the ex-parte dec ee and the applicant applies in revision to this Court.

It is first urged that the non-applicants ought to have proved that the service was proper and should have called the process-server. Had the report of the process-server been entirely in accordance with law, it would have been for the applicant to prove that he had not been served ; but there was a serious defect in the report of the process-server. O. 5, R. 17, Civil P. C., lays down that the report shall contain the name and address of the persons, if any, in whose presence the copy was affixed. The applicant is a merchant of Khamgaon, and there must have been persons present at the time of service. The report does not contain the name of any witness and is thus not framed in accordance with .law. It does not in my opinion furnish prima facie proof of due service, and it was for the non-applicants to prove, by examining the process-server, that the applicant had been duly served. I direct that the question whether the ex-parte decree should be set aside shoul i be reconsidered in the light of these remarks.

It has also been urged that the agent was not empowered to accept service of summons. But it appears clear that he was s) empowered. Another argument is that an agent, if so empowered, has an option to refuse summons. Reliance is placed on *In the matter of the Petition of Luchmee Chund* (1) But R. 17, O. 5,

(1) [1852] 8 Cal. 317.

Sch. 1, Civil P. C., lays down the procedure to be followed if an agent of the defendant, empowered to accept summons, refuses to do so : eventually the Judge may declare that the summons has been duly served or order such service as he thinks fit. It is quite clear from this rule that an agent is not invariably entitled to refuse summons. All that the learned Judges of the Calcutta High Court held was that in the particular circumstances, the agent might be justified in refusing to accept summons ; it may be noted that the defendant was a private gentleman and the agent was a Calcutta firm. In the present case the facts are very different and the Court rightly considered that the agent was bound to accept service. Costs in this case will be costs in the application to Small Cause Court. Pleader's fee Rs. 20.

S.J. *Retrial ordered.*

A. I. R. 1928 Nagpur 81

KINKHEDE, A. J. C.

Emperor

v.

Ganikhan and *others*—Complainants.

Criminal Revn. No. 159-B of 1927, Decided on 17th August 1927, made by Sess. Judge, Akola, on 17th June 1927.

(a) *Criminal P. C., S. 145—Order cannot be passed in respect of larger area than included in proceedings.*

A Magistrate has no jurisdiction to pass an order in respect of a larger area of land than was included in the proceedings : *A. I. R.* 1924 *Pat.* 589, *Foll.* [P 8 C 1]

(b) *Criminal P. C., S. 145 (4)—Original application should not be sent to police—Magistrate must himself be satisfied as to likelihood of breach—Proceedings should not be dilatory.*

Proviso 1, S. 4, imposes on the Magistrate a very great responsibility of being alert, active and prompt. The Magistrate must himself be satisfied, and he must form his own judgment and not proceed automatically upon a mere opinion of the police or the direction of some other officer : (33 *Cal.* 33, *Foll.*) His decision that there is a dispute likely to cause breach of the peace is the very foundation of all subsequent investigation and without it the latter is void and inoperative. The object of S. 145 being the prevention of a breach of the peace the foundation of jurisdiction is its likelihood: (21 *Cal.* 29 and 30 *All.* 41, *Foll.*) Both the fact that he is satisfied and the grounds thereof must appear in the first order directing the issue of notice. [P 83 C 2]

Where a party being wrongfully dispossessed moved the Magistrate to initiate proceedings under S. 145 and the Magistrate thinking fit to invite police report sent the application itself in original for enquiry and report to the police, and the police report reached the Magistrate after a considerable delay and he passed an order which did not fulfil the requirements of S. 145, Criminal P. C.

Held : that the Magistrate failed to appreciate the true and proper scope of the application, and to pass orders according to law, but, by his dilatory procedure, deprived the party dispossessed of the valuable right to claim benefit of the presumption of continuance of his possession for a space of two months next prior to the date of his preliminary order, and thus defeated the very object with which the legislature enacted Prov. 1, sub-S. 4. [P 84 C 1]

V. D. Kale and *Hatwalne*—for Opposite Parties.

Order.—This is a reference made by the Sessions Judge, Akola, in connexion with an order made by the Sub-Divisional Magistrate of Akot and Balapur, in a proceeding under S. 145, Criminal P. C., under the following circumstances.

Party No 1, Ganikhan, obtained possession through Court under a civil Court's decree, of the field in dispute described as S. N. 32 pot hissa 3, 9 acres 1 guntha of mauza Malrajura on 26th August 1926. On 14th September 1926 he moved the Magistrate to initiate proceedings under S. 145, Criminal P. C., alleging that Party No. 2 had wrongfully dispossessed him on 11th September 1926, i. e., he moved the Magistrate to take action, within three days of his eviction and 19 days of his entry into possession. He ran up to the Magistrate for redress, as he was afraid that there was imminent danger of a breach of the peace occurring. The Magistrate, if I may hazard a conjecture, was not perhaps satisfied that there was the likelihood of a breach of the peace as there was nothing before him beyond the mere assertion of Party No. 1, and he, therefore, thought fit to invite a police report by the end of the month. In doing so he sent the application itself in original for enquiry and report to the police. The police report thus called up, though ordered to be made by the end of September, was not made until 19th October 1926 by the head constable, who was deputed for the purpose by the Sub-Inspector, Station House Patur. The same was forwarded by the Sub-Inspector to the Circle Inspector, Balapur, on 20th October 1926, and he in his turn forwarded it to the Deputy Superintendent of Police, Akola, who

ordered the papers to be returned to the Sub-Divisional Magistrate under endorsement dated 27th October 1926, though the papers could thus reach the Magistrate's Court on 28th October 1926, they remained uncared for either with the Court Reader or the Magistrate himself until 12th November 1926.

There is nothing on the record to account for this delay or to explain away this lethargy on the part of both the police and the Magistrate. A word of explanation was certainly necessary to show why there was a default on the part of the police in submitting the report by the end of September as ordered, and the Magistrate was entitled to call upon the District Superintendent of Police through the District Magistrate, if necessary, to explain the cause of the delay and to request him to warn his subordinates to avoid such delays and defaults in future. The Magistrate who is himself a M.A. LL.B. and presumably has had sufficient experience was expected to exercise greater degree of diligence in the discharge of his own duties as a Magistrate including the one of keeping the staff attached to his Court up to the mark, by taking proper care to see that things are done systematically and according to procedure and above all punctually as well. If the Magistrate had attached an order-sheet to the application and noted thereon the fact of the application having been made for initiating proceedings under S. 145, Criminal P. C., and that before passing a preliminary order he desired to call for a police report and that the application was forwarded in original for enquiry and report to the police, and fixed a date for the return of the application and the submission of report, and given notice of the date to the party applying, I daresay, that would have been something. In that case, there would have been some record before him to go upon, and the same would have been put up before him at the due date, and the parties also would have attended before him and moved him for further orders. Instead of this the Magistrate endorsed an order, dated 15th September 1926, on the petition itself, addressed to the Sub-Inspector of Police through the District Superintendent of Police, Akola, asking him to "enquire and report by the end of this month." The practice of passing orders on the original petitions themselves and of forwarding them in original has always been deprecated by this Court. The Magistrate, by following an erroneous practice, thus lost all his hold upon the papers of the case, and had nothing in his possession, to pull up the police officer and enforce compliance with his orders in due time, with the result that he left it to the sweet will of the Police Department to delay the report and submit it after any length of time, and that too with impunity! The delay thus caused up to 28th October 1926 could easily have been avoided if the Magistrate had followed the proper procedure.

For the delay since 28th October 1926, when the report reached him, the Magistrate alone could be regarded as being himself responsible. Unless it could be explained away on the ground that he was not satisfied as to the existence of a dispute which was likely to cause breach of the peace, he had absolutely no excuse to delay the passing of such orders as the urgency of the case deserved until 12th November 1926. It is no doubt possible to conjecture that the Magistrate had not made up his mind as to whether there was a present real dispute concerning the land, i. e., about the actual possession of it. It is also likely that he was wavering, and was not definitely prepared to hold that the breach of the peace suggested by Party No. 1 and the police was not merely colourable and made to induce him to deal with questions properly cognizable by a civil Court. But his sudden activity on 12th November 1926 does not justify this conjecture. The Magistrate had been practically stirred into activity, as it were on that day, and tried to mend matters by hurriedly recording a formal preliminary order under that date without complying with the requirements of the law. But he was too late by one day. He perhaps never realized that the petition contained the admission of Party No. 1 that he was actually dispossessed on 11th September 1926 and that Party No. 2 was in actual possession, and further that Party No. 1 had in para. 4 of his petition actually prayed for being restored to possession and that this was, therefore, a case in which Party No. 1 should under the prov. 1, to sub-S. 4 be treated as being in such possession, and that an order merely declaring one party to be entitled to possession and forbidding all disturbance

of such possession was insufficient, but that, if the investigation pointed to that conclusion, there was a necessity to pass an order for restoration of possession to him as "the party forcibly and wrongfully dispossessed" as contemplated by sub-S. (6) of the said section.

The Magistrate does not seem to have even cared to read to police report carefully, if it had any value at all, in his opinion. That report says that it was 10 or 12 days after the possession in execution of the decree of a civil Court was delivered to Party No. 1, that he was evicted and driven out of the land by force. We know the date of delivery of possession to be 26th August 1926. So, if the report were believed, the date of dispossession would be the 5th or the 7th September 1926 and not 11th September 1926 as put down by Party No. 1 in his application. The Magistrate was in that case bound to pass an order within two months from whichever of these dates was correct, i. e,, before 5th or 7th November 1926. In that case the passing of the order was delayed by seven or five days.

Moreover, the Magistrate curiously enough mentioned the area in dispute as being 98 acres 1 guntha in his preliminary order dated 12th November 1926, but this was not the case of Party No. 1, who complained of dispossession from 9 acres 1 guntha of land only. A Magistrate has no jurisdiction to pass an order in respect of a larger area of land than was included in the proceedings: cf. *Uttim Singh* v. *Jodhan Rao* (1).

Sub-section 4, S. 145, directs that:

> The Magistrate shall * * * * if possible decide whether any and which of the parties was, *at the date of the order* before mentioned, in such possession of the said subject.

I have italicized the important words as they indicate the critical date for the purpose of determining actual possession. All that the Magistrate has, however, found is that possession of the field in question was delivered to Party No. 1, and that Party No, 2 wrongfully obstructed him but when the obstruction was caused is not found. This does not amount to a decision that Party No. 1 (in spite of his own admission to the contrary) was or continued in possession *at the date of the order* i. e., on 12th November 1926.

(1) A. I. R. 1924 Pat. 589=3 Pat. 288.

What the legislature intended by enacting Ch. 12, Criminal P. C., was to provide means of preventing breach of the peace between rival claimants of property until their claims have been decided in the civil Court. Prompt preventive action and not lethargy is what .is wanted in cases of this kind. But the Magistrate must himself be satisfied, and he must form his own judgment and not proceed automatically upon a mere opinion of the police or the direction of some other officer: cf. *Kulada Kinkar Roy* v. *Danesh Mir* (2). His decision that there is a dispute likely to cause breach of the peace is the very foundation of all subsequent investigation, and without it the latter is void and inoperative. The object of S. 145 being the prevention of a breach of the peace the foundation of jurisdiction is its likelihood: *Ram Chandra Das* v. *Monohur Roy* (3) and *Debi Prasad* v. *Sheodut Rai* (4). Thus both the fact that he is satisfied and the grounds thereof must appear in the first order directing the issue of notice. Then again, as the critical date for determining actual possession of the subject of dispute was the date of the preliminary order and this might give an unfair advantage to a person who was forcibly dispossessed from it, the legislature has thought fit, to enact the first proviso to sub-S. 4, and thus practically to give to the Magistrate a margin of two months' time to come to a decision on the question—whether the case is a fit one for the issue of the preliminary order—by limiting the period of want of possession to only two months next before the date of the preliminary order. It has thus imposed on the Magistrate a very great responsibility of being alert, active and prompt, or else how is he going to prevent an imminent danger of breach of the peace? If he delays, then, he is sure to indirectly deprive the party admitting dispossession of the benefit of a presumed continuity of his possession after the lapse of that period from the date of his admitted dispossession, which the law declares him to be entitled to under the said first proviso.

If one were to go strictly by the clear admission of dispossession made by

(2) [1906] 33 Cal. 33=2 C. L. J. 271=10 C. W. N. 257 (F. B.).
(3) [1894] 21 Cal. 29.
(4) [1908] 30 All. 42=1 A. L. J. 705=(1907) A. W. N. 265.

Party No. 1 himself, it is difficult to reconcile with it the Magistrate's conclusion (unless he wished to decide the question of title) that Party No. 1 was entitled to possession of the field until evicted therefrom in due course of law; if by the use of the expression " entitled to possession " all that he could and must be deemed to have decided (if at all) was that he simply declared that the party whom he finds to be in actual and exclusive possession, and who should be permitted to retain such possssion until evicted in due course of law, was Party No. i, then I must say his order is inconsistent with the aforesaid admission.

It will thus be seen that the Magistrate has not only failed to appreciate the true and proper scope of the application, and to pass orders according to law, but by his dilatory procedure, deprived the party dispossessed of the valuable right to claim benefit of the prior presumption of continuance of his possession for a space of two months next prior to the date of his preliminary order, and thus defeated the very object with which the legislature enacted the first proviso to sub-S. 4 as shown above.

Though fully realizing that it is anamalous, the Sessions Judge thinks that the possession of Party No. 2 even though wrongful, ought to have been maintained. As an answer to this suggestion the learned pleader for Party No. 1 brings to my notice a decision of Wallace, J., of the Madras High Court in *Krishnam Raju* v. *Swami Naidu* (5), wherein he declined to

subscribe to the proposition that a party taking possession by force must be retained in possession if owing to delay after the dispossessed party has asked the Court to take action, over two months have elapsed before the Court finally makes up its mind to issue a preliminary order.

But in the present state of the record and in the absence of a clear finding by the Magistrate that one of the parties was in actual possession *at the date of the preliminary order*, and as to who that party was, I am not prepared to confirm the possession of Party No. 2 as suggested by the Sessions Judge.

Under these circumstances following the precedents of *Bhuban Chandra Hazra* v. *Nibaran Chandra Santra* (6) and *P. Subba Goundan* v. *S. Subbayya Gounda* (7), I set aside the order of the Magistrate and direct him to rehear the parties, and after recording a statement of reasons for his decision to dispose of the matter in accordance with law. If he comes to the conclusion that the delivery was only of symbolical possession on 26th August 1926, and the Party No. 1 did not perform any acts of actual possession between that day and the date when he says he was obstructed, and that the actual possession remained with Party No. 2 down to a date within two months of the date of his preliminary order dated 12th November 1926, then the so-called forcible dispossession alleged by him to have taken place was no dispossession at all, much less would it be a wrongful act of Party No. 2. The result of such a conclusion would be that there was no real dispute and the breach of the peace, which was suggested, was not likely to take place, and was only a colourable device to induce him (Magistrate) to deal with question properly cognizable by a civil Court to recover possession of property through his intervention. It is open to him to hold accordingly and drop the proceedins as provided by sub-S. 5 of the said section. If he, however, be of a contrary opinion he should decide the case according to law. It may be pointed out here that if for any reason he is unable to satisfy himself as to which of the parties was then in actual possession of the subject of dispute, he may proceed under S. 146, Criminal P. C. The proceedings are returned with a copy of this order for necessary action.

N.K. *Order accordingly.*

(5) A. I. R. 1927 Mad. 816.
(6) A. I. R. 1922 Cal. 382=49 Cal. 187.
(7) A. I. R. 1923 Mad. 142.

A. I. R. 1928 Nagpur 85

FINDLAY, J. C

Dewaji Kunbi—Deft. 1—Appellant.

v.

Amrullasha and *others*— Plaintiff and Defendants—Respondents.

Second Appeal No. 35-B of 1926, Decided on 17th October 1927.

(a) *Landlord and Tenant —Co-landlords — Notice for ejectment of annual tenants by one of the co-landlords who is manager of the estate is valid.*

A notice from the certificated holder alone is a valid one for ejectment of annual ten-

ants and it is not open to an annual tenant, merely because some of the co-landlords may desire that he should be retained in the land, to claim that an ordinary act of management done by the certificated holder who has, moreover, by agreement and by long practice been recognized as the manager of the estate, is not valid. [P 85 C 2]

(b) *Berar Land Revenue Code, Ss. 78 and 79 (2)—Landlord and tenant—Notice of enhancement of the rent does not preclude landlord from issuing a further notice for ejectment of tenants.*

In the absence of an express provision contained in S. 79 (2) that it was to be subject to the provision contained in S. 78 it is preposterous to suggest that the more drastic remedy afforded by S. 79 is or could be abrogated by action under S. 78 and so mere issue of a notice of enhancement does not bar the landlord's resort to action for ejectment if that is otherwise legally open to him. [P 86 C 1]

C. B. Parekh—for Appellant.

M. R Bobde—for Respondents.

Judgment.— The judgment in this appeal will also govern the connected second appeals Nos. 36, 37, 38 and 39-B of 1926, the facts of which are, to all intents and purposes, similar.

The facts of the case are sufficiently clear from the detailed judgments of the Additional District Judge in civil appeal Nos. 13 and 14 of 1925, in his Court and I find it unnecessary to repeat them here. Each of the defendants has now come up on second appeal against the judgment and decree of the lower appellate Court ordering him to give up possession of the survey number, or part of the survey number concerned as the case may be.

It has not been disputed in this Court that the defendants are annual tenants, and only two points have been pressed out of the various grounds of appeal. The notice for enhancement of rent in the present case was given on 28th August 1922, and the notice of ejectment was given on 5th December of the same year. The first point for decision is whether the plaintiff respondent 1, Amrullasha, could himself validly give such notice. It is urged in this connexion that he cannot, by himself, represent the landlord and that as a matter of fact, the other cosharers are opposed to his claim. The lower appellate Court has not dealt in detail with the finding of the first Court, which is to be found in para. 7 of its judgment in suit 182 of 1923 and in para. 12 of its judgment in suit 197 of 1923, in which reasons are given for holding that the plaintiff and his predecessors have been solely managing the village. The kararnama to this effect has also been proved and it is impossible to find any reason for disturbing this finding of fact which has been arrived at by the first Court, nor has, indeed, any such reason been alleged. On this ground alone, therefore, the first contention urged in appeal was bound to fail.

Apart from the two cases quoted by the lower appellate Court, on which it relies for its finding that a notice from the certificated holder Syed Amrullasha alone was a valid one. I find myself in full agreement with the remarks of Mittra, A. J. C., in Second Appeal No. 408-B of 1926, decided on 17th March 1917, on this point. It is important, moreover, to remember that an estate like the present one is, in reality impartible and the persons beneficially interested in it cannot ordinarily demand more than the share of income they are entitled to. Whether or not they are entitled to revise or cancel any agreement for management, which was come to amongst themselves, is a matter I am not called upon to decide, but it is certainly not open to the present appellant, merely because some of such persons may desire that he should be retained in the land, to claim that this difference of opinion amongst the co-sharers would render invalid an ordinary act of management done by the certificated holder who has, moreover, by agreement and by long practice, been recognized as the manager of the estate. I find, myself, therefore, in full agreement with the Additional District Judge in his finding that the notices in question were valid, although signed by Syed Amrullasha alone.

The second point urged on behalf of the appellant seems to me to have even less substance. This is that having issued notice for enhancement of rent under S. 78, Berar Land Revenue Code, 1896, it was not open to Syed Amrullasha to issue notice of ejectment under S. 79 idem. These tenants are annual tenanats only and, in the absence of an express provision contained in S. 79 (2) that it was to be subject to the provision contained in S. 78, it is presposterous to suggest that the more drastic remedy afforded by S. 79 is, or could be abrogated by action under S. 78. Moreover, at any time, the landlord has

a right to ask for the rent of the holding to be enhanced under S. 78 entirely irrespective of the tenant who may hold it during the following year for which enhancement is asked. In view of the absolute provision contained in S. 79 (2), it is impossible to my mind to suggest that the mere issue of a notice of enhancement bars the landlord's resort to action for ejectment if that is otherwise legally open to him. Moreover, in the present instance, the notice in question was apparently not sent through a revenue officer as is required by sub-S. (8), S. 78. It has been proved also that each of the appellants declined to pay the enhanced rate, evidence on which point was properly admitted in the lower appellate Court and whose finding thereon I agree with. The replies of the appellants in which they not only declined to pay the enhanced rent but also, in effect, contested their landlord's title, speak for themselves. These replies were received before notice of ejectment was given and, in those circumstances, it seems to me futile to suggest that the landlord was debarred from having recourse to his remedy under S. 79 (2). The second contention in the appeal, therefore, fails and I am unable to see any reason for interference with the judgment and decree of the lower appellate Court.

The appeal is accordingly dismissed. The appellant must bear the respondents' costs. Costs in the lower Courts as already ordered.

S.J. *Appeal dismissed.*

A. I. R. 1928 Nagpur 86

KINKHEDE, A. J. C.

Dayaram Ganpatsa—Appellant.

v.

Dashrath Ratiram—Respondent.

Second Appeal No. 325 of 1926, Decided no 30th November 1927.

(a) *C. P. Land Revenue Act (C. P. Act 2 of 1917), S. 203—Abadi land—A tenant in one patti of a Mahal cannot hold house site in the abadi land of another patti, when the abadi land is sub-divided into pattis.*

Where the abadi of the mahal has been divided into pattis so that each pattidar has his separate abadi for the tenants or agriculturists of his patti, the agriculturists or non-agriculturists of each patti have a separate provision made for their residence in the abadi of their own patti and have no right to look to another patti or its abadi for residential quarters. [P 87 C 1]

(b) *Landlord and tenant—Abadi land—Cessation of tenancy forfeits tenant's right for site in abadi land.*

The cessation of tenancy works out an automatic forfeiture of the right to occupy the house site which at once escheats to the landlord. [P 87 C 1]

S. B. Gokhale—for Appellant.

W. R. Puranik—for Respondent.

Judgment.—It is an admitted fact that in the village of Utvad there is an imperfect partition into pattis. Even the abadi of the village has been partitioned and allocated to each patti. Plaintiff is the lambardar of patti 1, and the site in dispute forms part of the abadi allotted to that patti Defendant, no doubt, is a tenant of the village but not of patti 1. He owns land in patti 4 of which another person is the lambardar. One Bondru once held tenancy land in patti 1 but he ceased to be a tenant and thereafter he sold the site of his house to defendant. The question, therefore, was whether defendant's purchase of the site was at all operative as against the plaintiff. Plaintiff's contention was that with the cessation of Bondru's tenancy his right to the house site ceased and therefore the sale by him to defendant was null and void and conveyed no right to the site and secondly that the defendant was not a person who was legally entitled to a house site in the abadi of patti 1, merely because he possessed land in a separate patti No. 4 of the village.

The first Court held that Bondru was not a tenant at the time of the sale of the site in dispute and that defendant was not entitled to purchase an abadi site in patti 1 and decreed the plaintiff's claim for possession. The lower appellate Court upheld the decision. Hence this second appeal by the defendant.

It is contended that the wording of S. 203, Land Revenue Act, does not contemplate that where a mahal is subdivided into pattis, each patti is to be treated as a mahal, so as to disentitle a tenant of one patti from acquiring abadi site in another patti. In this particular case even the abadi of the mahal has been divided into pattis. So that each pattidar has his separate abadi for the tenants or agriculturists of his patti. Prima facie, therefore, the agriculturists or non-agriculturists of each patti have a separate provision made for

their residence in the abadi of their own patti and have no right to look to another patti or its abadi for residential quarters. Each patti must maintain its own complete autonomy and should have nothing to do with other patti, each being a self-contained patti. The various pattis have their separate lambardars and though in relation to the Government the liability of the pattidar for land revenue may not be separated, that liability is divided inter se and has been or at any rate is capable of being apportioned between the pattidars inter se. This virtually makes each patti as compact as possible with its own proportionate liability for land revenue and its own tenants and agriculturists or non-agriculturists under its separate lambardar although technically it could not be called a mahal. For all practical purposes each patti enjoys all the privileges and amities which a mahal might enjoy except as against the Government. Under these circumstances I hold that the defendant who is a tenant of patti 4 was not entitled to force himself on the lambardar of patti 1, and he could not induct himself, either by means of the public auction or of the destbardarnama taken from Bondru. into the abadi site of patti 1.

Moreover on the finding that Bondru had ceased to be a tenant before the sale, a finding which binds me in second appeal, his right to the house site became forfeited in favour of the landlord of the patti in which he held land and had no longer any transferable right to the house site he occupied. The cessation of tenancy works out an automatice forfeiture of the right to occupy the house site which at once escheats to the landlord. The appeal fails and is dismissed with costs.

S.J. *Appeal dismissed.*

A. I. R. 1928 Nagpur 87

KINKHEDE, A. J. C.

Rushi Bhiku and *others*—Defendants—Appellants.

v.

Rushi Sheoram — Plaintiff —Respondent.

Second Appeal No. 630 of 1926, Decided on 28th October 1927, from Decree of the Dist. Judge, Bandara, D/- 30th August 1926.

(a) *Easements Act, S. 15—Customary right—Appropriating and carrying earth for making pots for 20 years—Lawful inference is that grant has lawful origin.*

In order to establish a customary right to do acts such as appropriating earth on another's property, the enjoyment must have been so acquiesced in by the owner as would give rise to the inference that originally by agreement or otherwise the usage (of which the repeated and open enjoyment is only a proof) had become a customary law of the place in respect of the persons and things which it concerned. The period of 20 years is sufficiently long to enable a Court to draw the legal inference that the exercise of the right to appropriate and carry away the earth for making pots must have had a lawful origin in a grant : *A. I. R.* 1924 *Patna* 303 ; 23 *Bom.* 666, *Foll.* [P 88 C 1]

(b) *Easements Act, S. 52—Right to excavate the earth and carry it away for the purpose of making pots is a license irrevocable at the option of the owner of the land.*

The right to excavate the earth and to carry it away for the purpose of making pots is in the nature of a benefit arising out of land or amounting to an interest in land, and as such it will make the license irrevocable at the option of the owner of the land. [P 88 C 2]

(c) *Civil P. C. S. 100—Acquiescence for long period giving rise to presumption of grant is question of law.*

Whether from the proved or continued user for a long number of years acquiescence, giving rise to presumption of grant can be inferred is question of law. [P 88 C 1]

D. T. Mangalmurti—for Appellants.

M. R. Indurkar—for Respondent.

Judgment.—A portion measuring 75 acres of the plaintiff's absolute occupancy holding has been recorded, at the recent settlement of the village in which it is situated, as gair mumkin land, because the defendants, who form the community of Kumbhars of the village, make use of the earth of that portion for making pots. The lower appellate Court has decreed the plaintiff's claim on the ground that the customary right to appropriate the earth of the said portion is not proved to be reasonable even though the length of the period of the enjoyment as found by the Court is 20 years. The learned District Judge is right in holding that the right claimed by the defendants is not in the nature of an easement acquired by custom. The defendants-appellants accept this finding as correct, but contend that on the very findings arrived at by the Court, it should have been held that from the length of continued user for 20 years a lawful grant of the right could be presumed in the circumstances of the case.

There is a distinction between a customary right and a customary easement. For the acquisition of a customary right no particular period of enjoyment need be proved. What the defendants pleaded was a local custom which entitled them to commit on plaintiff's land acts, which if there had been no such custom, would be acts of trespass. In order to establish a customary right to do such acts on the property of another, the enjoyment must have been so acquiesced in by the owner as would give rise to the inference that originally by agreement or otherwise the usage (of which the repeated and open enjoyment is only a proof) had become a customary law of the place in respect of the persons and things which it concerned. Whether, from the proved or continued user for 20 years, such an acquiescence on the part of the owner, as would give rise to a presumed grant, could be inferred would be a question of law on which it is open to this Court to entertain a second appeal. I think that the period of 20 years is sufficiently long to enable this Court to draw the legal inference that the exercise of the right to appropriate and carry away the earth for making pots must have had a lawful origin in a grant ; otherwise, the owner would not have kept quiet over it; surely he would have protested against such user. In a case decided by the Patna High Court in *Bikoo* v. *Narayan* (1), the right of the inhabitants of a village to take earth from a piece of waste land to repair their houses after inundations was affirmed as being not unreasonable. In *Mohidin* v. *Shivlingappa* (2), where the plaintiff sued for an injunction to restrain the defendants from exercising the customary right which they, as members of a certain section of the Mahomedan community, had been for many years in the habit of exercising by burying their dead near the darga in plaintiff's land, it was held that such a right was recognized as a local custom, especially as it was confined to a limited class of persons and a limited area of land. The following observations sufficiently meet the learned District Judge's objection against the custom pleaded in the present case being regarded as reasonable :

> Next we have to consider the second objection and say whether this custom of burial can be disallowed as unreasonable. We hesitate to arrive at such a conclusion. Amongst all races that bury their dead, this right of burial in a particular locality is one that is most dearly prized, and although the plaintiff's land may be rendered practically useless, if these tombs are multiplied exceedingly, the contingency seems too distant to justify the Courts in summarily putting an end to the right. In *Hall* v. *Nottingham* (3), the possibility that the custom there set up might have the effect of taking away from the owner of the freehold the whole use and enjoyment of his property, was not thought a sufficient ground for disallowing it. If a custom which allows lawful games to be played on another person's land at all times of the year is not an unreasonable custom it seems impossible to hold that the limited custom established by the defendants is bad. The criterion of "reasonableness" by which the case of *Lutchmeeput Singh* v. *Sadaulla Nushyo* (4), was decided, may have been a good one as regards the alleged right of an indefinite number of persons to fish in the bhils of a private owner ; but it cannot be extended as a matter of law to all customs ; for, as shown in *Hall* v. *Nottingham* (3), a custom may be good though its exercise may have the effect of depriving the owner of the soil of the whole use and enjoyment of his property. Here the defendants are entitled to claim for a limited class the right of burial in one corner of a field near a darga. The mere possibility that after many years the number of tombs may have increased so much as to deprive the owner of the use of his field, or of a large portion of it, seems too remote to enable us to describe as unreasonable the custom in dispute.

I entirely concur in these observations and say that the custom pleaded is not unreasonable for the reasons given above by the Bombay High Court and that it is a valid custom which must be upheld in the interest of the whole village community.

It is also argued, and I think rightly, that the user which is proved in this case is not in the nature of a mere license but is a license coupled with a grant. The right to excavate the earth and to carry it away for the purpose of making pots would, in my opinion, be in the nature of a benefit to arise out of land or amount to an interest in land, and as such it would make the license irrevocable at the option of the owner of the land.

For these reasons I reverse the decree of the lower appellate Court and restore that of the first Court and dismiss the suit with costs to be paid by the plaintiff in all three Courts.

N.K. *Decree reversed.*

(1) A. I. R 1924 Patna 303.
(2) [1899] 23 Bom. 666=1 Bom. L. R. 102.
(3) [1875] 1 Ex. D. 1.
(4) [1882] 9 Cal. 698=12 C. L. R. 382.

A. I. R. 1928 Nagpur 89 (1)

KOTVAL, A. J. C.

Mohanlal—Defendant—Appellant.

v.

Satyabhama and *another*—Plaintiffs—Respondents.

Second Appeal No. 234-B of 1925, Decided on 29th June 1927, from decree of Addl. Dist. Judge, Amraoti, D/- 5th February 1925, in Civil Appeal No. 247 of 1924,

Limitation Act, Art. 10—*Pre-emption—Land in possession of trespasser at the time of sale—Land admits of physical possession—Limitation begins from the time purchaser takes possession.*

Land in the possession of a trespasser at the date of the registration of the sale-deed is not land which does not admit of physical possession. Limitation for the purpose of pre-emption begins therefore to run from the time when the purchaser takes possession : (1888) *A.W.N.* 227 ; *A. I. R.* 1921 *Mad.* 554 ; *A. I. R.* 1926 *All.* 70 and 16 *N. L. R.* 37, *Foll.* [P 89 C 2]

W. R. Puranik—for Appellant.

A. V. Wazalwar—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption in which the plaintiffs have succeeded in the lower Court. The only question for decision here is one of limitation. The sale-deed in respect of the land sought to be pre-empted was registered on the 15th June 1922 and the suit was instituted on the 29th March 1924. The purchaser defendant pleaded that at the date of the registration the land did not admit of physical possession as it was in the possession of a trespasser, that the second part of Col. 3, Art. 10, Sch. 1, Lim. Act, therefore applied and that the suit was time barred. The plaintiffs pleaded and the lower Courts have found that the purchaser took possession at the end of the year 1923.

The question for decision is whether land in possession of a trespasser at the date of the registration of the sale-deed is land which does not admit of physical possession. The following authorities support an answer to this question in the negative. *Chandan Singh* v. *Chandi Prasad* (1), *Velayudham Pillai* v. *Velayuddam Pillai* (2) *Jayamaya Dasi* v. *Tulsa* (3) and the observations at p. 58 in *Jairam* v. *Sitaram* (4).

(1) [1888] A. W. N. 227.
(2) A. I. R. 1921 Mad. 554.
(3) A. I. R. 1926 All. 70.
(4) [1920] 16 N. L. R. 37=52 I. C. 940 (F. B.).

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The words " does not admit of physical possession " do not refer to the inability of the vendor in fact to give possession to the purchaser. They refer to inability both in fact as well as in law. The principle applicable is that where the vendor is in personal and immediate possession of the property sold, or where the right to such possession thereof is in the vendor at the date of the registration of the sale-deed : the property is one admitting of physical possession. In the case where a trespasser is in possession such right is with the vendor and the property therefore admits of physical possession. In the case of a tenant in possession or usufructuary mortgagee in possession such right is not in the vendor and the property is therefore one which does not admit of physical possession. It must therefore be held that land in the possession of a trespasser at the date of the registration of the sale-deed is not land which does not admit of physical possession. Limitation therefore began to run from the end of the year 1923 when the purchaser took possession and the suit was within time.

The appeal fails and is dismissed with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 89 (2)

FINDLAY, J. C.

Ganpat—Defendant—Applicant.

v.

Lahana—Plaintiff—Non-applicant.

Civil Revn. No. 345 of 1926, Decided on 29th September 1927, from order of Small Cause Court Judge, Ramtek, D/- 5th August 1926, in Small Cause Suit No. 285 of 1926.

(a) *Provincial Small Cause Courts Act* (9 *of* 1887), *Art.* 3, (y)—*Money advanced by one party to another in connexion with marriage which subsequently fell through—Suit for recovery is for damages of breach of contract of marriage and is not cognizable by a Court of Small Causes—Contract Act, S.* 73.

A suit for the recovery of money advanced by one party to another in connexion with marriage which subsequently fell through is not one for the mere recovery of a loan or refund of money advanced but is in essence one for damages in respect of the breach of contract of marriage and so is not cognizable in the Court of Small Causes: 15 *Cal.* 833, *Foll.*: 18 *C. W. N.* 36 (*S. N.*) and 19 *C. W. N.* 28 (*S. N.*) *Dist.* [P 90 C 2]

(*b*) *Contract Act, S. 23—Contract to give son or daughter in marriage in consideration of money received is void and unenforceable by law—A suit for recovery of money already advanced can, however, lie.*

A contract by which a father or a guardian is paid money in consideration of his giving his son or daughter in marriage is against public policy and cannot be enforced in a Court of law: 22 *Bom.* 658, 32 *Mad.* 185 and 37 *Mad.* 393, *Foll.* [P 90 C 2]

The guardian or parent to whom such a sum of money had been promised in consideration of his giving his son or daughter in marriage might not be able to recover the sum so promised on the ground that the agreement is void as opposed to public policy, yet a suit can lie to recover money which has already been advanced in case the marriage falls through there having been a breach of the marriage contract: 41 *Mad.* 197 and 33 *Bom.* 411, *Foll.* [P 90 C 2]

K. P. Vaidya—for Applicant.

M. R. Indurkar—for Non-applicant.

Order.—The first point raised in this application is that the present suit was not triable by the Court of Small Causes having regard to Art. 35 (g), Small Cause Courts Act. In the plaint it was alleged that Rs. 100 was advanced, so to speak, as consideration for marriage contract, as well as Rs. 15 for expenses and Re. 1 as a pledge. On behalf of the plaintiff it was further pled that the Rs. 100 were paid, as per custom, with the object of defraying generally the expenses of the *pat* marriage.

I have been referred by the pleader for the non-applicant to the decisions in *Jagornath* v. *Radha Sunder* (1) and *Giris Chandra* v. *Purna Chandra* (2) to support the position that a claim like the present one for money advanced in respect of a marriage contract is recoverable in the Small Cause Courts. The ratio decidendi of these decisions seems to me to be that the suit is, in essence, one for a mere refund of money advanced, and not for compensation, having reference to S. 73, Contract Act. In *Kali Sunker Dass* v. *Koylash Chunder Dass* (3), Pigot and Gordon, JJ., held that a suit to recover money spent in feeding relatives, in paying carriage hire and musicians in connexion with a marriage, which fell through, was not cognizable by a Small Cause Court. I concur in this opinion.

For my own part, and with all deference to the Judges who decided the Calcutta High Court cases quoted above, I am of opinion that, in essence, the present suit is, in reality, one for damages in respect of the breach of contract of marriage. It would be a reasonable construction to put on the contract in question that Rs. 100 was paid thereunder and that this sum, in reality, represented the amount of compensation which could be claimed if there was a breach of the contract. I do not think that, in the circumstances, the suit can properly be regarded as one for the mere recovery of a loan or refund of money advanced. The payment was inextricably connected with the marriage contract and it seems to me to follow that the suit for its recovery comes within the letter and the spirit of Art. 35 (g), Small Cause Courts Act. I am of opinion, therefore, that the suit was not cognizable in the Court of Small Causes.

It has, however, been urged on the strength of the decisions in *Dholidas* v. *Fulchand* (4), *Venkata Kristnayya* v. *Lakshmi Narayana* (5) and *Devarayan* v. *Mutturaman* (6), that the suit did not lie as the payment was contrary to public policy and void under S. 23, Contract Act. These decisions so far support the proposition that a contract by which their father or their guardian is paid money in consideration of his giving his son or daughter in marriage is against public policy and cannot be enforced in a Court of law. It was, however, pled in the present case on behalf of the applicant that there was a caste custom to make such a payment as we are concerned with, the underlying idea being that the money so paid would be used in meeting the expenses of marriage. I am not, however, prepared to accept the contention offered on behalf of the defendant-applicant in this connexion. It may be that the guardian or parent, to whom such a sum of money had been promised in consideration of his giving his son or daughter in marriage, might not be able to recover the sum so promised on the ground that the agreement is void as opposed to public policy. Here, the position is entirely different. The plaintiff accepted the money in advance, and a suit can in my opinion, lie to recover that money, there having been a breach of the marriage contract: cf

(1) [1909] 13 C. W. N. 36 (short notes).
(2) [1915] 19 C. W. N. 28 (short notes).
(3) [1888] 15 Cal. 833.
(4) [1898] 22 Bom. 658.
(5) [1909] 32 Mad. 185=3 I. C. 554=18 M. L. J. 403.
(6) [1913] 37 Mad. 393=24 M. L. J. 310=18 I. C. 515=(1913) M. W. N. 200.

Srinivasa v. *Sesha* (7) and *Gulabchand* v. *Fulbai* (8). I am of opinion, therefore, that the suit in the present suit was not barred on the ground just considered.

A further question would, in any event, have arisen as to whether or not there was a caste custom to make such a payment in advance and also as to whether such a payment was intended to be used in defraying the expenses of the marriage. The suit, however, not being, in my opinion, cognizable by the Small Cause Court, must fail. The judgment and decree, revision of which is sought, are reversed and the plaintiff's suit is dismissed. The plaintiff-non-applicant must bear the defendant-applicant's costs in both Courts.

S.J. *Decree reversed.*

(7) [1918] 41 Mad. 197=34 M. L. J. 282=41 I. C. 783=6 M. L. W. 42.
(8) [1909] 33 Bom. 411=3 I. C. 748=11 Bom. L. R. 649.

A. I. R. 1928 Nagpur 91 (1)

KINKHEDE, A. J. C.

Abdul Raheman and *another* — Appellants.

v.

Mulchand—Respondent.

Second Appeal No. 347 of 1926, Decided on 15th July 1927, from decision of 1st Addl. Dist. Judge, Khandwa, D/- 15th March 1926, in Civil Appeal No. 8 of 1926.

Easements Act, S. 15—Easement—Removal of support of wall before accrual of right of easement by prescription by neighbour is not actionable.

A party has no cause for complaint if his neighbour withdrew the support of his own wall from under the plaintiff's modern superstructure before the user had ripened into a prescriptive right: *Guteley* v. *Marten*, 1 *R. R.* 269 and *Dalton* v. *Angus*, 6 *App. Cases* 740, *Foll.* [P 91 C 1]

Abdul Razak—for Appellants.
S. B. Gokhale—for Respondent.

Judgment.—On the finding the plaintiff is an encroacher on the defendant's premises, as such he deserved no sympathy, nor could any equitable considerations prevail in his favour. It is, however, said that the defendant was guilty of pulling down the plaintiff's structure which depends for its support on the defendant's existing wall, when he pulled down his own wall. In short he designedly pulled down his own wall in order to cause wrong to the plaintiff by depriving him of the side support which his (defendant's) wall afforded to plaintiff. On behalf of the defendant it is argued that the plaintiff's superstructure was admittedly a modern one and, had it been permitted to continue to rest itself on the defendant's wall, plaintiff could have acquired a prescriptive right to support his modern wall on defendant's wall, and, therefore, it was lawful for the latter to withdraw the support in the manner he did. Reliance is placed upon a passage occurring in Clerk and Lindsell on Torts, 6th edn., p. 496, which I may usefully quote here:

> Not only is the defendant under no obligation to take care in such a case but he may lawfully cause the damage intentionally with the very object of preventing the acquisition of a right of support, though probably the case would be reversed if the party aggrieved had, by prescription, acquired such right: *Guteley* v. *Marten* (1).

In view of this state of the law, the plaintiff has no cause for complaint if the defendant withdrew the support of his own wall from under the plaintiffs' modern superstructure only three years after its construction, i. e., before the user had ripened into a prescriptive right by 20 years enjoyment: cf. *Dalton* v. *Angus* (2) Under these circumstances I think plaintiff's claim was rightly dismissed with costs. The appeal fails and is dismissed with costs.

S.J. *Appeal dismissed.*

(1) 1 R. R. 269.
(2) [1881] 6 A. C. 740=50 L. J. Q. B. 689=30 W. R. 191=44 L. T. 844.

A. I. R. 1928 Nagpur 91 (2)

PRIDEAUX, A. J. C.

Saba—Defendant—Applicant.

v.

Dayaram and *another* — Plaintiffs — Non-Applicants.

Civil Revn. No. 252 of 1927, Decided on 1st November 1927, from order of 2nd Cl. Sub-Judge, Balaghat, D/- 30th April 1927, in Civil Suit No. 217 of 1926.

Civil P. C., S. 151—Application under O. 9, R. 9, not made within 30 days—Court cannot extend the period—Civil P. C. O. 9, R. 9.

Though a party is entitled under R. 9, O. 9, to apply for an order to set the dismissal aside, he must do so within the period of 30 days. Extension of that period cannot be made by a Court under S. 151. [P 92 C 1]

Section 151, Civil P. C. cannot be invoked to help a party who has a remedy provided by law and who has failed to take advantage of that remedy within the period of limitation prescribed : *A. I. R.* 1922 *Pat.* 479, *Foll.* [P 92 C 1]

A. V. Vazalwar—for Applicant.

M. R. Indurkar—for Non-applicants.

Order.—This is an application under S. 115, Civil P. C. The non-applicants filed Civil Suit No. 217 of 1926 in the Small Cause Court, Balaghat. On 13th December 1926 the plaintiffs were absent and the suit was dismissed under O. 9, R. 8, Civil P. C. On the 21st January this year the plaintiffs applied that their suit be restored to file and the dismissal be set aside. The Court restored the suit to file under the powers given it by S. 151, Civil P. C.

Now, it is clear that the plaintiffs were entitled under R. 9 to apply for an order to set the dismissal aside, and if they could satisfy the Court that there was sufficient cause for their non-appearance when the suit was called for hearing the Court could make an order setting aside the dismissal ; but under Art. 163, Lim. Act, the period of making such an application is limited to 30 days. Here, though the case was dismissed on 13th December 1926, the application was not made until the 21st January 1927. S. 5, Lim. Act, has not been made applicable to an application under O. 9, R. 9, and therefore that section will not apply to the present case. I am clearly of opinion that, where a definite period of limitation has been provided by law within which action must be taken, a Court is not entitled to extend such period by purporting to act under S. 151, Civil P. C. There is authority for this view: see *Ajodhya Mahton* v. *Phul Kuer* (1). S. 151, Civil P. C., cannot be invoked to help a party who has a remedy provided by law and who has failed to take advantage of that remedy within the period of limitation prescribed. In the present case the Court had no power to set aside the dismissal in the exercise of its inherent powers. I therefore set aside the lower Court's order restoring the case to file.

The non-applicants will pay their own and the applicant's costs here and in the lower Court. I fix pleaders' fees at Rs. 15.

N.K. *Order accordingly.*

(1) A. I. R. 1922 Patna 479=1 Pat. 277.

A. I. R. 1928 Nagpur 92

PRIDEAUX, A. J. C.

Vithu—Appellant.

v.

Maroti—Respondent.

Second Appeal No. 24-B. of 1926, Decided on 7th November 1927, from decree of 1st Addl. Dist. Judge, Akola, D/- 20th October 1925 in Civil Appeal No. 237 of 1924.

Hindu Law— Stridhan — Stridhan except Saudayik cannot be disposed of by woman without husband's consent during coverture.

Except in the kind known as saudayik a woman's power of disposal over her stridhan is during coverture subject to her husband's consent : 21 *Mad.* 100, *Diss. from* and 30 *Bom.* 229, *Foll.* [P 93 C 2]

S. A. Ghadge—for Appellant.

A. V. Khare and *W. B. Pendharkar*—for Respondents.

Judgment.—Defendants 2 and 3 were the daughters of one Girmaji who died in 1908. The plaintiff's story is that he purchased the property in suit from defendants 2 and 3 who inherited it from their deceased father. But defendant 1 obstructed the plaintiff in taking possession. Hence the present suit. Defendant 1 has purchased the property from defendants 2 and 3 on 7th June 1909, but the plaintiff contended that on that date they were minors ; so the sale is void. It was further pleaded that defendant 2 was not the guardian of defendant 3 in which capacity she is said to have executed the sale-deed in favour of defendant 1, and it was said that there was no legal necessity for the sale. The plaintiff's story was that defendant 2 was born on 13th June 1892 and defendant 3 on 4th November 1897. The first two defendants contested the suit. Their story was that defendant 2 is the guardian of defendant 3 and was a major at the date of the sale to defendant 1, and that the sale was made to pay off the debts of the deceased Girmaji, and further that it was a prudent act and for the benefit of defendant 3. The sale to the plaintiff was impeached on the ground of undue influence and pressure ; and defendant 3 was said to have ratified the sale to defendant 1 on 4th October 1920.

The trial Court found that defendant 2 was a minor on 7th June 1909 when she executed the sale in favour of defendant 1. Defendant 2 was found not to be the guardian of defendant 3 at that time, and the sale was found not bind-

ing on defendants 2 and 3. It was held that the sale to defendant 1 was for legal necessity and that defendant 3 did not ratify the sale, and further that the plaintiff's sale was not made under influence. The claim was decreed in full.

Defendant 1 appealed, and the lower appellate Court's finding may be summarized as follows: Defendant 2 was only 17 on 7th July 1909 and was a minor, and therefore the sale-deed of that date conveyed no title to defendant 1, and the ratification of that deed by defendant 3 could not make the transaction valid and binding even against her. There was no evidence to show that defendant 2 made any representation that she was a major, and even if she did, that would not estop the plaintiff. There was no necessity for the sale to defendant 1, it is not being proved that any debts due by Girmaji existed. Pressure or illegal influence was held not to be established in the plaintiff's sale. The Judge writes:

> The other ground on which the sale to plaintiff is impeached is that defendants 2 and 3 got the property from their father and these ladies could not alienate the property without the consent of their husbands. There is now no question of the consent of the husband of fendant 3 for that is not questioned here. There is no "proof adduced" by the plaintiff that defendant 2's husband had given his consent to the sale in favour of plaintiff. The husband Jairam (D. W. 7) denies this expressly. Plaintiff asserted as P. W. 1 that Jairam had taken part in bringing about the sale but there is no independent proof on the point. I must therefore find that defendant 2's husband did not consent to the sale in plaintiff's favour.

Holding that the wife was incompetent to sell the property without the consent of her husband, it was found that the plaintiff had no title to defendant 2's share, and the decree of the first Court was modified by decreeing joint possession to the extent of half. Against that decision the present appeal had been filed.

The appellant's arguments can be put under three heads. The first is that as Jairam, the husband of defendant 2 consented to the sale-deed dated 7th June 1909, it should be held that he consented to the sale of the property to the plaintiff. Secondly, that as the sale was not void but voidable, the husband alone was the person who could raise the plea and he was not a party to the case. It is thirdly argued that a broad view of the Hindu law on the sucject should be taken and as the two ladies were absolute heirs no consent of Jairam was necessary as regards defendant 2.

It is pointed out, and I think rightly that the Madras case quoted, namely *Salemma* v. *Lutchmana Reddi* (1) does not apply; but in the Bombay case *Bhau* v. *Raghunath* (2) it is expressly laid down that:

> except in the kind known as Saudayik, a woman's power of disposal over her stridhan is during coverture subject to her husband's consent, and without such consent she cannot bequeath it by will when she is survived by her husband, who is not shown ever to have consented to the will.

Sir Hari Singh Gour, in his work "The Hindu Code," p. 1196, states that:

> a woman cannot alienate or devise her stridhan; other than saudayik during coverture without her husbad's consent.

In the present case the stridhan was not Saudayik, and it seems to me that under the principle enunciated in the Bombay case above quoted, it was in the present case necessary for the consent of the husband of defendant 2 to be obtained to the plaintiff's sale to make it valid. I do not think that because the husband agreed to sale in 1909 it can be held that he therefore consented to a sale in 1920. It cannot be held that he gave his general power to dispose of the property. The husband is not a party to the present case, but it somes to me that defendant 2 can take the plea, and finding of the lower appellate Court that Jairam did not consent to the alienation in favour of the plaintiff seems to me correct. The plaintiff cannot therefore under that sale recover defendant 2's share of the property.

The result is that this appeal fails and is dismissed with costs. The appellant will pay the respondent's costs.

S.J. *Appeal dismissed.*

(1) [1898] 21 Mad. 100=8 M. L. J. 14.
(2) [1906] 30 Bom. 329=7 Bom. L. R. 996.

A. I. R. 1928 Nagpur 93

FINDLAY, J. C., AND MACNAIR, A. J. C.

Mt. Rupa—Defendant—Appellant.

v.

Chaudhari Bhairaon Prasad — Plaintiff—Respondent.

First Appeal No. 81 of 1926, Decided on 4th August 1927, from decree of Addl. Dist. Judge, Narasinghpur, D/- 27th Aug. 1926, in Civil Suit No. 16 of 1924.

(a) *Evidence Act, S. 74—Records of acts of public officers do not prove all facts stated therein.*

Under S. 74, Evidence Act, documents forming records of the acts of public officers are public documents, but they do not furnish proof of all facts to which they refer. [P 95 C 1]

(b) *Evidence Act, S. 111 — Hindu widow whose previous mismanagement was proved must show that her subsequent management will be in the interests of the reversioners.*

It was for the widow to rebut the inferences drawn from her conduct during the period by proving that her management subsequent to the date when she came back into possession showed due consideration for the interests of the reversioners, where it was proved that a widow made acts of alienation and waste when she was in possession of the estate, and the party suing relied on acts of waste during that period. [P 95 C 1]

(c) *Hindu Law — Widow — Certainty of future mismanagement is a ground to deprive a widow of management—Civil P. C., O. 40, R. 1.*

Though thirty years have elapsed since the widow mismanaged the property and that the other acts of waste were committed when she was out of possession and in receipt of pittance, but when it is certain that, if she is allowed to manage the property, it will be ruined.

Held : that there is ground to deprive the widow of management. [P 96 C 2]

(d) *Hindu Law—A Hindu widow can waste neither moveable nor immovable property.*

A widow has no more right to waste moveable property than immovable. [P 96 C 1]

H. S. Gour and *N. G. Bose*—for Appellant.

A. Razak—for Respondent.

Judgment.—Chaudhury Patiram died in 1889 leaving two widows Mt. Kesar and Mt. Rupa, of whom Mt. Kesar was the senior. The widows quarrelled, and it is admitted that the estate deteriorated very rapidly. In 1894 the Court of Wards assumed superintendence of the estate and borrowed a considerable sum to pay off debts. In 1904 the Court of Wards relinquished the estate. A mortgage-deed was executed in favour of Raja Gokuldas and a lease of the estate was given to the respondent Bhairaon Prasad who is a reversioner. In 1910 the son of Raja Gokuldas sued for foreclosure of this mortgage. Mt. Kesar died soon after the suit was instituted. Mt. Rupa's conduct with regard to this suit was not consistent. At times she contested the suit and at times supported the mortgagee. She presented an application on 12th July 1913 asking that the preliminary foreclosure decree should be made final as she had come to terms with the mortgagee. Again on 5th August 1913, after the Court of Wards had again assumed management in 1913 in order to save the estate, she denied the authority of the Court of Wards to pay the decretal amount and asked that the decree should be passed in terms of the compromise arrived at between her and the decree-holder. Some part of the property was sold and the decree of Raja Gokuldas's mortgage was satisfied. The estate remained under the Court of Wards till 4th April 1923 when Mt. Rupa obtained possession of the estate.

The suit out of which this appeal arises was instituted some eight months later. The plaintiff asked that Mt. Rupa should be deprived of the management of the estate and that the estate should either be made over to him for management or that a receiver should be appointed by the Court. The grounds on which he based this prayer were that Mt. Rupa's conduct during the period between her husband's death in 1889 and the relinquishment of the estate by the Court of Wards in 1923 showed that she could not be trusted to deal with the estate in a manner consistent with her limited rights in it. He alleged that she had wasted the property during the period from 1889 to 1894 when she and her co-widow were in joint possession, and that during the period when she was not in actual possession she had been guilty of various acts prejudicial to the estate. The cause of action arose on 4th April 1923 when Mt. Rupa obtained possession of the estate and was placed in a position where she had opportunity to ruin the estate.

The learned District Judge has found that the plaintiff is the reversioner of the deceased Patiram and is entitled to maintain this suit. He has found that Mt. Rupa was responsible to a large extent for the serious mismanagement of the estate from 1889 to 1894. Patiram left a fine estate and a considerable sum in cash and by 1894 the widows had succeeded in wasting the cash balance and incurring debts estimated at Rs. 32,000. He has also found that she opposed the partition of mauza Motigaon for improper reasons and thereby caused considerable loss to the estate : that she did her best to put an end to the rights of the reversioner in the estate by getting it foreclosed when there was no necessity for foreclosure : and that she tried to postpone the rights of the then reversioner by giving false

evidence in support of one Munda. These findings led to the conclusion that the defendant cannot be trusted to deal with the estate without prejudice to the reversioner, and accordingly it was directed that the estate should remain during the lifetime of Mt. Rnpa in the custody and under the control of a competent receiver and manager appointed from time to time by the civil Court.

Mt. Rupa appeals. The first point urged before us is that the learned Judge has made an improper use of letters which passed between various Government officials. We consider that there is some substance in this argument. Under S. 74, Evidence Act, documents forming records of the acts of public officers are public documents, but they do not furnish proof of all facts to which they refer. Statements in these letters that Mt. Rupa had acted in a particular way are merely the opinions reached in consequence of investigations by the writers of the letters in question. We do not propose to base our judgment on such statements.

In the first three grounds of appeal it is urged that the plaintiff must prove acts of alienation or waste subsequent to 4th April 1923 when the appellant came into possession of the estate. It is sufficient to say that the suit was filed a few months after 4th April 1923 and the plaintiff relies on acts of waste before that time. It was open to the appellant to rebut the inferences drawn from her conduct prior to 4th April 1923 by proving that her management subsequent to that date showed due consideration for the interests of the reversioner, but it is not urged before us that she has adduced reliable evidence to this effect.

The next point urged is that, during the period from 1889 to 1894, the appellant was little more than a girl and was not responsible for the management of the estate. It is unfortunate that the learned Sub-Judge has relied on opinions expressed by Government officials on this point and has not referred to the oral evidence : but he has referred to the pleadings of the defendant. She stated in her pleadings that she quarrelled with her co-widow and there was litigation between them ; she borrowed partly for the purpose of paying her husband's debts and partly for the expenses of this litigation. If she borrowed money to pay her husband's debts, she must have taken a prominent share in the management of the property. As D. W. 1 she states :

> There was no litigation between me and Mt. Kesar. I do not know if the allegations regarding disputes between me and Mt. Kesar are true or not.

This statement is opposed to her pleading. In view of her pleading of facts from which it can be inferred that she took a large share in the management of the property, the evidence of Bhairaon Prasad (P. W. 1) that Mt. Rupa managed all the villages (this may mean all the villages except Niwari) appears perfectly credible. Mt. Janki (P. W. 2) says that Mt Rupa spent the whole of her husband's property, and Baldeo Prasad (P. W. 4) says that Mt. Rupa had about 40 or 50 servants and she wasted the whole estate. We see no reason to distrust this evidence. An attempt was made in the lower Court to show that Patiram died in debt and did not leave much moveable property, but it was admitted before us that Patiram left considerable moveable property and few debts, and that, whichever widow was reasonable, there was great waste during the five years following his death.

Ground 6, of the appeal challenges the finding that the plaintiff is the next reversioner, but this ground is not pressed.

The main ground of appeal is that the facts proved do not justify exclusion of Mt. Rupa, the rightful owner, from enjoyment of her estate. In Mayne's Hindu Law and Usage, 9th edn. page 957, the grounds on which a Hindu widow may be deprived of the management of her estate are considered. Specific acts of waste, or of mismanagement, or other misconduct, must be alleged and proved. The case must be a gross one. The ground of deprivation must be that she cannot be trusted to deal with the estate in a manner consistent with her limited rights. Now, the mismanagement in 1889 to 1894 was very great. It is not disputed that a fine estate with few debts and a large amount of moveable property came into the hands of two widows. After five years, it is admitted, the moveable property practically disappeared, and a debt of over Rs. 30,000 had been incurred. We have held that Mt. Rupa was to a large extent responsible for this waste. It is clear that, if such waste recurs, the estate of the reversioner will be greatly diminished. In Mayne's Hindu

Law, para. 645, it is stated that it is now finally settled as regards cases governed by the law of Bengal and Benares that the same restrictions on the power of disposition of a widow apply to moveable property as to immovable property. A widow has no more right to waste moveable property than immovable. There is, then, very strong reason for the appointment of a receiver if there is reasonable ground for belief that Mt. Rupa will now behave in the same way as she behaved some 30 years ago.

During the interval, though Mt. Rupa was not in possession, she had still opportunity to inflict damage on the property. In a document Ex. P. 42, executed by Mt. Rupa on 10th March 1909, she has admitted that her opposition to the partition of a village was not made in the interests of the estate and that this opposition involved considerable loss to the estate. In view of this admission it was for her to rebut the statements admitted by her. We hold, then, that in her capacity of owner she caused damage to the estate by opposing a beneficial partition. Later in 1913 she objected to the attempts made by Bhairaon Prasad and the Court of Wards to pay off the mortgage debt and avert foreclosure : she wanted to allow the estate to be foreclosed. It was possible to pay off this debt by the sale of portion of the estate and thus to preserve a very valuable residue for the reversioner. Mt. Rupa subsequently stated that she was to be given something from the estate by the mortgagee, if foreclosure took place. There could not be a clearer case of attempting to deal with the estate without regard to the rights of the rever ioner. Again, in 1914 one Munda brought a suit for a declaration that he was the next reversionary heir in Niwari e tate Ex. P. 10 is a copy of Rupa's deposition in the case. She stated that the plaintiff is the son of Karansha by his wife Mathura. When a previous statement was shown to her she made a number of varying statements ending in an allegation that the previous statement has not been recorded correctly. It has been held that Bhairon Prasad is the next reversioner to the estate. In view of Mt. Rupa's previous statement it must be held that she made a statement which she had no reason to believe to be true with the object of depriving Bhairaon Prasad of his rights. Mt. Rupa as D. W. 1 states that she assisted Raja Gokuldas to foreclose the mortgaged property as the plaintiff had given a lot of trouble and her evidence in the case filed by Munda appears to have been given from the same motive.

We have considered the facts (1) that 30 years have elapsed since Rupa mismanaged the property, and (2) that the other acts of waste were committed when she was out of possession and in receipt of a pittance. But we still think it almost certain that, if she is allowed to manage the property, it will be ruined. We therefore consider that there is ground for depriving Mt. Rupa of management and dismiss the appeal with costs on the appellant.

The respondent has filed a cross-objection urging that he should be put in possession as manager and that Mt. Rupa should be held to be entitled only to a small sum for maintenance. It is urged that he was given some assurance by the Government and was thereby induced to give up his position as lessee in order that the estate should remain under the supervision of the Court of Wards during the lifetime of Mt. Rupa. It is clear that Mt. Rupa is not bound by any assurance which Government may have given to the respondent. Ground 1 of the cross-objection speaks of a family arrangement by which the widows have relinquished their rights in view of a fixed charge, but it is not urged that there was any such arrangement. We see no ground for interference with the order passed by the lower Court in this connexion and dismiss the cross-objection with costs on the objector. Pleader's fee Rs 30.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 96

KINKHEDE, A. J. C.

Amarchanda—Appellant.

v.

Ramjiwan and *others*—Respondents.

Misc. Appeal No. 5 of 1926, Decided on 26th July 1927, from decree of Dist. Judge, Hoshangabad, D/- 15th October 1925, in Civil Appeal No. 78 of 1925.

(a) *C. P. Tenancy Act, Sch. 2, Art. 1—Article applies to possession from part.*

The words "possession" and "person" do not comprise within their scope a claim for

" joint possession," nor do they include a dispossession or exclusion from possession by a co-owner or a co-tenant. [P 97 C 1]

(*b*) *Limitation Act, Art.* 120—*Suit for joint possession for common enjoyment is governed by Art.* 120.

A transferee of the undivided interest of one of several co-owners does not get right to immediate possession, but if he wants separate possession of his purchase, he must sue for partition. If co-owners want common enjoyment of such property before partition, they must sue for joint possession and to such suits Art. 120 applies. [P 97 C 1]

Fida Husain—for Appellant.

Shridharrao Gokhale — for Respondents.

Judgment.—This is an appeal against an order of remand. The point raised is that the case ought to have been decided as one governed by Sch. 2, Art. 1, C. P. Tenancy Act and not by Art. 120 or 144, Lim. Act. To give effect to this contention is practically to extend the meaning of the words "possession" and "person" in such a manner as if they comprise within their scope a claim for "joint possession" and include a dispossession or exclusion from possession by a co-owner or co-tenant. I am not prepared to extend their scope in this manner for the simple reason that it may be tantamount to laying down as an invariable rule of law that exclusive possession held by one of several co-owners must necessarily be presumed to be adverse so as to give the other co-owners, who are excluded, an immediate right to sue the person in possession for ejectment ; but this is opposed to all principles of law relating to joint property.

The normal presumption in such cases is that the possession of one co-owner is not on his account but on behalf of all. Moreover, a transferee of the undivided interest of one of several co-owners does not get right to immediate possession, but if he wants separate possession of his purchase, he must sue for partition. It is clear that the right of co-owners must be settled in a suit or proceeding for partition of the joint property and that if they want common enjoyment of such property before partition they must resort to, or sue for and obtain relief in one of the usual modes of such enjoyment ; and it is undoubted that the relief of joint possession is one of such modes. The plaintiff has sued for such a relief and to such a suit Art 120, Lim. Act, has been held applicable in *Ram Dayal* v. *Gulabia Bai* (1). I, therefore, think that the order of remand is proper and must be upheld. The appeal fails and is dismissed with costs.

N.K. *Appeal dismissed.*

(1) [1908] 4 N. L. R. 120.

A. I. R. 1928 Nagpur 97

MACNAIR, A. J. C.

Linganna Naganna—Defendant 2—Appellant.

v.

Ahmadshah—Plaintiff—Respondent.

Second Appeal No. 243-B of 1926, Decided on 5th August 1927, from decree of Dist. Judge, Amraoti, D/- 29th March 1926, in Civil Appeal No. 4 of 1926.

(*a*) *Transfer of Property Act, Ss* 52 & 91—*Attaching creditor purchasing equity of redemption pending mortgage suit has a right to redeem.*

The doctrine of pendente lite cannot be applied to a person who was entitled to redeem when the mortgage suit commenced, and but for the foreclosure proceedings would still be entitled to redeem, any more than it could be applied to two owners of parcels of the mortgaged property who pending the mortgage suit, transferred their parcels each to the other.

A person attached the rights of redemption in certain property. Some time later the mortgagee sued for foreclosure without making the attaching creditor a party, while the suit was pending the creditor brought the rights of redemption to sale and purchased them himself; after this the mortgagee obtained a final decree for foreclosure, whereupon the creditor sued for redemption :

Held: that the attaching creditor had a subsisting title to redeem the mortgaged property: 44 *Mad.* 33, *Diss. from.* [P 98 C 1]

(*b*) *Civil P. C., O.* 21, *R.* 103—*Suit for redemption—Criminal P. C., S.* 145.

Failure to file suit under R. 103 or within three years of criminal Court's order refusing right to present possession does not bar the suit for redemption. [P 98 C 1]

B. R. Pendharkar and *W. B. Pendharkar*—for Appellant.

A. V. Khare—for Respondent.

Judgment.—The plaintiff-respondent Ahmedshah attached the rights of redemption in certain property. Some months later the mortgagee sued for foreclosure without making Ahmedshah a party. While this suit was pending Ahmedshah brought the rights of redemption to sale and purchased them himself. After this the mortgagee-appellant obtained a final decree for foreclosure. The plaintiff sued for redemption and has obtained a decree.

The question which I have to consider is whether Ahmedshah has a subsisting right of redemption. It is conceded before me that the attaching creditor was a necessary party to the foreclosure suit, and that so long as he remained an attaching creditor, he had a right of redemption. This point seems clear from S. 91, T. P. Act. The attaching creditor can institute a suit for redemption of the mortgaged property, that is to say, he has a right of redemption; and O. 34, R. 1, Civil P. C., directs that all persons having an interest in the right of redemption shall be joined as parties to any suit relating to the mortgage.

But it is contended that the attachment no longer exists, and Ahmed is now only a transferee pendente lite of the mortgagor's rights. Reliance is placed on *Chamiyappa Tharagan* v. *Rama Ayyar* (1). With the greatest respect I state my opinion that some of the findings of the learned Judges are unsound: surely a person who is entitled to redeem must be a person who has an interest in the right to redeem. But their Lordships were considering the case of an auction purchaser who was not the attaching creditor. In the present case the auction purchaser had a right to redeem when the mortgage suit was instituted. This right subsisted when he became the owner of the right of redemption. I do not consider that the doctrine of pendente lite can be applied to a person who was entitled to redeem when the mortgage suit commenced, and but for the foreclosure proceedings would still be entitled to redeem any more than it could be applied to two owners of parcels of the mortgaged property, who, pending the mortgage suit, transferred their parcels each to the other.

I hold, then, that Ahmeshah has a subsisting title to redeem the mortgaged property. I need not deal at length with the argument that Ahmedshah has lost his right because he failed to institute a suit under O. 21, R. 103, Civil P. C., or within three years after the criminal Courts had decided that he had not a right to present possession. In both cases the suit, which must be instituted within a limited period, is to establish a right to present possession of the property. The present suit is for redemption and is not a claim to the "present possession" of the property: it does not challenge the correctness of the order under R. 100, O. 21, Civil P. C., or the order passed by the Magistrate. The appeal therefore fails and is dismissed with costs on the appellant.

N.K. *Appeal dismissed.*

(1) A.I.R. 1921 Mad. 30=44 Mad. 232.

A. I. R. 1928 Nagpur 98

FINDLAY, J. C.

Yado Prasad and *another*—Defendants—Appellants.

v.

Onkarlal Sao and *another*—Plaintiffs—Respondents.

Second Appeal No. 543 of 1925, Decided on 4th August 1927, from decree of Dist. Judge, Nagpur, D/- 29th August 1925, in Civil Appeal No. 82 of 1925.

Transfer of Property Act, S. 74—A suit for foreclosure by prior mortgagee—Puisne mortgagee in possession not made a party—Prior mortgagee cannot recover possession from puisne mortgagee.

Where the property is in possession of puisne mortgagee at the date of the foreclosure suit by prior mortgagee to which he was not made party, the prior mortgagee cannot claim possession from him : *A. I. R.* 1918 *P. C.* 34 and 13 *N. L. R.* 69, *Ref.* [P 100 C 1]

P. C. Dutt and *M. Y. Sharif*—for Appellants.

B. K. Bose and *W. R. Puranik*—for Respondents.

Judgment.—The present suit relates to a malik makbuza field No. 59 of mauza Kharsoli, Nagpur, held originally by one Sakharam and Mt. Thusi in equal shares. It will be convenient to give more or less in chronological order the main transactions with relation to the property, and I set these out below :

(i) Two separate mortgages, dated 12th June 1869, one by Sakharam and one by Mt. Thusi of the malik makbuza field and of three absolute occupancy fields for Rs. 200 and Rs. 71 respectively, in favour of Jairam, the father of plaintiff 1 and grandfather of plaintiffs 2 to 4 ;

(ii) sale of the field by Sakharam and Mt. Thusi to Mithu Sonar on 13th May 1887 ;

(iii) mortgage of the field by Mithu Sonar to Gopal Ramkrishna Andhare on 30th August 1909, a mortgage with possession ;

(iv) defendant 1, and his father, on

25th January 1910, attached the field in execution of a money decree ;

(v) on 4th April 1910, plaintiff 1 and his deceased brother Ramachandralal brought suits on the mortgages specified in (i) above; Mithu was impleaded in these suits. In the suit against Thusi and Mithu (No. 202 of 1910) for Rs. 764-8-0, plaintiffs said they did not want relief against the absolute occupancy fields which were in possession of three other parties. The defendants in that case claimed apportionment and the Court assessed a value of Rs. 2,500 on the absolute occupancy fields and on the malik makbuza field respectively. Preliminary decree for foreclosure for Rs. 362-4-0 was passed on 27th January 1913.

In the suit against Sakharam and Mithu (No. 602 of 1910), the claim against the absolute occupancy fields was also relinquished. The amount sued for was also relinquished. The amount sued for was Rs. 2,143-13-0. Preliminary decree of foreclosure was obtained on 31st August 1914. Defendant 2, Mithu, appealed and the suit was remanded for fresh trial. The present defendants applied on 3rd October 1912 to be impleaded. This was done, and they filed a written statement on 17th March 1913, raising a plea of limitation. Eventually the suit was dismissed against them and decreed against the first two defendants on 30th August 1914. The plaintiffs appealed relying on the decision in *Narayan* v. *Mahadeo* (1) and the appellate Court held that Yado Parshad, and his father's names should have been struck off and the suit decreed against the original defendants. Both these decrees were made final on 6th December 1915 ;

(vi) on 27th August 1910, Gopal Ramkrishna Andhare transferred his mortgage rights under (iii) above to Namdeo Sonar;

(vii) Namdeo Sonar transferred the same rights to defendants on 27th June 1912;

(viii) the sale under the attachment by defendant 1, and his father specified in (iv) above was confirmed on 26th April 1912, in their favour.

In the case of the suits alluded to in (v) above, Gopal Ramakrishna Andhare was not impleaded although he was in possession on the date of their institution : cf. O. 34, R. 1, Civil P. C.

In the present suit the Subordinate Judge held that the plaintiffs are entitled to possession of the malik makbuza field on redemption of the defendants' mortgage and passed decree accordingly. The defendants appealed on the grounds that plaintiffs had no right to possession at all and that, in any event, they should have been allowed to redeem the plaintiffs' mortgages. The District Judge set aside the decree of the first Court and instead passed a decree granting the plaintiffs possession subject to the defendants' right to redeem the plaintiffs on payment of Rs. 4,407-8-5 due on their mortgages.

Against the judgment and decree of the lower appellate Court the defendants have come up to this Court on second appeal, their position being that the plaintiffs-respondents not having impleaded them in Suits Nos. 202 and 602 of 1910, the present suit was barred. It was further urged that at least there should have been apportionment of the mortgage debt with reference to the relative value of the malik makbuza field as compared with that of the three absolute occupancy ones. The plaintiffs also have filed a cross-objection to the effect that they were entitled to an unconditional decree for possession, and that defendants had no right to redeem the plaintiffs' mortgages.

The position of the defendants-appellants is that as they were not impleaded in Suits Nos. 202 and 602 of 1910, Gopal Ramchandra's rights were not affected by the decrees passed in these two suits. The latter was in possession then and not either Sakharam, Mt. Thusi or Mithu ; cf. *Hargu Lal Singh* v. *Gobind Rai* (2), *Madan Lal* v. *Bhagwan Das* (3), *Het Ram* v *Shadi Ram* (4), *Raghunath* v. *Sheolal* (5) and *Sheoram* v. *Jamnabai* (6). The present suit, therefore, it is urged, is barred against them.

The defendants-appellants further urge that on the worst aspect of the case for them, they are at least entitled to apportionment of the mortgage debt : cf. *Budhmal Kevalchand* v. *Rama Yesu*

(1) [1914] 10 N. L. R. 173=26 I. C. 720.

(2) [1897] 19 All. 541=(1897) A. W. N. 154 (F. B.).
(3) [1899] 21 All. 235=(1899) A. W. N. 41 (F. B.).
(4) A. I. R. 1918 P. C. 34=40 All. 407=45 I. A. 130 (P. C.).
(5) [1917] 13 N. L. R. 69=39 I. C. 849.
(6) A. I. R. 1923 Nag. 273=19 N. L. R. 18.

Sangle (7), *Imam Ali* v. *Baij Nath Ram Sahu* (8) and *Hari Kissen Bhagat* v. *Veliat Hossein* (9).

The position of the plaintiffs-respondents is now that they only claim to redeem the defendants' mortgage. Admittedly, they did not make the defendants parties in the suits of 1910. They allege, however, that they now stand in the mortgagor's shoes and whatever rights of redemption he had, they now possess. They have in short an absolute right of redemption subject only to the defendants' adverse right to redeem : cf. *Patiram* v. *Ghasiram* (10).

There can, I think, be no question but that the plaintiffs had in this connexion a dual position: (a) as prior mortgagees and (b) as owners of the mortgagor's equity of redemption: cf. *Hukum Singh* v. *Lallanjee* (11), *Birinchi Singh* v. *Saroda Prasad Mukherji* (12) as well as *Dhanwante Chaudhurani* v. *Hargovind Prashad* (13) and *Hassanbhai* v. *Umaji* (14).

The argument afforded on behalf of the plaintiffs-respondents accordingly was that they stand in the shoes of the original mortgagor and possess the mortgagor's equity of redemption. But on the facts of the present case, there is this all important difference that they deliberately refrained from making Gopal Ramkrishna Andhare a party in their mortgage suits, although he was in possession of the mortgaged subjects at the time they were instituted. It seems to me that, in these circumstances, the prior mortgagee having foreclosed not as against Gopal Ramkrishna Andhare, the puisne mortgagee and, moreover, the person legally entitled to actual possession at the date of the suit but only as against the original mortgagor, cannot now claim possession in the present suit as against the puisne mortgagee : cf. *Raghunath* v. *Sheolal* (5) and *Het Ram* v. *Shadi Ram* (4) Andhare, at the time of the earlier suits, had an undoubted right to redeem the plaintiffs' mortgages and the latter deliberately refrained from giving him that opportunity. The cases relied on by the learned District Judge for the opposite proposition, viz. *Hukum Singh* v. *Lallanjee* (11) and *Dhanwante Chaudhurani* v. *Hargobind Prashad* (13) are, in my opinion, distinguishable from the present, inasmuch as here not only did the present defendants apply to be impleaded but Gopal Ramkrishna Andhare was in possession of the field at the time of institution of the suit. The defendants had, moreover, in existence at the time, as shown by the District Judge in para. 7 of his judgment, a further right to redeem the property as attaching creditor. I am, therefore, of opinion, for the above reasons that the present suit is barred. The plaintiffs are not, in my opinion, entitled to possession. The judgment and decree appealed against are accordingly reversed and instead a decree will issue dismissing the plaintiffs' suit. The plaintiffs-respondents must bear the defendants-appellants' costs in all three Courts.

N.K. *Appeal allowed.*

(7) [1920] 44 Bom 223=55 I. C. 327=22 Bom. L. R. 68.
(8) [1906] 33 Cal. 613=10 C. W. N. 551=3 C. L. J. 576.
(9) [1903] 30 Cal. 755=7 C. W. N. 723.
(10) [1890] 3 C. P. L. R. 82.
(11) A. I. R. 1921 All. 339=43 All. 204 (F. B.).
(12) A. I. R. 1924 Pat. 452=3 Pat. 114.
(13) A. I. R. 1924 Pat. 484=3 Pat. 435.
(14) [1904] 28 Bom. 153=5 Bom. L. R. 892.

A. I. R. 1928 Nagpur 100

HALLIFAX AND KOTVAL, A. J. Cs.

Lakshmi Narayan — Decree-holder—Appellant.

v.

Shridhar and *others* — Judgment-debtors—Respondents.

First Appeal No. 53 of 1926, Decided on 19th August 1927, from decree of Addl. Dist. Judge, Hoshangabad, D/- 17th April 1926, in Execution arising out of Civil Suit No. 24 of 1915.

(a) *Civil P. C., S. 47—Once the decree had been executed, the Court has no power to entertain an application for restoring possession—Execution—Jurisdiction.*

By an auction sale in execution of a decree the purchaser got proprietary right in the whole of the village excluding occupancy rights in the *sir* land, and he was put in possession of the proprietary rights in the village including the *sir* land. Later on, the purchaser dispossessed the owner of their occupancy holding of the said *sir* land, upon which the owner applied to the Court which had executed the decree to restore them to possession of their holding.

Held : that the Court could not grant the application for possession as the decree had been completely executed, as the possession of the owners as tenants was not disturbed till the auction-purchaser actually went on the land and began to cultivate it or prevented them from doing so. [P 101 C 1, 2]

Held : further, that the application cannot be treated as a plaint under S. 47 (2), Civil P. C. [P 101 C 2]

(*b*) *Occupancy holding — Meaning of the phrase "excluding sir land."*

The phrase "excluding *sir* land" occurring in a decree was held to mean including the proprietary right, but excluding from it the occupancy right in the *sir* land. [P 101 C 1]

H. S. Gour—for Appellant.

S. B. Gokhale—for Respondents.

Judgment.—Slackness of phrase and thought is responsible for this very simple case being complicated by many irrelevant arguments in both Courts and having taken a year to try. The phrase that perhaps shows the greatest laxity of expression and has been the most misunderstood is that relating to the *sir* land in the village in question when it was sold. In every document from the preliminary decree for sale to the warrant for delivery of possession and indeed the report of delivery of possession, the village is ordered to be sold or said to have been sold *sir* zamin chhorke or "excluding *sir* land." Those words taken literally import a sale of neither the proprietary right nor the occupancy right in the *sir* land, one which would leave the original proprietor still owner of that land as *sir*. It is, however, clear that their real meaning is to include in the sale the proprietary right but to exclude from it the occupancy right in the *sir* land. But all through the case, even in this Court, most of the reasoning has been based on the literal meaning of the words, and other parts of it on their real meaning.

The only facts that are relevant are these. The proprietary right in the whole of the village of Malona, which belonged to the respondents and included 82·06 acres of *sir* land, was sold by auction in execution of a decree on the 25th May 1922 and bought by the appellant. The occupancy rights in the *sir* land were expressly excluded from the sale by the phrase already mentioned, which has lost its essential ambiguity by long usage, though it would not matter if they had not been excluded so long as they were not expressly included. On the 24th April 1923 the appellant was put in possession of what had been sold to him, that is to say of the proprietary rights in the whole village including the *sir* land. But he was not put in possession of the occupancy rights in what had been *sir* land any more than of the occupancy rights in any other land in the village. At some later date, probably within two or three months after the 24th April 1923 the appellant, who then owned the village, dispossessed the respondents of their occupancy holding of 82·06 acres.

On the 20th April 1925 the respondents applied to the Court which had executed the decree in 1923 to restore them to possession of their holding. Twelve issues were framed, all irrelevant, and the trial of them took a year and resulted in an order for the restoration of the respondents to possession, against which the present appeal has been filed. The dispute has arisen out of the irrelevant facts that the sale was under a mortgage decree held by the purchaser and that the 82·06 acres in question were not *sir* till shortly before the sale.

Though it is irrelevant it is perhaps advisable to explain how it is wrong to say, as the appellant says, that on the transfer of a village under a mortgage, whether by foreclosure or sale, the mortgagor becomes an occupancy tenant of only so much of the *sir* land as had that character at the date of the mortgage and not of that part of it which has become *sir* in the interval. Whether the land was khudkasht or banjar or tenancy land at the time of the mortgage, the mortgagor has in the interval acquired in it the occupancy right which, with the proprietary right he held before, makes up the *sir* right though it remained in a state that may be called dormant. That occupancy right is undoubtedly an accretion to the mortgaged property and, in the absence of a contract or law to the contrary, would pass with it to the mortgagee. But there is a very clear enactment to the contrary in S. 49, Tenancy Act, and the mortgagors in this case were entitled to remain in possession as occupancy tenants of all the land that was *sir* on the date of the sale.

It appears probable that the respondents' application for restoration of possession could not have been granted by the lower Court even if their ouster had been under the warrant issued by that Court. The decree had been completely executed, and any such mistake cannot be called a matter covered by S. 47, Civil P. C. A special exception is made in this respect by R. 100, O. 21, in

favour of a stranger to the decree, but the judgment-debtor is expressly excluded from the benefit of that objection. Even if he were not, the period of limitation for such an application is that provided by Art. 165, Lim. Act, which is thirty days. But the dispossession was not under the warrant at all, as the possession of the respondents as tenants was not disturbed till the appellant actually went on the land and began to cultivate it or prevented them from doing so, and that was probably in the course of the next two or three months and might have been even later.

If it were possible to treat the application as a plaint, under S. 47 (2), Civil P. C. the suit based on that plaint would be within time under Art. 1 (Suits), Tenancy Act. But that cannot be done because the dispossession has no more connexion with the execution proceedings than if it had occurred a year or even more after they had ended, instead of a few months or weeks. If the appellants file a suit at once, they may possibly get the benefit of the provisions of S. 14, Lim. Act, but that is not a matter with which we are now concerned.

The order of the lower Court will be set aside and the respondents' application for restoration to possession will be rejected. Both parties are equally responsible for the time and money wasted on these proceedings, and it will therefore be ordered that each shall pay its own costs in both Courts.

N.K. *Appeal dismissed.*

** A. I. R. 1928 Nagpur 102

FINDLAY, J. C., AND PRIDEAUX, A. J. C.

Commissioner of Income-tax—Applicant.

v.

Bansilal Abirchand—Non-applicant.

Misc. Judicial Case No. 60 of 1926, Decided on 15th February 1928, on reference made by Applicant, D/- 1st October 1926.

** (a) *Income-tax Act, S. 13—Stock jobbing business carried on for several years—Accounts kept on the method of : (1) spreading losses and profits over whole term of years or (2) taking final account when transaction closed—Method was approved.*

The assessee, who had been dealing in stock jobbing business for several years, adopted somewhat special methods of keeping accounts, namely, either to spread the profits or losses over the whole term of years in which transactions occurred or to take final losses or going at the end of the period when the transactions completely ceased. The Assistant Commissioner of Income-tax was of opinion that the assessee should have closed his share account during each of the years and the loss should be claimed every year.

The Commissioner of Income-tax, in dealing with the assessee's appeal was also of opinion that the method of account adopted by the latter was not permissible as the loss could not be regarded as the loss of the previous year but represented in reality the loss of various previous years: [P 104 C 1]

Held : that there was no reason why the assessee should not be allowed to claim the losses in question under the system of account adopted by him when whether the book system of account adopted by the assessee was a desirable one or not, no profits could eventually escape taxation thereunder, although possibly the income-tax authorities might in any particular case have to wait a long time before receiving profits. [P 103 C 2]

Held : further, that as the market price of shares on the stock-exchange vary immensely even from day to day, any such system based on the idea of arbitrarily closing accounts on a certain date might prove a highly artificial and unsatisfactory one. [P 105 C 1]

** (b) *Income-tax Act, S. 13—Method of accounts accepted by the income-tax officer in one transaction—He cannot object to same method in similar other transactions.*

Where the income-tax officer accepted the method of accounting adopted by the assessee in certain transactions but objected to it in other transactions of similar nature:

Held : that there was no question of the doctrine of estoppel, as a mere rule of evidence applying ; the doctrine of equitable estoppel necessarily arises. [P 104 C 2]

* (c) *Income-tax Act, S. 13—Stock valued at cost price—Market price less in year of assessment—Assessee not claiming loss on that head—Cost price should be considered.*

In a wheat-selling business, at the beginning of the account year, the assessee found himself with 2,227 bags of wheat on hand and took credit for these at the actual price he had paid for them, viz., Rs. 20 a bag. The Commissioner of Income-tax only allowed Rs. 10 a bag, as he found that in the year in question that was their actual market value. The assessee had in previous years neither showed profits nor claimed losses on this stock.

Held : that every consideration of justice and equity required that the stock should be valued at the original price paid by the assessee for it. [P 105 C 2]

* (d) *Income-tax Act, S. 4 (3) (i)—Fund alleged as for charitable purposes found completely within assessee's volition—No deduction can be claimed.*

Where certain sums alleged as set apart for charitable purposes were claimed as excluded from income on the ground that they referred to a trust fund, but it was found that there were no real elements of trust present therein

in that the assessee could, by an oral or a written order at any moment, completely alter the nature of the fund and the management, its nature and the distribution of the proceeds were entirely within his own volition and no one could compel him to spend the money in any particular way:

Held : that the amount had been properly included in the income. [P 106 C 1]

D. N. Choudhri—for Applicant.

G. L. Subhedar and *P. R. Srinivasan*—for Non-applicant.

Order.—This is a reference by the Commissioner of Income-tax under S. 66, Income-tax Act, the non-applicant being the firm of Messrs. Bansilal Abirchand, R. B. Bankers, the managing proprietor of which is Rai Bahadur Sir Bisesardas Daga.

The non-applicant has been assessed to income-tax for the year 1925-26. His income tax in certain respects has been assessed on the profits of the previous year. The non-applicant firm owns branches both in and outside the Province and indulges in various kinds of business, besides that of banking proper. The firm owns considerable property at various places and shares in a number of permanent partnerships and the like.

Five questions have been referred for our opinion :

(i) Whether the loss of Rs. 501,200, said to have been incurred on New Great Eastern Mill shares and claimed in the year under assessment should have been allowed to the non-applicant.

(ii) Whether the loss of Rs. 48,831, on account of the closure of the grain business at the Jubbulpore shop, should have been similarly allowed to the non-applicant.

(iii) Whether a similar loss of Rs. 3,564, in respect of the Katni shop should have been allowed to the non-applicant.

(iv) Whether a loss of Rs. 22,676 in respect of the value of the wheat of the Jubbulpore shop should have been allowed to the non-applicant.

(v) Whether Dharmada receipts, amounting to Rs. 8,129, were improperly included in the income of the non-applicant.

The first three questions mentioned above admittedly stand or fall together, the same principle being involved in connexion with the question of whether or not these losses could be properly claimed by the non-applicant in the year under assessment. In para. 2 of the Assistant Commissioner's report of the 15th February 1926 a fair enough description is given of the method adopted by the non-applicant in connexion with the items we have mentioned above. In the case of stock jobbing business and the like, it has apparently been the practice of the non-applicant to adopt a somewhat special method of keeping accounts. There are two such obvious methods ; one to spread the profits or losses over the whole term of years in which transactions occurred or to take final losses or gains at the end of the period when the transactions completely cease.

In the case of the New Great Eastern Mill shares the non-applicant adopted the latter method. From 1977 onwards up to the year preceding assessment the non-applicant had been dealing comparatively largely in these shares. Transactions both of buying and selling had taken place, but in the year on which the non-applicant's income is based he remained without a single one of these shares in his poseession. For the first time, therefore, then, the total loss involved in the dealings as regards these shares was claimed by the non-applicant as a set off for the purposes of income-tax assessment.

The Assistant Commissioner of Income-tax, in para. 2 of his order, dated the 15th February 1926, was of opinion that the non-applicant should have closed his share account during each of the years in which transactions in this mill shares took place. He pointed out that the fact of the non-applicant hoarding up his account of these shares for several years was apparently inconsistent with the principle underlying S. 13, Income-tax Act. The Assistant Commissioner's argument in this connexion may be put in a nutshell as follows :

The assessee did not close his accounts annually, but carried the whole thing as a book balance and accumulated the loss of three or more years in this year's account. This is not allowable by the income-tax law, as his accounts ought to be closed every year and the loss should be claimed every year.

The Commissioner of Income-tax, in dealing with the assessee's appeal, was also of opinion that the method of account adopted by the latter was not permissible. He held that the loss on these shares claimed by the assessee could not be regarded as the loss of the previous year but represented in reality the loss of various previous years in which the book balances had simply been carried forward without any actual striking of a profit or loss in any of the intervening years.

The guiding provision of law in this connexion is to be found in S. 13, Income-tax Act. That section lays down that

> income, profits and gains shall be computed in accordance with the method of accounting regularly employed by the assessee ; provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the income-tax officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the income-tax officer may determine.

Turning to para. 35 of the instructions regarding the income-tax law and rule to be found at page 97 of the Income Tax Manual, the possibility of assessing the non-applicant in accordance with the sytem of account as he has adopted, is clearly adumbrated in the last sentence of para. 1 of Instruction No. 36. For our own part we are wholly unable to see why the non-applicant should not be allowed to claim the losses in question under the system of account adopted by him. If that system of account is considered by the income-tax officer as an unsuitable or an improper one, he can issue specific orders in the matter under the proviso to S. 13, but until he has done so, we are of opinion that the system of account adopted by the non-applicant should, in the meanwhile, have been accepted for the purpose of assessment of income-tax in the year under assessment. It seems obvious that whether the book system of account adopted by the non-applicant is a desirable one or not, no profits can eventually escape taxation thereunder, although possibly the income-tax authorities might in any particular case have to wait a long time before receiving profits. Curiously enough, the Income-tax Commissioner, in his order dismissing the non-applicant's appeal, has, to all intents and purposes, admitted that in connexion with these shares the non-applicant must have incurred losses in previous years—losses which were admittedly not allowed for. In the year under assessment the Income-tax Commissioner calculates that there was an actual gain of over Rs. 24,000 as regards the dealings in these shares, but he, with a generosity which is perhaps unusual in the case of income-tax authorities, did not take this profit into account for the simple reason that he could not at that time of day allow the non-applicant for the losses in the previous years.

A very pertinent circumstance in connexion with the question we have to decide is the fact that the non-applicant has, in at least two cases, e. g., the Birla Jute Mills and the Hukumchand Mills, been admittedly taxed on petty profits derived from these shares in the preceding years—profits which were arrived at on precisely the same system of accounting which is now objected to by the Commissioner of Income-tax. In the case of these shares the account was similarly finally struck off after the last batch of shares had been disposed of and the net profits, as shown in the year, on the basis of which the assessment of income-tax was made, as included in the non-applicant's income for the purpose of assessment. It has been urged on behalf of the non-applicant that the proper procedure for the Commissioner was, under the proviso to S. 13, Income-tax Act, to have given the non-applicant due notice that, in his opinion, the income could not be properly deduced from the method of accounting employed and that a different method of account would have to be adopted. It has been urged in this connexion that a question of estoppel arises and, while we are of opinion that there is no question of the doctrine of estoppel as a mere rule of evidence applying, it does seem to us that the doctrine of equitable estoppel necessarily arises in the circumstances of the case. The Commissioner of Income-tax has for other purposes, viz., the Hukumchand Mills and Birla Jute Mills, accepted, for purposes of estimation of profits, precisely the same system of accounting which he now objects to when, as in the case of New Great Eastern Mills shares, a loss has occurred. This position seems to us contrary to the most elementary principles of justice and equity and, in reality, amounts to saying that an assessee's income in any given year is what he has made out of a profitable branch of business, but that, at the same time, any loss made in another absolutely analogous branch of his business should not be taken into account in determining what his assessable income is.

We see, moreover, that considerable difficulty is likely to arise in the method of accounting which the Commissioner of

Income-tax considers should have been adopted by the assessee. He apparently desires the assessee in each year to estimate his losses on the stock of shares in question. Any such system, it seems to us, might prove a highly unsatisfactory one. The market price of shares on the stock exchange vary immensely even from day to day and any such system, based on the idea of arbitrarily closing accounts on a certain date, might prove a highly artificial and unsatisfactory one. Under the applicant's system of keeping account, assuming it to be carried out in a business-like, thorough and straightforward fashion it seems to us inevitable that actual losses or shares in question over the whole set of transactions connected therewith will be definitely known when the transactions in these have ceased for good and all. Indeed, from another point of view, it would seem impossible in any given year in the case of shares like these to arrive at any reasonable or proper estimate of profit or loss incurred for the simple reason that it is impossible to estimate at their proper value whatever shares concerned the holder may still have in his hands.

We have already alluded to the fact that the Commissioner of Income-tax estimated that a profit of Rs. 24,000 odd had been made on these shares in the Sambat year 1977-1978, but this estimate seems to us a surely artificial one for the simple reason that, in comprising the shares on hand, the Commissioner of Income-tax took their value at the time of the transaction which occurred therein. Under the conditions then prevailing as regards such shares, any such value might be artificial and very far from the truth, and the method adopted is an extremely arbitrary one. Unless and until, therefore, the Commissioner of Income-tax sees cause to insist under S. 13, Income-tax Act, on the assessee employing another method of accounting, we are of opinion that, having regard to the provisions of S. 24, Income-tax Act, the assessee was entitled to claim a debit for the loss incurred on these New Great Eastern Mills shares. As we have pointed out, it is clear that in connexion with other shares the Commissioner accepted this method for the purpose of calculation of gains, and the principle laid down by Coutts-Trotter, C. J., and Krishnan, J., in *Commissioner of Income-tax, Madras* v. *Chengalvaroya Chetti* (1), seems to us to be fully applicable to the present case: cf. also *Commissioner of Income-tax, Madras* v. *Subramaniam Chettiyar* (2). We would, therefore, answer the first question referred to us in the affirmative.

Coming to the second question, e. g., the loss of Rs. 48,831 incurred on account of the closure of the grain business at the Jubbulpore shop: precisely the same considerations apply and the same remark applies to the loss of Rs. 3,564 in respect of the Katni shop.

The fourth question referred for decision is whether the loss of Rs. 22,676, incurred in connexion with the value of bags of wheat at the Jubbulpore shop should have been allowed. At the beginning of the account year the non-applicant found himself with 2,227 bags on hand and took credit for these at the actual price he had paid for them, viz. Rs. 20 a bag. The Commissioner of Income-tax, however, only allows Rs. 10 a bag, as he finds that in the year in question that was their actual market value. If the Commissioner of Income-tax is correct in his estimate of the value, it follows that in the preceding year or the previous one, the non-applicant must have incurred a loss of Rs. 10 per bag in connexion with the said stock. Admittedly, this was never claimed and, as the assessee had in previous years neither showed profits nor claimed losses in this stock, we are of opinion that every consideration of justice and equity required that the stock should be valued at the original price paid by the assessee for it, if we are to arrive at a really correct and not an arbitrary calcultaion of its profits or losses in connexion with this branch of this business. It is not disputed that the same system of accounting was, mutatis mutandis, adopted in connexion with this item as applied in the case of the first three items we have dealt with above for the same reasons we would answer the fourth question referred to us in the affirmative.

The fifth question stands on a different footing. The suggestion on behalf of the non-applicant is—vide the statement of his agent made on 30th July 1926—that these dharmada receipts really refer to a trust fund and should be excluded from the income. The item in question is

(1) A. I. R. 1925 Mad. 1212=48 Mad. 836.
(2) A. I. R. 1927 Mad. 841=50 Mad. 765.

made up of 11 items referring to 11 different shops. It is shown as interest paid on amounts set apart by the non-applicant's predecessors for charitable purposes and it is alleged that it is only used for such purposes. 'We are wholly unable to see that the real elements of trust are present therein. Very obviously, the non-applicant can, by an oral or a written order at any moment, completely alter the nature of this fund and can, in short, abolish the Dharmada system if he so desires. The management, its nature and the distribution of the proceeds are entirely within his own volition and no one can compel him to spend the money in any particular way. We agree with the Commissioner of Income-tax that this amount has been properly included in the income. We, therefore, answer the first four questions referred to us in the affirmative and the fifth question in the negative. In other words, as regards the fifth question the Dharmada receipts amounting to Rs. 8,129 were properly included in the income of the non-applicant.

As regards costs the non-applicant has succeeded in the main and we accordingly order the applicant to bear his costs which we assess at Rs. 250.

D.D. *Order accordingly.*

** A. I. R. 1928 Nagpur 106

HALLIFAX, A. J. C.

Shribalabh Brahman—Plaintiff—Applicant.

v.

Gulab Mali—Defendant—Non-applicant.

Civil Revn. No. 271 of 1926, Decided on 29th June 1927, from order of 2nd Class 1st Addl. Sub-Judge, Harda, in Civil Suit No. 41 of 1922, D/- 24th June 1926.

(a) *Civil P. C., S. 151—Landlord and tenant—Minor occupancy tenant—Suits by landlord for rent—Tenant not appearing in Court—Ex-parte decree passed—Tenant getting the decrees set aside on grounds of his minority and nonrepresentation in the suit—Landlord, on the tenant's attaining majority, applying to have his previous rent suits restored—Suits should be restored.*

A landlord filed a suit against an occupancy tenant for rent due from him and the plaint described the tenant as minor and asked for the appointment of his grandmother as his guardian for the suit and notices were duly served, but there was no appearance for the defendant and the Court passed an ex-parte decree without having appointed any guardian for the defendant, whereupon the minor filed a civil suit claiming a declaration that the rent decree passed against him was void because he was still a minor and had not been represented in the suit at all. A decree to that effect was passed and an appeal against it failed. After this, two more suits were instituted by the landlord in whom also the tenant did not appear and so ex-parte decisions against him were passed. The minor again filed suits against these decrees which also were declared void like the previous one. The landlord, subsequently, on the tenant's attaining majority, filed an application to have his three rent suits restored to the file and treated as still pending, under S. 151, Civil P. C.

Held : that as the rent claimed in all three cases was really due to the landlord, it is at least certain that he had a right to have that question examined when he filed his suits, and as the tenant himself or his guardian intentionally refrained from appearing in all the rent-suits for no purpose but that of allowing decrees to be passed on them which could be set aside on the ground of minority after the claims were time barred, they took an undue advantage by the use of the rules of procedure, however correct that use may be, that is to say, it is an abuse of them, and so the only way of preventing that abuse is by ordering that the three rent-suits shall be restored to the file and treated as pending cases, instituted on the dates on which the plaints were originally presented, and shall be tried out from the beginning. [P 107 C 1,2 P 108 C 1]

**(b) *Civil P. C., S. 151—Provisions of law leading to injustice—S. 151 applies—It also applies to violate provisions of law under certain circumstances.*

Where there are direct provisions of the law by which justice can be attained and injustice avoided, S. 151 naturally has no application. It applies only when there are direct provisions of the law of procedure which lead to injustice. The application is wholly one for the violation of provisions of the law and S. 151 says this can be done, though only in certain strictly limited circumstances. The argument that if the applications under S. 151 are granted they will nullify the effect of certain decrees passed by the civil Courts is no argument for or against them. [P 107 C 2]

G. L. Subhedar—for Applicant.

K. V. Deoskar—for Non-applicant.

Order.—Gulab Mali, the opponent of this and the two connected applications for revision, is an occupancy tenant of land belonging to the applicant Shribalabh Brahman. He attained majority on 29th May 1924. On 15th April 1920, Shribalabh filed a suit against him (C. S. No. 57 of 1920) claiming the amount of the second kist of rent for 1916-17 and the full rent of the two following years. The plaint described Gulab as 15 years of age, which was very nearly correct,

and asked for the appointment of his grandmother as his guardian for the suit. Notices were duly served, but there was no appearance for the defendant and the Court passed an ex-parte decree on 15th April 1920, without having appointed any guardian for the defendant.

In 1922 Gulab filed Civil Suit No. 85 of 1922, claiming a declaration that the rent decree passed against him was void because he was still a minor and had not been represented in the suit at all. A decree to that effect was passed, on the 6th November 1922, and an appeal against it naturally failed.

In the same year Shribalabh filed two more suits for rent against Gulab, No. 41 of 1922, on 20th February 1922, about a month before the institution of Gulab's suit for a declaration in respect of the previous decree, and No. 323 of 1922, on 8th August 1922, four or five months after it. That there was no fraudulent intention about this, at least when the suits were instituted, is proved by the excessive carelessness shown in describing Gulab not only as a major in both suits but as 21 years old in February in one and as 40 in August of the same year in the other. Summons in each case was served on Gulab personally, which of course he disregarded, and ex-parte decrees for the rent claimed were passed on 12th June 1922, a month after the first decree had been declared void, and 3rd October 1922, a month before it. Like the first they were both declared void on 2nd May 1925, in a suit instituted by Gulab in 1923.

After wasting some months in appealing against this declaratory decree, in addition to the two years wasted in contesting the suit in which it was passed, Shribalabh applied, on 5th October 1925, to have his three rent suits restored to the file and treated as still pending, under S. 151, Civil P. C. That is an admission that this could not be done under the provisions of the Civil Procedure Code, and a prayer that those provisions should be contravened, on the ground that that is the only way in which injustice can be prevented. The judgment of the lower Court is hard to follow, but at least it shows a complete failure to understand the position. Four arguments are set out as advanced against the granting of the application, and in the view that these "seem plausible enough" the application is rejected.

The first argument is

that when there are express provisions of law dealing with a case S. 151, Civil P. C., has no application.'

That is perfectly true in a sense, but a sense directly opposite to that in which it has been understood. Where there are direct provisions of the law by which justice can be attained and injustice avoided, S. 151 naturally has no application. It applies only when there are direct provisions of the law of procedure which lead to injustice.

The next two "arguments" are instances of direct provisions of the law which would be violated if the application were granted. But the application is wholly one for the violation of provisions of the law and S. 151 says this can be done, though only in certain strictly limited circumstances. (One of the provisions mentioned is that for setting aside an ex-parte decree. It is hard to see how that comes into this case)

The fourth argument is

that if the applications are granted they will nullify the effect of the declaratory decrees passed by the civil Courts.

That is certainly a correct description of the applications, but it is no argument for or against them. If it were a reason for not granting them, the declaratory decrees ought never to have been passed, as they certainly nullified the effect of the previous rent decrees.

Gulab Mali has furnished many indications of the rent claimed in all three cases having been really due, particularly by failing to deny it in this Court even after time was allowed to him to ascertain the facts, if they were not known to him already. But even if it cannot be assumed for the purposes of the present discussion that the rent claimed was really due, it is at least certain that Shribalabh had a right to have that question examined when he filed his suits.

Now it is clear that Gulab understood the whole matter when the first notice was served on him in 1920. He was then 14 or 15 years of age, and in 1922, filed the suit in which the rent-decree was set aside. It is probable that he acted himself in the matter, perhaps under advice from others, but anyhow he himself or his guardian intentionally refrained from appearing in all the rent suits for no purpose but that of allowing

decrees to be passed on them which could be set aside on the ground of minority after the claims were time.barred That is undoubtedly getting an undue advantage by the use of the rules.of procedure, however, correct that use may be, that is to say it is an abuse of them.

In this case there is no way of preventing that abuse but by ordering that the three rent suits shall be restored to the file and treated as pending cases, instituted on the dates on which the plaints were originally presented, and shall be tried out from the beginning. I know of no provision of the law authorizing such an order, and there may be many that directly forbid it, but the power to pass it (mentioned in S. 151, Civil P. C., as existing of itself but not conferred by that section) can be used only in these circumstances ; unless it is the power to break rules, it is nothing at all, and rules that do not exist cannot be broken. The order stated is accordingly passed. The whole costs of these proceedings, in which the pleader's fee will be fifteen rupees, and of those in the lower Court out of which they arose, will be paid by Gulab Mali.

S.J. *Case remanded.*

A. I. R. 1928 Nagpur 108

FINDLAY, J. C. AND MACNAIR, A. J. C.

Sheobalak Prasad—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 79 of 1927, Decided on 13th May 1927, from judgment of Sess. Judge, Raipur, D/- 23rd April 1927, in Sessions Trial No. 7 of 1927.

(a) *Evidence Act, S. 27—S. 27, is not repealed by S. 162, Criminal P. C.—Criminal P. C., S. 162.*

Section 27, Evidence Act is not repealed by S. 162, Criminal P. C. *A.I.R.* 1926 *Rang.* 116 (*F.B.*), *Foll.* [P 110 C 1]

(b) *Criminal P. C., S. 162—S. 162 does not refer to a statement made by an accused after arrest.*

The word "statement" in S. 162, Criminal P. C., is a very general word. It is intended to refer to statements recorded under the provisions of Ss. 160 and 161, Criminal P. C. A clear distinction is drawn in S. 173, Criminal P. C., between "persons who appear to be acquainted with the circumstances of the case" and the accused, and this must raise a doubt whether the phrase "persons supposed to be acquainted with the facts and circumstances of the case" in S. 161 includes an accused after arrest, but the side note to S. 161 can be used to assist to come to the conclusion that S. 161 is not intended to apply to an arrested accused. Therefore it follows that S. 162 does not refer to statements made by an accused after arrest: *A.I.R.* 1926 *Rang.* 116 (*F.B.*), *Foll.* [P 110 C 2]

R. N. Padhey and *K. B. L. Agnihotri*—for Appellant.

G.P. Dick—for the Crown.

Judgment.—The learned Sessions Judge has found that the appellant Sheobalak Brahman, a lad of about 16 years, murdered Babadin, a Banya boy about 9 years old and has sentenced the appellant to death.

The main facts found by the learned Sessions Judge, who has devoted proper attention to the consideration of the prosecution evidence, are as follows: On the morning of Tuesday 22nd February 1927, Babadin, who wore ornaments worth about Rs. 64, took the cattle to the kharga in order to deliver them to the village grazier. Mangulal, P. W. 20, Babadin's father, went to the kharga with another cow and noticed Sheobalak at the kharga. Sheobalak and Babadin subsequently went to the house of Mt. Bitti, P. W. 4, where Sheobalak purchased some guavas. Babadin returned to his parents' house at about 9-30 a.m. and told his mother that Sheobalak had given him guavas to eat and had promised to give him some more. His mother told him not to go back to Sheobalak. Her reason for doing so may have been that meal-time was approaching. She then went to the tank to bathe. Mangulal read for about an hour and then took his food. While doing so, he asked his wife where Babadin was. She said she would look for him and she and Mangulal inquired at the neighbouring houses. Mt. Bitti, P. W. 4, told Mangulal of the sale of the guavas and at about 2-30 p.m. Mangulal went to the house of Sheobalak. Sheobalak said that the boy had left him after eating guavas and he had not seen him again. The search was continued and Mangulal heard that two girls had seen Sheobalak and Babadin going towards Bhaislotan. After receipt of this information the jungle was searched. Next morning Mangulal sent a report, Ex. P-1, to the police. The search was continued and the body of Babadin was found in a nala in the jungle. All the ornaments excepting the

earrings had been removed. Chunnilal, Sub-Inspector of Police, P. W. 22, states that Baura, P. W. 8, brought the first information report, Ex. P-1, at about 8 a.m. on 23rd February 1927. This report mentions that the boy had been seen going with Sheobalak towards Bhaislotan by the daughter of Deonath and a girl of Bhadora. When the body was discovered, Mangulal asked Gulab Kotwar P. W. 7, to report the discovery to the police. Chunnilal, P. W. 22, got Gulab's report, Ex. P-2, recorded at about 11 a.m. He was camping at mauza Karhani and sent both the reports, Exs. P-1 and P-2, to the police station of Marwahi. Chunnilal proceeded to the spot where the body was and held an inquest. There were two wounds on the head. The body was then sent for post-mortem examination. Chunnilal then went to the house of Sheobalak and seized the shirt he was wearing as it appeared that it was stained with blood. This shirt was subsequently sent to the Imperial Serologist who reports that it is stained with human blood. Sheobalak then told the Sub-Inspector that he had given the ornaments of Babadin to his servant Gora. Gora was sent for and he dug up the missing ornaments from a field outside the village.

The two girls to whom Ex. P-1 refers, Sitabia, P. W. 5, and Chaiti, P. W. 21, have been examined. Sitabia before the committing Magistrate, stated that she saw Sheobalak and Babadin from her courtyard. She is a small girl and may have forgotten the circumstances in which she saw the boys. In the Sessions Court she says she saw the boys when she was taking dhup from trees. Chaiti, P. W. 21, tells the same story. Sakharam, P. W. 6, says that he saw Sheobalak going towards mauza Seoni with a farsi about midday on the day of the murder. We need not refer to the evidence regarding the recovery of the farsi from Nandlal, P. W. 15. The recovery is not important as no stain was found on the Farsi. Nandlal has made contradictory statements and no weight can be laid on his statement that Sheobalak gave him the farsi on the day of the murder.

The appellant's counsel urges before us that there is no direct evidence against his client and that since Sheobalak is not a pauper, the obtaining of the ornaments was not a sufficient motive for the commission of the crime. He argues that the evidence regarding Sheobalak's statement about the ornaments is inadmissible. We shall deal with this argument later and shall first consider the remainder of the evidence.

Sheobalak, before the Magistrate, denied that he had purchased guavas at all, but there is no reason whatever to disbelieve the evidence on this point. We believe the evidence that Ex. P-1 was written before the body was discovered. It contains a clear reference to the story told to the Sessions Judge by Sitabia, P. W. 5, and Chaiti, P. W. 21. We have, therefore, no hesitation in accepting the evidence of these girls in spite of the facts that Sitabia was under a misapprehension when she was examined before the committing Magistrate, and that Chaiti, P. W. 21, was not examined before the Magistrate. The appellant has never stated that he went with Babadin to the jungle before Babadin returned to his house and the time indicated by Chaiti is about the time when Babadin left his house after his return. We have no doubt then that Babadin, after visiting his house, was seen going with Sheobalak in the direction of Bhaislotan. He was murdered in a nala beyond Bhaislotan: the Sessions Judge in para. 3 of his judgment has given particulars regarding the situation of Bhaislotan and the spot where the body was discovered.

In the next place the shirt that Sheobalak was wearing was seized on the afternoon of the day on which the boy was murdered and the Imperial Serologist has reported that blood was found on the shirt. Sheobalak's explanation of these blood-stains is supported by no evidence and is improbable.

Again there is no reason for rejecting the evidence of Sakharam, P. W. 6, who states that at about midday he saw the appellant returning from the direction of the spot where the body was found carrying a farsi in his hand. This is an implement with which the wounds found on the body might have been inflicted.

Next there is the fact that the ornaments taken from the boy were produced by Gora who is in the service of the appellant. It would be a strange coincidence, if the appellant had been wrongly suspected on insufficient grounds, that the ornaments were found in the possession of his only servant.

It is a well-known fact that a very large proportion of murders of children from the sake of ornaments are committed by youths who have recently become adolescent. The motive must be a desire to obtain the means to gratify desires which are strong at this stage of life. Sheobalak is said to be a strong and grown-up boy. It is very likely that, though he had cultivation, he had not control of the resources of the family. There is then a probable motive for the murder.

We are, therefore, of opinion that, apart from the evidence that the appellant said that he had given the ornaments to his servant Gora, the conviction is fully justified.

We proceed to consider the admissibility of this evidence. There has been some difference of opinion on the question whether S. 162, Criminal P. C., has by implication repealed S. 27, Evidence Act. The provisions of S. 27, Evidence Act, have been in force since 1872. They have been constantly applied and their scope has been frequently discussed in judgments. We find it impossible to believe that there was any intention to repeal such widely-known and important provisions by implication.

> It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments on the Statute Book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so : (Maxwell on the Interpretation of Statutes, 6th edn., p. 296).

It appears to us that this presumption has special force when the law referred to is widely known and constantly applied. We find support for our belief in the reported Full Bench judgment of *Emperor* v. *Maung Tha Din* (1). Four of the learned Judges on the Bench agreed that S. 27, Evidence Act, was not repealed, and Heald, J., the only dissenting Judge, states :

> I do not for a moment think that S. 162 of the Code was intended to affect S. 27, Evidence Act.

On p. 36 in Maxwell on the Interpretation of Statutes, it is said :

> But it is another elementary rule, that a thing which is within the letter of a statute will, generally, be construed as not within the statute unless it be also within the real intention of the legislature and the words if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention.

Again on p. 38 :

> General words admit of indefinite extension or restriction, according to the subject to which they relate, and the scope and object in contemplation. They may convey faithfully enough all that was intended, and yet comprise also much that was not.

Now the word "statement" in S. 162, Criminal P. C., is a very general word. We agree with the opinion of Rutledge, C. J., in *Emperor* v. *Maung Tha Din* (1), that this word was intended to refer to statements recorded under the provisions of Ss. 160 and 161, Criminal P. C. This is a possible and reasonable construction and it appears to us one which, even if less correct grammatically than other constructions, is more in harmony with the intention of the legislature.

Section 161, Criminal P. C. authorizes certain police officers to examine orally any persons supposed to be acquainted with the facts and circumstances of the case. Heald, J., has remarked that this may include the examination of accused or suspected persons. We agree in so far as such persons are examined in the capacity of persons who are supposed to be acquainted with the facts and circumstances of the case. But a clear distinction is drawn in S. 173, Criminal P. C., between

> persons who appear to be acquainted with the circumstances of the case

and the accused, and this must raise a doubt whether the phrase

> persons supposed to be acquainted with the facts and circumstances of the case

in S. 161 includes an accused after arrest. In our opinion, as this doubt exists, the side-note to S. 161 can be used to assist us to come to the conclusion that S. 161 was not intended to apply to an arrested accused. The side-note to S. 161 is "Examination of Witnesses by Police" and as Maxwell states on p. 76 of his treatise, the rule as to the rejection of side-notes for the purposes of interpretation is now of imperfect obligation.

It follows that S. 162 does not refer to statements made by an accused after arrest. We hold then that the statement of the appellant that he had given the ornaments to Gora is admissible in evidence. We believe that the police had no idea that Gora could produce these ornaments until the statement was made. There is ample authority for holding that a statement that property has been given or sold to a certain person and that statement leads to the recovery of the pro-

(1) A. I. R. 1926 Rang. 116=4 Rang. 72 (F. B.).

perty is admissible in evidence. In this case we hold that it did lead to the recovery of the property. The statement indicates that the appellant had been in possession of the property soon after the murder and furnishes very strong additional grounds for his conviction.

We dismiss the appeal and uphold the conviction. We have experienced some difficulty in deciding the question of sentence. Crimes of this nature should ordinarily be punished with the sentence of death, but the medical evidence shows that the appellant is only 16 years of age and we have come to the conclusion that his extreme youth furnishes a ground for passing the lesser sentence. We, therefore, reduce the sentence to transportation for life.

N.K. *Sentence reduced.*

A. I. R. 1928 Nagpur 111

FINDLAY, J. C.

Ronya and *others*—Judgment-debtors—Applicants.

v.

Baliram—Decree-holder — Non-Applicant.

Civil Revn. No. 153 of 1927, Decided on 16th September 1927, from decree of Dist. Judge, Chhindwara, D/- 18th February 1927, in Misc. Appeal No. 17 of 1926

(a) *Civil P. C., O. 21, R. 89—Application presented in Court with necessary deposit is acceptable though not containing express prayer for setting aside sale.*

Where an application presented in the Court, although, in the terms thereof, there was no express prayer for the setting aside the sale, was treated as one for setting aside the sale by the Subordinate Judge who signed the report and allowed the money to be deposited,

Held : that the application should be treated as one under O 21, R. 89, Civil P. C.: 44 *Bom.* 50 and 43 *Bom.* 735, *Dist.* [P 111 C 2]

(b) *Civil P. C., O. 21, R. 84—Sale is complete when both bid is accepted and 25 per cent. of the value is deposited.*

A sale cannot be said to have been completed until the bid had been accepted and the deposit of 25 per cent. had been made. [P 112 C 1]

P. C. Dutta—for Applicants.

D. W. Kathalay—for Non-Applicant.

Order.—I am of opinion in this case that the orders of the lower Courts are improper ones. The learned District Judge, on the authority of *Tipangavda* v. *Ramangavda* (1) and *Raoji Baburao* v. *Bansilal* (2), has held that the application, dated 3rd September 1926, apparently presented to the Court on 4th September 1926, could not be held to amount to an application for setting aside the sale. In the 43 *Bombay* case quoted, there was apparently a mere deposit without application, a receipt being obtained from the nazir. In the 44 *Bombay* case quoted, no application to, or communication with, the civil Court was made. Here, the application was presented in the Court and there can be no question whatever, but that it was in effect intended to be an application under R. 89, O. 21, Civil P. C., although, in the terms thereof, there was no express prayer for the setting aside of the sale. The reader's report shows that it was, however, supposed and presumed to be such and the application in question was duly signed by the Subordinate Judge.

It is true that the report of the reader on the back of the application is not necessarily authoritative, but that report stated that the application was one for the setting aside of the sale. Although this was not so, having regard to the actual phraseology of the application, it was treated as such by the Subordinate Judge who signed the report and allowed the money to be deposited. In those circumstances, I am unable to concur with the lower Courts that the application was not, in effect, one for the setting aside of the sale. In view of its purport and terms, this was precisely what it was and it could indeed have been nothing else. On any reasonable construction of the document, therefore, it must be held that there was an application on 4th September 1926 for the setting aside of the sale, and it is not disputed that the applicant had made the necessary deposit therewith, as required by R. 89, O. 21, Civil P. C.

The next point, which arises for decision, is whether the application of 4th September 1926, was made within 30 days

(1) [1920] 44 Bom. 50=54 I. C. 670=22 Bom. L. R. 35.

(2) [1919] 43 Bom. 735=53 I.C. 135=21 Bom. L. R. 835.

of the sale. On that point, I am of opinion that limitation ran not from 3rd August 1926, but from 5th August 1926. The bid was only accepted on 5th August 1926 and, having regard to the terms of R. 84, O. 21, I do not think the sale can be said to have been completed until the the bid had been accepted and the deposit of 25 per cent. had been made. So long as the bid was not accepted, it is impossible to say in my opinion that the sale was completed.

It follows, therefore, in my opinion that the Judge of the first Court was not entitled to confirm the sale: the order of 13th November 1926 passed by the Subordinate Judge, is reversed aud Execution Case No. 187 of 1925 is remanded to his Court for disposal according to law in accordance with the above remarks. The present applicants' costs in this Court and in the lower appellate Court will be borne by the non-applicant, decree-holder. I fix Rs. 15 as pleader's fees.

S.J. *Case remanded.*

A. I. R. 1928 Nagpur 112

FINDLAY, J. C.

Paiku—Plaintiff—Appellant.

v.

Mt. Kamalji—Defendant—Respondent.

Second Appeal No. 453 of 1927, Decided on 26th September 1927, from decree of Additional District Judge, Nagpur, D/- 14th July 1927, in Civil Appeal No. 34 of 1927.

Civil P. C., S. 11—Res judicata — Causes of action arising out of the same title — One cause of action decided in an independent suit— Second suit on the other cause of action is barred.

Where causes of action although relating to different details, viz., in the previous suit the materials of the house, and in the second suit the site of the house, both arose out of precisely the same title, viz., that plaintiff had acquired the property under the sale-deed of a certain date.

Held : that decision in the previous suit operated as res judicata and the second suit was barred : 2 *N. L. R.* 94,; 36 *Bom.* 1-9; and 26 *Mad.* 760, *Dist.* [P 112 C 2]

S. Y. Deshmukh—for Appellant.

Judgment.—I have heard counsel for the plaintiff-appellant in this case but find myself in full agreement with both the lower Courts in their finding that the judgment in Suit No. 275 of 1925, was necessarily res judicata in the present case, for there cannot be the slightest doubt but that in that suit the present plaintiff could and should have joined the relief which he now claims. It is equally clear to me that a decision on the question of the appellant's title to the house had necessarily to be made in that suit, as the then defendant directly raised the question of title, and that was found against the present plaintiff. The facts in *Gopala* v. *Ania* (1) were very different. In it, in a previous suit the decision in which the lower Courts had held to operate as res judicata, the question of title was neither put in issue nor adjudicated upon. In the case quoted, the cause of action in the previous suit on a lease arose ex contractu ; here, on the other hand, the causes of action although relating to different details, viz., in the previous suit the materials of the house, and in this suit the site of the house, both arose out of precisely the same title, viz., the plaintiff's claim was that he had acquired the property under the sale-deed of 12th August, 1908. The question of alleged res judicata discussed in *Govind* v. *Jijibai* (2) was an entirely different one, nor is the decision in *Ramaswami Ayyar* v. *Vythinatha Ayyar* (3) which has been quoted by counsel for the appellant, at all apposite to the facts of, or the principles involved in the present case.

I am in full agreement with the decisions of the Judges of the two lower Courts and dismiss the present appeal without notice to the respondent.

N.K. *Appeal dismissed.*

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(1) [1906] 2 N. L. R. 94.
(2) [1912] 36 Bom. 189=13 I. C. 849=14 Bom. L. R. 9
(3) [1903] 26 Mad. 760=13 M. L. J. 448.

A. I. R. 1928 Nagpur 113

HALLIFAX, A. J. C.

Narsinghdas Marwari—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 172-B of 1927, Decided on 17th September 1927, from decision of Sess. Judge, Amraoti, in Criminal Appeal No. 261 of 1927, D/- 12th July 1927.

(a) *Penal Code, Ss. 378, 420, 403 and 409— Difference between offence of theft, cheating, criminal misappropriation and criminal breach of trust explained.*

An easy method of differentiating between the offence of theft, cheating with delivery of property, criminal misappropriation and criminal breach of trust is to find out whether the original taking was honest or dishonest and whether it was with the consent of the owner or without it. In theft the original taking is without honesty and without the consent of the owner, and in criminal breach of trust it is with both. In obtaining property by cheating the taking is dishonest but with the consent of the owner, and in criminal misappropriation it is honest but without the consent of the owner. [P 114 C 1, 2]

(b) *Criminal P. C., S. 439 — Revision is not competent to correct mere illegality,*

The power of interference in revision is to be used only for the purpose of correcting injustice and not mere illegality. [P 114 C 2]

R. R. Jayavant—for Petitioner.

G. P. Dick, Standing Counsel—for the Crown.

Order.—This, like most applications for revision in criminal cases, is nothing more than a second appeal in which no question of law whatever is raised, but every finding of fact in which the Courts below concurred is attacked, not, as obviously mistaken, but on the ground that an evaluation of the evidence by this Court should and would lead it to a different conclusion. Even if that did happen, this Court would not have even the right to disturb the decisions at which the appellate Court has arrived. It happens further that in this case the learned Sessions Judge did fall into a very obvious mistake of law in respect of the sentence, but that has passed unnoticed and was not mentioned in the application for revision.

The sentence maintained in the Sessions Court was one of rigorous imprisonment for one year and a fine, with further rigorous imprisonment for four months in default of payment of it. That sentence is perfectly legal under S. 420, Penal Code, under which it was passed, but in the Sessions Court the finding was altered to a conviction of attempting to cheat, punishable under Ss. 417 and 511 read together. The longest term of imprisonment that could be imposed substantively under these two sections combined is six months, and the longest that could be imposed in default of payment of fine is a month and a half.

Now, though the applicant had no right to ask that the whole of the evidence should be examined by this Court for the third time, that has been done, and it is found, as might be expected, that it leads inevitably to the inferences of fact which two Courts have already drawn from it. They are these. The accused, a cotton broker, had in his possession a number of bales of cotton belonging to the complainant. On the 25th January the bales were weighed and found to consist of 129 akhas. (The akha is a unit, which has not been defined in the case, but seems to include both weight and quality.)

The bales were in two lots or stacks, one of 43 units and the other of 86. The accused made three entries in his nakal bahi or day-book, all in the name of the complainant, of 43 units, 74 units and 12 units. It is in respect of the 12 units of the last item that he has been found to have committed an offence. After the weighment he told the complainant's servant, who had not checked it, that the total amount was 117 units, which was 12 short of the truth. The servant doubted this and asked for the tak patti or weighman's tally, which the accused declined to give him, saying it was not necessary. The servant came back shortly afterwards with a friend and the accused repeated to them both the statement that the quantity of cotton was only 117 units and again declined to show them the weighman's tally.

On the 27th January, two days after the weighment, the accused sold the lot of 43 units and credited the complainant with the price in his khatauni or ledger. Five days later, on the 1st February, he sold the other lot of 86 units and credited the complainant with the price of 74 only. What entry was made at that time in respect of the remaining 12 units is uncertain, though it is clear that it was not a credit entry in favour of the complainant. (Before the ledger was produced in this case the page on which the entry of the

74 units appeared was removed and another substituted for it, showing the same entry and another just below it of the price of the 12 units which was also credited to the complainant).

During the next two or three weeks the complainant several times asked the accused for satisfactory evidence that his cotton had not amounted to more than 117 units, as he felt sure it had, and he asked in particular for the bill for ginning it which was with the accused, but the accused put him off from time to time by various falsehoods. On the first two occasions he said the bill had not yet reached him, on the third that he had already sent it by the hand of a messenger and on the fourth that it was lost. Eventually, on 22nd February, he gave the complainant a written receipt for the full amount of the cost of ginning his cotton, stating in it that the cotton consisted of 117 units. The complainant then went to the purchaser of the cotton, as he ought to have done and quite possibly had done earlier, and ascertained that 129 units had been sold as his.

The offence constituted by these facts is undoubtedly criminal breach of trust. There is no question of a mere attempt, any more than there would be in a case of theft in which the stolen property was recovered or restored. The learned Sessions Judge seems to have been aware that S. 409 of the Penal Code, really fitted the facts, but to have refrained from applying it because it was not mentioned in the charge. A perusal of Chap. 19, Criminal P. C., would have shown that this could and should have been done. The accused knew all the facts alleged against him, and probably knew nothing at all about the difference between the various sections that have been mentioned.

As this ignorance is not confined to accused persons it may be useful to state compendiously an easy method of differentiating between the offence of theft, cheating with delivery of property, criminal misappropriation and criminal breach of trust. That depends on whether the original taking was honest or dishonest and whether it was with the consent of the owner or without it. In theft the original taking is without honesty and without the consent of the owner, and in criminal breach of trust it is with both. In obtaining property by cheating the taking is dishonest, but with the consent of the owner, and in criminal misappropriation it is honest but without the consent of the owner.

Now it is not the duty of this Court sitting in revision to correct mere mistakes in law which have no more effect than mistakes in grammar or spelling. The power of interference in revision is to be used only for the purpose of correcting injustice not mere illegality. For that reason, even if the view of the Sessions Court that the facts constituted no more than an attempt to cheat were correct, I should refuse to reduce the sentence in this case unless it appeared to be heavier than those facts warranted. A Magistrate and a Sessions Judge have expressed the opinion that it is not so, and I agree with them. But the real illegality in the case is in not passing the sentence under S. 409, of the Penal Code, and if any interference is required at all it would be to alter the finding to one of an offence punishable under that section. That, however, would be a matter for an Academy of law, not for a Court of law.

I decline accordingly to interfere at all with the decision of the Sessions Court by altering either the finding or the sentence. To leave them both will do as little harm and to correct one of them as little good as to do the same thing in regard to a word that appears in the record with two different spellings.

N.K. *Application dismissed.*

A. I. R. 1928 Nagpur 114

FINDLAY, J. C.

Vinayak Narayan Datar—Applicant.

v.

Sakharam Laxman Mahajan — Non-applicant.

Misc. Petn. No. 48 of 1927, Decided on 14th October 1927, for leave to appeal to Privy Council from judgment reported in *A. I. R.* 1927 *Nag.* 264.

(a) *Civil P. C., S.* 110—*Appeal to Privy Council—Substantial question of law means substantial question of law as between the parties.*

The phrase "substantial question of law" in S. 110, Civil P. C., means a substantial question of law as between the parties to the proceeding and not merely one of general importance.

[P 115 C 1]

(b) *Will—Probate of draft of will cannot be ordered in the absence of evidence to show that it had been drawn up in accordance with instructions of testator.*

Where there had been no proof that the testator had anything to do with the

preparation of the draft of the will in question but, on the contrary, it seemed to have been prepared by a coterie of the applicant's party in the hope that the dying man could be induced to execute it,

Held: probate of the draft could not be ordered as the will itself was not proved: 28 *All.* 715, *Dist.* [P 115 C 2]

D. W. Kathalay—for Applicant.

R. B. Gadgil—for Non-applicant.

Order.—This is an application for leave to appeal to their Lordships of the Privy Council against the decision of a Bench of this Court, dated 23rd April 1927, in Misc. Appeal No. 42 of 1926 *

It is not disputed that the value of the subject-matter or property involved exceeds Rs. 10,000, and the only question is whether, in view of the judgment of this Court being an affirming one, any substantial question of law is involved. We accept the position that the phrase "substantial question of law" in S. 110, Civil P. C., means a substantial question of law as between the parties to the proceeding and not merely one of general importance. Even so, however, we can find not the slightest reason for supposing that as between the parties to the proceeding any substantial question of law is involved in the present case. As is clear from the judgment of the Bench, that judgment was wholly concerned with a pure finding of fact as to whether the will in question had been executed or not. The counsel for the applicant has urged that ground A, which he mentions as one of the matters to be agitated before their Lordships of the Privy Council, involves a question of law. That ground is to the effect that the Bench of this Court erred in law in starting from the evidence of the handwriting expert. It is true that, in paras. 4 and 5 of the judgment of this Court, the Bench was of opinion that the evidence of Brewster (D. W. 11) was to be preferred, but the decision on the question of fact involved rested on many other factors as well and it was indifferent whether the Court considered first the handwriting expert's evidence or any of these factors. We have been referred to certain remarks made by Ayyar, J., in *In re B. Venkata Row*(1), (at p.165), as to the comparatively minor importance of the evidence of handwriting experts, but what that case in reality laid down was that an accused should not be convicted of forgery upon the uncorroborated testimony of such an expert. We have not the slightest hesitation in agreeing with the said dictum, but this, in effect, gives no real help to the applicant in the circumstances of the present case.

It has been suggested that an important question of law is involved as to the exact value which their Lordships would attach to expert evidence of the kind in question, but we are wholly unable to accept such a suggestion and it seems to us impossible to premise of the circumstances of the present case that any question of law is involved in this connexion.

It has further been suggested, on the strength of the decision in *Aulia Bibi* v. *Alaud-Din* (2), that this Court should have ordered probate of the draft of the will if it was held that the will itself was not proved. In the case in question there was convincing evidence that the will had been drawn up in accordance with instructions given by a Mahomedan lady concerned in the case. The circumstances of this case are wholly different and there has not been any proof that the alleged testator had anything to do with the preparation of the draft in question. On the contrary, it seems to have been prepared by a coterie of the present applicant's party in the hope that the dying man could be induced to execute it. The case is, in short, one in which pure questions of fact are involved and in which we cannot grant leave as craved for. The application is accordingly dismissed. The applicant must bear the non-applicant's costs. We fix pleaders' fees at Rs. 50.

S.J. *Application dismissed.*

(2) [1906] 28 All. 715=3 A. L. J. 519=(1906) A. W. N. 210.

* vide A. I. R. 1927 Nag. 264—Ed.

(1) [1912] 36 Mad. 159=22 M. L. J. 270=14 I. C. 418=(1912) M. W. N. 125.

A. I. R. 1928 Nagpur 115

FINDLAY, J. C.

Mohammad Abdul Sattar—Plaintiff—Appellant.

v.

Mt. Umraobi and *others*—Defendants—Respondents.

First Appeal No. 87 of 1926, Decided on 23rd September 1927, from decree of 1st Class 1st Sub-Judge, Nagpur, D/-30th July 1926, in Suit No. 61 of 1925.

Civil P. C., S. 34 (b)—Judge should give reasons for disallowing future interest.

The mere presence of Sub-S. (2), S. 34 on the Statute Book does not necessarily imply an invitation to Judges, when they see reason to disallow future interest, to refrain from stating these reasons, and obviously in the normal case it is highly desirable that the Judge should give his reason for disallowing such future interest: 37 *Bom.* 326 (*P. C.*), *Ref.* [P 116 C 2]

B. V. Pradhan—for Appellant.

R. N. Padhey—for Respondents.

Judgment.—The plaintiff-appellant has been granted a decree for Rs. 8,418-10-8 against the three defendants-respondents as the legal representatives of one Shaikh Kalloo to whom the advances in suit had been given for trade purposes and for building a house. The defendants-respondents have been declared only liable to the extent of the assets of the deceased Shaikh Kalloo in their possession.

In the present appeal I am only concerned with the lower Court's disallowance of interest pendente lite and of future interest from the date of decree to the date of realization. In para. 13 of the plaint, interest at the contract rate of 1 per cent. per mensem during the pendency of the suit was claimed, as well as future interest at a rate to be fixed by the Court. No specific issue was framed with regard to these two items, and the judgment of the lower Court is absolutely silent as regards them. The plaintiff has, therefore, appealed to this Court for allowance of both these items of interest.

On behalf of the respondents it has been urged that as regards both items, the silence of the lower Court's judgment and decree must be read as inferring that the Subordinate Judge did exercise a discretion in the matter and exercised it in the way of disallowing either kind of interest. There can, however, be no doubt whatever that sub-S. (2), S. 34, Civil P. C., only has reference to future interest, viz., interest from the date of decree to the date of payment or to such earlier date as the Court thinks fit. Even so, however sub-S. (2) obviously finds a place in the statute book with the one and sole object of preventing a separate suit being brought for future interest when the connected judgment and decree are silent on the point.

The possibilities appear to me to arise as regards the attitude of the lower Court in this matter. It is perfectly possible, judges being only human, that the Subordinate Judge intently overlooked the question of the allowance or disallowance of interest pendente lite and future interest. It is equally possible that he did exercise a discretion in the matter but remained silent as to his reasons therefor. In the case of the interest pendente lite, this silence was unjustifiable, although it may be possibly termed justifiable, however inadvisable, in the case of future interest. The mere presence of sub-S. (2), S. 34, on the statute book does not necessarily imply an invitation to Judges, when they see reason to disallow future interest, to refrain from stating these reasons, and obviously in the normal case it is highly desirable that the Judge should give his reason for disallowing such future interest. I have been referred to the remarks of their Lordships of the Privy Council in *Hiralal Ichhalal* v. *Narsilal Chaturbhujdas* (1), but little help is to be derived from that case in view of the absence of the full judgment of the learned District Judge, to which their Lordships refer. It was possible, of course, for the plaintiff to have applied to the lower Court to repair the omission as to the disallowance of future interest, but it was not incumbent on him to take this course and I am clearly of opinion that he was entitled to come on appeal to this Court, as he has done.

As regards the disallowance of interest pendente lite, there is nothing whatever to show that the Subordinate Judge exercised any discretion whatever in the matter. Prima facie there is no reason whatever why in this case interest pendente lite should not be allowed at such rate as this Court thinks fit and reasonable. The debts in suit were duly incurred for legitimate purposes; the plaintiff appears to have behaved with absolute fairness throughout, and the rate of interest charged was an eminently reasonable one. It is not clear even that there was any undue delay in the filing of the present suit, the decree in which, it will be remembered, only has effect against the property left by the deceased debtor in the hands of the present respondents. Shaikh Kalloo died in June 1924, and the circumstances detailed in paras 7 and 8 of the plaint would account for a

(1) [1913] 37 Bom. 326=40 I. A. 168=15 Bom. L. R. 483 (P. C.).

large part of the delay of 14 months which occurred before the present suit was filed: for the comparatively long pendency of this very simple suit various needless and several futile pleas offered on behalf of the defendant 2, are largely responsible. It has also been suggested that, in view of the receipt (P. 10), in which accounts were made up on 15th August 1922, after a balance had been struck, the interest awarded in reality amounts to compound interest. This is, in essence, so far true, but it cannot be gainsaid that the decision of the lower Court is correct in the interest it has awarded on the documents on record evidencing the debt, and, if the present respondents considered that the decree was wrong in this respect, it was their duty to have filed an appeal. The case, therefore, seems to me one in which the plaintiff is entitled to interest pendente lite, but, on the whole and in view of the amount of interest already included in the sum decreed, I fix the rate of interest pendente lite at 8 annas per cent. per mensem. As regards future interest also, making the most favourable assumption for the respondents, viz., that the Judge of the lower Court did exercise, so to speak, a silent discretion in the matter and disallowed such interest, I am of opinion, for the same reason as I have given with regard to the allowance of interest pendente lite, that the plaintiff is entitled to future interest at the same rate, viz., 8 annas per cent. per mensem.

The decree of the lower Court will be modified accordingly by allowing interest at 8 annas per cent. per mensem on the sum already decreed from the date of suit to the date of decree, and thereafter future interest will run on the whole amount due at 8 annas per cent. per mensem till realization. The defendant-respondents will bear the plaintiffs-appellant's costs in the lower Court as already ordered by that Court, while in this Court the defendants-respondents will bear the plaintiff's-appellant's costs in appeal in proportion to his success therein. The remaining costs in this Court will be borne by the party as incurred.

S.J. *Decree modified.*

A. I. R. 1928 Nagpur 117

FINDLAY, J. C.

Charles Henry Smalley—Petitioner.

v.

Mrs. Olive Muriel Smalley—Opposite Party.

Civil Revn. No. 349 of 1927, Decided on 4th November 1927, from order of Dist Judge, Nagpur, D · 29th August 1927, in Civil Suit No. 3 of 1927.

(a) *Divorce Act* (4 *of* 1869), *S.* 11—*Indian Courts have not the same discretion as the English Courts under the provisions of this section.*

In the matter of excusing a petitioner from naming an alleged adulterer, a co-respondent in a suit for dissolution of marriage, the Indian Courts have not the same discretion as the English Courts have:: *Saunders* v. *Saunders*, (1897) P. 89, *Ref.* [P 118 C 1]

(b) *Divorce Act* (4 *of* 1869), *S.* 11—*Probability of Petitioner finding not name of adulterer by deligent enquiry—S.* 11 (2) *does not apply.*

Where the petitioner has knowledge where his wife is residing and it is inconceivable to suppose that with due effort and enquiry he would not be able to discover the name of the alleged adulterer or adulterers, the case would not be covered by the second ground as given in S. 11. [P 118 C 2]

H. S. Gour—for Petitioner.

Order. — The petitioner, Charles Henry Smalley, applies for revision of an order of the District Judge, Nagpur, dated 29th August 1927, in Civil Suit No. 3 of the same year. By this order the District Judge declined to issue any citation or to proceed further on Mr. Smalley's petition for dissolution of marriage. In para. 5 of the petition in the lower Court it was alleged that Mrs. Smalley, the respondent, had committed adultery in Darjeeling in the year 1926 with a person unknown to the petitioner. The learned District Judge further examined counsel for the petitioner with reference to the fact of any co-respondent having been cited, and accordingly the said counsel is said to have stated orally that the petitioner was aware of the alleged adulterer, but that as he was an officer holding a high position in Government service, he did not wish to disclose it. The learned District Judge held that this reason, as well as the fact that the petitioner having no absolute proof of the adultery, did not wish to cite any particular person as co-respondent, were inadequate ones and

he, therefore, declined to proceed further as stated.

I have had an affidavit filed by the petitioner in this Court and have also examined him further on oath. From the affidavit and the said examination on oath it would appear that there has been some misunderstanding of the real position of the petitioner in this matter. It is now clear apparently that his wife, in the oral confession she is said to have made to him, did not disclose the name of her paramour or paramours. From independent enquiry, however, the petitioner has suspicions against two men, one of whom is a Government official, but he has sworn that his reason for not mentioning their names is that, in spite of efforts and enquiry, he has been unable to obtain any substantial proof against either man and he, therefore, is reluctant to take the risk of making them co-respondents.

It has been suggested on behalf of the present applicant that the remarks of Lindley and Smith, JJ., in *Saunders* v. *Saunders* (1), are applicable in the present case and that the learned District Judge erred in not proceeding further in spite of the failure of the petitioner to name a co-respondent. I do not think, however, that in this matter the Indian Courts have the same discretion to dispense with the naming of a co-respondent as the English Courts have. The three grounds stated in S. 11, Act 4 of 1869 are the only ones on which leave can so be granted to proceed with the petition for dissolution of marriage. The second ground therein stated, viz.:

> that the name of the alleged adulterer is unknown to the petitioner although he has made due efforts to discover it

will not, it seems to me, apply in the circumstances of the present case. The petitioner has apparently knowledge where his wife is now residing, and it is almost inconceivable to suppose that, with due effort and enquiry, he would not be able to discover the name of the alleged adulterer or adulterers. It may be remarked in this connexion that the English statute is more widely worded and the co-respondent may be dispensed with on special grounds to be allowed by the Court. Here, on petitioner's own statement, it is fairly obvious that he has well-grounded suspicions against two men and, if he is not prepared to make due enquiry and, if after such enquiries have been made he is not prepared to mention the name of either man, or of both, the position would be different; but, as the case at present stands, I cannot, on the materials before me, hold that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts to discover it.

In this view of the case, I am of opinion that the District Judge was justified in declining to proceed further until the petitioner has either satisfied the Court that, he is unable to discover the adulterer's name, or, in the alternative, satisfies the Court that due effort having been made, the name of the adulterer cannot be discovered.

The application is accordingly dismissed.

N.K. *Application dismissed.*

(1) [1897] P. 89=66 L. J. P. 57=45 W. R. 583 =76 L. T. 330.

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* A. I. R. 1928 Nagpur 118

FINDLAY, J. C.

Shriniwas Balkisandas Marwadi—Defendant—Applicant.

v.

Municipal Committee, Nagpur—Plaintiff—Non-applicant.

Civil Revn. No. 176 of 1927, Decided on 3rd October 1927, against order of Small Cause Court Judge, Nagpur, D/- 19th March 1927, in Small Cause Suit No. 2085 of 1926.

* *Provincial Small Cause Courts Act* (9 *of* 1887) *Sch.* 2, *Art.* 1—*Suit by Municipality for damages for use and occupation of certain land can be tried by Small Cause Court.*

A suit by a municipality for damages for the use and occupation of certain land is not one which can properly be described as a suit for profits derived from immovable property but is a suit against a trespasser for damages for the use and occupation of land and as such is not excluded from the jurisdiction of the Small Cause Court : 22 *Mad.* 149 and 17 *Cal* 707, *Ref.* [P 119 C 1]

N. G. Bose—for Applicant.

B. R. Mandlekar—for Non-applicant.

Order.—The present suit was brought by the Municipal Committee, Nagpur, against the present defendant-applicant for damages for the use and occupation of certain land, and decree was granted by the Judge of the Small Cause Court in favour of the plaintiff.

The first point urged in revision on behalf of the defendant-applicant is that the suit was excluded from the jurisdiction of the Small Cause Court under Art. 1, Sch. 2, Provincial Small Cause Courts Act. I am however, wholly unable to regard the present suit as one which can properly be described as a suit for the profits derived from immovable property. It is, on the contrary, a suit against a trespasser for damages for the use and occupation of land : cf. *Vira Pillai* v. *Rangaswami Pillai* (1) and *Krishna Prosad Nag* v. *Maizuddin Biswas* (2).

The only other ground pressed on revision is founded on the notice (A-1) which I have seen cause to admit on revision. It is suggested that it is unlikely that the two rooms in question would have been let out to the present applicant without also some adjoining land, but the plaintiff-non applicant has filed in this Court the office copy of this notice and when this is read along with the resolution of the Municipal Committee, of which p. 2 is a copy, it is perfectly clear that either through collusion with the present applicant or through some misapprehension, the muharrir Mahebuballi issued the notice in question in terms which were entirely unjustified. I, therefore, see no ground whatever for differing from the Judge of the lower Court in holding that the defendant-applicant had encroached on the land and am unable to interfere. The application is accordingly dismissed. The applicant must bear the non-applicant's costs. Costs in the lower Court as already ordered.

S.J. *Application dismissed.*

(1) [1899] 22 Mad. 149.
(2) [1890] 17 Cal. 707.

A. I. R. 1928 Nagpur 119

KINKHEDE, A. J. C.

Kisan Ghule—Plaintiff—Appellant.

v.

Puransa and *others*—Defendants—Respondents.

First Appeal No. 7-B of 1927, Decided on 23rd September 1927, from decree of Special 1st Class Sub-Judge, Akola, D/- 23rd December 1926, in Civil Suit No. 32 of 1926.

(a) *Evidence Act, S. 163—Party to a suit calling opposite party to produce account-books as evidence and inspecting them—The books should be allowed as evidence in toto without further proof.*

When a party to a suit calls the opposite party to produce the account-books as evidence and on their being produced inspects them, the account-books should be taken as evidence of both the parties without any further proof and should be admitted in toto : 5 *Bom. L. R.* 380 and 9 *All.* 713 (*P. C.*), *Rel. on.* [P120 C 1]

(b) *Evidence Act, S. 163—Adverse inference—Suit on mortgage—Failure to produce account-books — No adverse inference is permissible unless plaintiff has refused to produce.*

Where a suit is brought on a bond or mortgage no adverse inference is permissible against the plaintiff for non-production of his account-books unless the other party has called upon him to produce such account-books and he has failed to comply with the demand. [P 120 C 1]

A. V. Khare—for Appellant.
G. G. Hatwalne—for Respondents.

Judgment.—I have confined the arguments to grounds 8, 9 and 10 of the memorandum of appeal as I thought that the trial of the case has been very improper and full of irregularities of procedure.

The suit was based on a mortgage and not on account-books but plaintiff desired to tender his relevant account-book entries as evidence and, therefore, mentioned them as pieces of evidence in his list of reliance. The defendants taking advantage of this mention applied for inspection of plaintiff's account-books with a view to extract their defence out of them. The plaintiff protested but notwithstanding his protest the inspection was allowed and the defendants took inspection and filed an additional written statement admitting some and disputing certain other items entered in the books. But they did not make their defence intelligible by filing extracts of the relevant entries to which the same related.

It was the duty of the Court to examine the defendants further as regards the disputed items and call upon them to produce extracts of accounts on which they relied in support of their contention and then ask the plaintiff to admit or deny the defendants' assertions and to produce such extracts of accounts as may be necessary. The procedure laid down for discovery of documents was followed but only partially. Nobody seems to have also cared to look into the pro-

visions of S. 163, Evidence Act, and see for himself whether in the circumstances of this case it has any application. Under that section it was the plaintiff's duty to have required the defendants, who had taken inspection, to tender the account books as evidence of both parties. Having taken inspection of plaintiff's books of account the defendants took the risk of making them evidence of both parties in the case. In fact they needed no further proof and were admissible and should have been admitted in toto : cf. *Mahomed Khan* v. *Abdul Rahman* (1) and *Rajeswari Kuar* v. *Rai Bal Krishan* (2). Failure on his part to avail himself of this privilege has landed the plaintiff into a difficulty and has entitled a dismissal of his claim.

Then again, even though the plaintiff pointed out the omission of the Court below to examine him in answer to the defendants' additional rejoinder filed after taking inspection of plaintiff's books of account, the Court below failed to rectify its own mistake, and tried to technically shift the error on to the shoulders of the plaintiff. This has naturally ended in a disaster to the plaintiff's cause. The Court ought to have re-opened the case and examined the parties for focussing points of controversy between them and given them opportunity to substantiate their respective cases.

Then a third defect of procedure which I think is very flagrant was to draw an adverse inference against the plaintiff for nonproduction of his account books, even though he sued upon a bond or mortgage and not on the account books. Such an inference is not permissible unless the other party has called upon the plaintiff to produce such documents and the latter has failed to comply with the demand. Here he had complied with the demand of the defendants and produced his account books for their inspection and they had in fact taken the inspection and "extracted" their "defence out of them." It is urged by plaintiff that the defendants have taken full notes or extracts of the entries relating to their dealings with the plaintiff but have kept them back. I have only to draw the lower Court's attention to the observations of their Lordships quoted in Mulla's Civil Procedure Code, edition 8 at p. 527 under the heading "Non-disclosure of documents—Presumption." The appellant has produced some extracts of his accounts in this Court. They have been placed on record. They will have to be compared with the originals and perhaps supplemented ; the defendants will also have to be called upon to say what they may choose to say as regards their relevancy and genuineness if they challenge it. If they persist in denying the debit items, the plaintiff must be given the chance of corroborating them by the evidence of persons who know anything about them. As held in *Rajeswari Kuar* v. *Rai Bal Krishan* (2).

> it would be a monstrous thing if the party sued were allowed to call for the accounts of the plaintiff and extract from them just such items as proved matters of defence . . . and were not to allow those items which make in favour of the plaintiff. The High Court held that the books must be admitted in toto. Their Lordships think the High Court were entirely right . . . .

I do not think it will serve any purpose to keep the case pending on my file and call for findings, as the defects in the procedure which the Court below is ordered to remedy are such as necessitate further pleadings and trial. Fresh pleadings and issues will have to be recorded and framed ; it is, therefore, desirable to reopen the case wholly rather than only partially. I, therefore, remand the case for fresh decision after further trial in accordance with law.

The costs of this appeal shall be costs in the cause, the appellant shall have refund of the Court-fee paid on the memo. of appeal.

S.J. *Case remanded.*

(1) [1903] 5 Bom. L. R. 380.
(2) [1887] 9 All. 713=14 I. A. 142=5 Sar. 80 (P. C.).

A. I. R. 1928 Nagpur 120

FINDLAY, J. C.

Gangadhar Rao Madhorao Chitnavis—Plaintiff—Appellant.

v.

Parshram and *others* — Defendants — Respondents.

First Appeal No. 130 of 1926, Decided on 22nd August 1927, from judgment of 1st Class Sub-Judge, Nagpur, D/- 30th October 1926, in Civil Suit No. 21 of 1924

(a) *Usurious Loans Act* (10 *of* 1918)—*Act is not applicable to transactions previous to* 1918.

The Usurious Loans Act has no application to a mortgage executed before 1918, the year in which the Act was passed. [P 121 C 2]

(b) *Contract Act, S. 74—Compound interest at enhanced rate after default is penal.*

An agreement to pay compound interest at an enhanced rate on default is penal. [P 122 C 1]

(c) *Contract Act, S. 74—Rate of interest penal —Creditor accepting less voluntarily — Court can give lower rate of interest than that claimed by creditor.*

Where the provisions as to interest are penal it is the duty of the Court to decide what reasonable compensation should be awarded to a creditor, when a default is made by the debtor in the payment as stipulated, and the mere fact that the creditor has himself deemed it advisable to only claim compound interest at a lesser rate than the one provided in mortgage-deed does not necessarily preclude the Court from granting even a lower rate than that. [P 122 C 1]

M. R. Bobde—for Appellant.

M. R. Indurkar, N. B. Bhawalkar and *W. R. Puranik*—for Respondents.

Judgment.—I am only concerned with the question of allowance or disallowance of interest in the present case. The mortgage-deed in suit for Rs. 3,500 was executed on 30th November 1911. The consideration was wanted for the following purposes: The mortgagors had to pay a decree for Rs. 3,014 odd outstanding in favour of another creditor; to the mortgagee also a decree for Rs. 333 odd was due, and the small balance of consideration was apparently taken in cash. The first instalment was to be paid on a fixed date about 13 months later, and thereafter the remaining six instalments were to be paid year by year at the same time. With each instalment the interest then due at 1 per cent. per mensem was also to be paid. If each of the said instalments and interest were not paid, an enhanced rate of Re. 1-4-0 compound interest was to be chargeable. The mortgage-bond in suit also contained the following two clauses:

(a) If owing to our not having paid the kist of Government demand, you are required to pay that amount, this (sic) may be treated as foreclosed before the stipulated period, and you may take possession.

(b) If two of the instalments agreed by us for satisfaction of the said amount are defaulted by us, we will pay the entire amount together with interest in a lump.

Such are the essential terms of the mortgage-deed, p. 1.

The following payments have admittedly been made:

Rs. 1,600 on 2nd April 1915.
" 1,850 on 29th June 1917.

In other words, within less than six years of the date of execution of the mortgage, an amount equivalent to practically the whole principal, except Rs. 50, had been paid. In spite of this, the present suit was brought for an amount of Rs. 5,784-4-0 on the basis of compound interest at 1 per cent. per mensem being claimed instead of the enhanced rate of Re. 1-4-0 per cent per mensem.

The Subordinate Judge held that the conditions referred to above of the mortgage were not penal, particularly having regard to the fact that the plaintiff had charged only compound interest at 1 per cent. per mensem. He, however, held that the case was one which was covered by the Usurious Loans Act, 1918, and he accordingly reopened the transaction and allowed simple interest at Re. 1-4 per cent. per mensem. On this basis, the lower Court awarded the plaintiff-appellant a decree for Rs. 3,851-6-0.

The plaintiff has now come up on appeal claiming that interest should have been allowed at the compound rate of 1 per cent. per mensem, and a total of Rs. 5,784-4-0 is accordingly claimed as having been due on the date of the suit.

The pleaders for the respondents have admitted that the Usurious Loans Act as such could have no application to the present mortgage which was executed in 1911 and it is difficult to understand how an experienced Judge like the Judge of the lower Court held that it could apply. It has, however, been urged on behalf of the respondents that, in any event, the provisions of the mortgage as to payment of compound interest at an enhanced rate were penal and that it was open to this Court to allow a reasonable compensation under S. 74, Contract Act, entirely irrespective of the fact that the plaintiff has only claimed compound interest at the original rate of 1 per cent. per mensem.

On behalf of the appellants it has been urged that the provision as to interest was not penal and I have been referred in this connexion to the old decision of this Court in *Jagmohan* v. *Tikaitrai* (1), wherein Neill, J. C., held that a stipulation that compound interest shall be paid on interest not paid up is not a penalty.

(1) [1893] 6 C. P. L. R. 11.

The same view was taken in *Bhagwant Atmaram* v. *Ganpati Chowdhari Kunbi* (2) by Ismay, J. C. It has been suggested that it is erroneous to look at the present mortgage-deed as one which initially provided for simple interest and it has been pointed out that the question of compound interest did not arise unless and until the first or any other instalment was defaulted. That is, no doubt, perfectly true, but the fact remains that, if payments had been made regularly year by year, as provided for in the bond, the interest payable by the mortgagors was only simple interest at 1 per cent. per mensem. The indubitable fact, therefore, remains that, in case of default, compound interest at an enhanced rate of Re. 1-4-0 per cent. per mensem was to be chargeable. It seems to me, therefore, that the Subordinate Judge was clearly wrong in holding that the conditions as to interest were not penal.

Although the facts of the case in *Purushottam* v. *Sahu Gond* (3) were wholly different from those of the present case, yet the principles laid down in that case seem to me fully applicable in the present one also. Here we find only a provision for compound as opposed to simple interest and that at an enhanced rate, but we have also a condition of exigibility of the whole amount, if apparently any two of the instalments are defaulted. It is not even clear from the bond whether such dafault must be in any two instalments or any two consecutive instalments, but the point is immaterial for the purpose of the present appeal. Holding, therefore, as I do, that the provisions as to interest were penal, it seems to me that it is the duty of the Court, on the principles laid down in *Purushottam* v. *Sahu Gond* (3) to decide what reasonable compensation should be awarded to the plaintiff, and the mere fact that the latter has himself deemed it advisable to only claim compound interest at the lesser rate of 1 per cent. per mensem does not necessarily, in my opinion, preclude this Court from even granting a lower rate than that.

It has been urged on behalf of the respondents that the case, from the mortgagors' point of view, is a very hard one. Although practically all the principal was paid off within six years of the date of the execution of the mortgage-deed in suit, the amount now claimed has accumulated to the already stated large sum of Rs. 5,784-4-0. That is, no doubt, true; but the fact remains that in the case of a mortgage like the present the respondents had it in their own hands all through to clear off what would have been, in reality, a petty sum as compared with the amount now claimed from them. Action under S. 60, T. P. Act, was always open to the mortgagors in this connexion. It is doubtless a common custom amongst creditors and mortgagees in this country to wait until the last moment, or, anyhow, for an unduly long time before coming to Court on a mortgage like the present, and the practice may be reprehensible from a moral point of view, and, in my opinion, is. The fact, however, remains that, from the legal point of view, the mortgagor, if he is able and really anxious, so to speak, to force the hands of the mortgagee, has the remedy in his own hands as pointed out above, and he can thus defeat the policy of any mortgagee who deliberately delays bringing his suit on the mortgage.

In this aspect of the case, it seems to me that I would not be justified in refusing the mortgagee's claim for compound interest at the original rate of 1 per cent. per mensem. It seems to me that neither from the legal nor the equitable point of view, this relief can be refused to the appellant (mortgagee). The lower Court allowed interest at this rate up to 30th April 1927, the date which was fixed for payment. I do not think that, in view of the circumstances of this case and of the large amount of interest, which I felt myself bound to allow to the plaintiff, any further interest should be granted. A decree, will, therefore, be made of the amount due up to 30th April 1927 on the basis of a compound rate of interest at 1 per cent. per mensem and the amount so due will be substituted for the amount of Rs. 4,244-5-6 found due in the lower Court's decree. The defendant-respondents must also bear the plaintiff-appellant's costs in both Courts.

S.J. *Appeal partly allowed.*

(2) [1905] 1 N. L. R. 9.
(3) A. I. R. 1926 Nag. 90=22 N. L. R. 23.

A. I. R. 1928 Nagpur 123

FINDLAY, J. C.

Raoji—Defendant—Appellant.

v.

Mt. Girjabai—Plaintiff—Respondent.

Second Appeal No. 58 of 1926, Decided on 4th November 1927, from decree of Dist. Judge, Nagpur, D/- 2nd Nov. 1925.

C. P. Land Revenue Act, Ss. 187 and 188—Appointment of lambardar under S. 187—He must be presumed to have all the powers of lambardar under S. 188.

Where a lambardar has been appointed under S. 187, until his appointment as lambardar is upset, he must be presumed to have all the ordinary powers of the lambardar under S. 188, Land Revenue Act. [P 123 C 2]

R. N. Padhey—for Appellant.

P. A. Pandit—for Respondent.

Judgment.—The plaintiff-respondent's suit was dismissed in the first Court as the result of a perfunctory and careless judgment, in which neither the oral nor the documentary evidence was considered in a careful or accurate manner. The plaintiff, Mt. Girjabai, appealed to the Court of the District Judge who decreed the plaintiff's claim in a reversing judgment in which the facts of the case are very fully stated.

There are, in reality, only two questions involved in the present second appeal and on neither of these has the appeal any chance of success. The first point urged is that the plaintiff, although technically appointed lambardar of patti No. 1, is not, in reality, such, inasmuch as the two widows of Piraji are, in reality, the owners of their deceased husband's share, and the present plaintiff is not, in reality, an owner, but is, at the best, a mere reversioner. It is perfectly true that under S. 187, sub-S. (2), C. P. Land Revenue Act, 1917, a proprietor must be appointed lambardar and it may be that the appointment of the present plaintiff-respondent as lambardar will be found to be invalid when questioned in due course of law in the civil or the revenue Court, as the case may be, by the real proprietor of the share, but it does not seem to me that, as between the present appellant and the plaintiff-respondent, this question arises at all, in view of the admitted fact that, rightly or wrongly, Mt. Girjabai has been appointed lambardar as well as of the proved and admitted fact that the plaintiff is at present in possession of Piraji's share. Until the plaintiff's appointment as lambardar is upset, she must be presumed to have all the ordinary powers of the lambardar under S. 188, Land Revenue Act, and it follows ipso facto therefrom that she was entitled to sue in the present suit. I am in full agreement with the finding of the learned District Judge on this point and there is clearly no substance in the position taken up on behalf of the appellant in this connexion.

The second allegation offered on behalf of the defendant-appellant is that the lower appellate Court's finding that the alleged partition has not been proved is a wrong one. This is a mere attempt to interfere on second appeal with a perfectly legitimate finding of fact which has been arrived at by the lower appellate Court. The proof whether there has been a partition or not as between co-owners in a village is a very different matter from the question of whether there has or has not been a disruption of a joint Hindu family : cf. *Bed Prasad* v. *Nakchhed Prasad* (1), but, even if it were open to this Court to interfere with the finding of fact in question, I can see no sufficient reason for doing so. I have been asked to lay special weight on the entries in the khasras (Exs. D. 8 and D. 9) which are, in reality, the only piece of evidence which would go to show that the fields in suit were expressly held by Ganpati.

The khasras are, no doubt, prepared on the spot by the patwari and, from one point of view, they might, therefore, be looked on as a most valuable piece of evidence, but, from another point of view, it would be equally possible to premise that they in this connexion form a species of record which interested parties might induce patwaris to make erroneous or incorrect entries in. The fact remains, however, that the jamabandis for the same year contained divergent entries which are not reconcilable with the entries in D. 8 and D. 9. What the village papers evidence as a whole does suggest is that Raoji began to cultivate certain areas of banjar land and from time to time obtained leases therefor from Ganpati and paid him rent, but these facts are an wholly insufficient basis on which to hold that the partition has been established. Even if we assume that Dhondba

(1) A. I. R. 1924 Nag. 410=21 N. L. R. 12.

is now manager on behalf of Ganpati, the omission to examine the latter on behalf of the present appellant is a significant one and, still further, it is almost absurd to suppose that the appellant cannot have known or had reason to believe that lists of partition were available which he could have arranged to produce in evidence. I further concur with the remarks of the lower appellate Court in para. 3 of its judgment as regards the oral evidence on the question of partition. Very obviously there was insufficient material on record on which the District Judge could, with any certainty of fairness, have held that the partition had been proved.

There is no reason to interfere and the appeal is, therefore, dismissed. The appellant must bear the respondent's cost. Costs in the lower Courts as already ordered.

N.K. *Appeal dismissed.*

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* A. I. R. 1928 Nagpur 124

PRIDEAUX, A. J. C.

Fadalilal—Defendant—Appellant.

v.

Roochand and *another* — Plaintiffs—Respondents.

Second Appeal No. 483 of 1926, Decided on 30th September 1927, from decree of Addl. Dist. Judge, Narsinghpur, D/- 8th July 1926, in Civil Appeal No. 2 of 1926.

* *Contract Act, S. 25 (3)—Acknowledgment of previous debts implies promise to pay and can be a basis of a fresh contract after limitation—Limitation Act, S. 19.*

An acknowledgment of debt implies a promise to pay, and though an acknowledgment is required by S. 19, Limitation Act, to be made before the expiry of the period of limitation, a promise under S. 25, Contract Act, may be made after the period. [P 125 C 2]

H. S. Gour—for Appellant.

N. G. Bose—for Respondents.

Judgment.—The plaintiffs sue for Rs. 876-7-0. Their case is that on 23rd July 1923 Rs. 1,300 were due by the defendant to them on old accounts. The plaintiffs intended suing and got a plaint drafted, but the defendant then agreed to execute a sarkhat for Rs. 670 and to secure it by the pledge of gold ornaments already held by the plaintiffs on old pledges, and to execute another sarkhat for Rs. 630, pay all the expenses which the plaintiffs incurred in preparing their suit and to pay interest at 12 as. per cent. per mensem. The defendant therefore executed the sarkhats Exs. P-2 and P-3 on 23rd July 1923. He did not redeem the ornaments mentioned in Ex. P-2, and these were sold, fetching Rs. 668. The balance due on the two sarkhats with interest came to Rs. 876-7-0.

The defendant's story was that he executed the first sarkhat Ex. P-1 without understanding the accounts. This was for Rs. 1,025. He also executed the other two sarkhats, Exs. P-2 and P-3, at the plaintiffs' shop as the defendant's brother told him that he had made an account of his own debts with the plaintiffs and that to meet the plaintiffs' wishes the defendant should go and execute them. The defendant further contended that the claim was time barred and also that he is not liable to pay interest at higher rate than the rate of interest originally agreed upon between the parties.

These allegations were denied and the case went to trial on the following issues:

1. Did the defendant on 23rd July 1923 promise to pay Rs. 1,300 due on old accounts to plaintiffs and execute the sarkhats for Rs. 670 and Rs. 630?
2. Did he agree to pay interest at 12 as. per cent. per mensem?
3. Did he agree to pay the costs of any plaint as alleged?
4. If so, what are those costs?
5. Did the defendant execute the sarkhat for Rs. 1,025 without understanding the accounts?
6. Did he sign the sarkhats of Rs. 670 and Rs. 630 under any mistake?
7. Does any of these facts, if proved, entitle the defendant to go behind the settled accounts?
8. To what relief, if any, are the plaintiffs entitled?

The trial Court held that the defendant executed the two sarkhats, that he agreed to pay interest at 12 as. per cent. per mensem and agreed to pay the costs of the plaint which amounted to Rs. 20. As regards the sarkhat for Rs. 1,025, the first Court found that the defendant failed to prove that he executed them without understanding the accounts and that the other two sarkhats were signed under any mistake. Dealing with the amount due, the trial Court finds that the defendant did promise to pay Rs. 1,300, and that for this amount sarkhats for Rs. 670 and Rs. 630 were executed; but the agreement being oral could not help the plaintiffs under

S. 25 (3), Contract Act, unless the acknowledgments (Ex. P-2 and Ex. P-3) could be interpreted to be those "agreements in writing and signed" by the defendant. The Court finds that an unconditional acknowledgment such as Exs. P-2 and P-3 has always been held to imply a promise to pay, but that as held in *Ratan Lall* v. *Anwarkhan* (1). such an implied promise to pay is not a contract within the meaning of S. 25 (3), Contract Act. A portion of the claim evidenced by the first sarkhat for Rs. 1,025 was held time barred. The Judge writes:

If the acknowledgments Exs. P-2 and P-3 could be interpreted to mean "an express promise to pay in writing," in other words if they could be interpreted to constitute a contract within the meaning of S. 25 (3), Contract Act, I would be inclined to decree the plaintiff's claim, disregarding the fact that at least a portion of it consists of a time barred debt; (vide *David Sutherland Clarke* v. *Rose Grimshaw* (2). But as the facts are, the acknowledgments cannot be interpreted to mean "written promises to pay" and, therefore, cannot form the basis of a suit: vide *Beohar Raghubersingh* v. *Udechand* (3). The plaintiffs have not chosen to base their claim on accounts, in spite of a written application of the defendant filed on 9th November 1925. They have expressly based their claim on an agreement, which it has been shown above cannot help the plaintiffs inasmuch as it was not "in writing"—the acknowledgments Ex. P-2 and Ex. P-3 also having been held above as not forming a contract within S. 25 (3), Contract Act. The defendant has had no chance of showing how the whole amount of the 1st sarkhat Ex. P-1 was time barred on the date of that sarkhat. Under the circumstances plaintiffs' claim, in so far as it relates to the accounts under Ex. P-3 and Ex. P-2, cannot succeed.

But the plaintiffs' claim for Rs. 23-13-0, i. e., Rs. 20 for the plaint costs and interest, was decreed and further. finding the defence false, the first Court gave the plaintiffs Rs. 75 as compensation under S. 35-A, Civil P. C.

On appeal the Additional District Juge, Narsinghpur, holds that there was a new contract between the parties on 23rd July 1923, the old debt being wiped off on that date. The fact that the liability under the sarkhat dated 24th July 1920 forms the consideration for the compromise sued upon does not prevent the compromise being a new and independent contract which may form the basis of a suit and which may be proved by oral evidence. It was held that the new contract is enforceable, that the suit is not one for recovery of an old debt, but for the recovery of money due under an agreement of compromise. It was held that no part of the plaintiffs' claim is beyond time and the appeal was allowed, the cross-objections being dismissed. Against that decision the present appeal has been lodged by the defendant.

It is argued for the appellant that on 24th July 1920, when Ex. P-1, the sarkhat for Rs. 1,025 was executed, Rs. 920 then due were barred by time. It is argued that once a debt is barred by time, it ceases to operate as any consideration and that it can only be proved by a new contract as provided for in S. 25, Contract Act, that is under S. 19, Lim. Act, and any compromise under S. 25, Contract Act, must be registered.

For the respondents (plaintiffs) it is contended that Ex. P-1 for Rs. 1,025 is not a mere acknowledgment as ornaments were pledged: it is a contract; and within three years two other sarkhats Ex. P-2 and Ex. P-3 were executed on 23rd July 1923. There is a promise to pay. *Maniram* v. *Set Rupchand* (4), *Ratanlal* v. *Anwarkhan* (1), *Sitaram* v. *Nandram* (*A. I. R* 1925 *Nagpur* 9 *at* 11) and *Chunilal* v. *Laxman Govind* (5) are relied on. As to there being no consideration, it is contended for the respondents that forbearance to sue is sufficient: *Mahalinga Nadar* v. *Ganapathi Subbien* (6). The second two sarkhats, it is pointed out, were executed within three years of the first, and the suit is filed within three years of the date of the second two.

There is no doubt that acknowledgment of debt implies a promise to pay, and though an acknewledgment is required by S. 19, Lim. Act, to be made before the expiry of the period of limitation, a promise under S. 25, Contract Act, may be made after the period. There is no doubt that in the present case the defendant did promise to discharge his old debt by the execution of the two new sarkhats, and it seems to me that the lower appellate Court is right in holding that there was a new contract between the parties on 23rd July 1923. The sarkhats were given, the consideration for the same being the old debt due on the plaintiffs' forbearance to sue, and I

(1) [1920] 2 N. L. J. 261.
(2) A. I. R. 1923 Lah. 481.
(3) [1898] 11 C. P. L. R. 65.
(4) [1906] 33 Cal. 1047=2 N. L. R. 130=33 I. A. 165 (P, C.).
(5) A. I. R. 1922 Bom. 183=46 Bom. 24.
(6) [1904] 27 Mad. 528 (F. B.).

think the case can be termed to be one for recovery of money due under a compromise. I agree with the Court below that the claim is in time and dismiss the appeal with costs. The appellant will pay the respondents' costs.

S.J. *Appeal dismissed.*

A. I. R. 1928 Nagpur 126

HALLIFAX, A. J. C.

Mt. Sakhu—Defendant—Appellant.

v.

Kashiba—Plaintiff—Respondent.

Second Appeal No. 35-B of 1927, Decided on 4th November 1927, from decree of Dist. Judge, Amraoti, D/- 30th September 1926, in Civil Appeal No. 120 of 1926.

Interest—Rule of damdupat is applicable to all mortgages whether the mortgagee is in possession or not.

The rule of damdupat is applicable to all mortgages whether the mortgagee is in possession or not, if it is otherwise applicable; but in some cases, where the mortgagee is in possession, it does not apply, in the sense of being of any effect, because the payments made every year from the income of the property keep the amount of the interest below the amount of capital. In each case it is merely a matter of calculation. [P 126:C 2]

M. B. Niyogi—for Appellant.

B. W. Joshi—for Respondent.

Judgment.—The mortgage which is sought to be enforced in this case was executed on 20th January 1914. The consideration was a loan of Rs. 1,400 which the mortgagor agreed to repay in instalments of Rs. 200 each, with interest, on Paush Wadya 13th, which is approximately the 20th January of each of the following seven years. Interest on the loan was to be at 9 per cent., but any sum in default was to carry interest at 24 per cent. and the whole amount still due was to be paid at once on the occurrence of two defaults. The mortgagee was in possession of the mortgaged field from May 1917 to February 1925, and made Rs. 150 out of it in each of those eight years. He sued for the enforcement of his mortgage on 13th July 1925, claiming Rs. 3,500.

The claim for more than twice the principal is based on the quaint plea that a mortgagee in possession of the mortgaged property is not subject to the rule of damdupat. This was apparently taken in reliance on the head-note in the report of *Panduji* v. *Panduji* (1). That head-note states a proposition that is obviously wrong and does not appear in the judgment. The matter is too simple to need discussion. The rule of damdupat is applicable to all mortgages whether the mortgagee is in possession or not, if it is otherwise applicable, but in some cases, where the mortgagee is in possession, it does not apply, in the sense of being of any effect, because the payments made every year from the income of the property keep the amount of the interest below the amount of the capital. In each case it is merely a matter of calculation.

In this case no calculations have been made and the rule of damdupat has been regarded in the lower appellate Court as making Rs. 2,800 due on the date of the suit. That is impossible, as one payment of Rs. 150 had been made in June 1925, at the end of the mortgagee's possession; the total amount due at the time of that payment was only Rs. 2,800 which was reduced by it to Rs. 2,650, and the interest had no time to amount to Rs. 150 more by the date of the suit.

It seems to have been assumed that the plaintiff is entitled to all the penalties for default set out in the bond. Continuing to assume that, the account would stand as follows: In January 1915 the interest payable was at 9 per cent. on the whole sum, that is Rs. 126. For the second year it would be at 9 per cent. on Rs. 1,200 and at 24 per cent. on Rs. 326, and thereafter at 24 per cent. on the whole sum due. At the end of the fourth year the total shown by the account would be Rs. 3128, but by the rule of damdupat not more than Rs. 2800 would be due, and that would be reduced to Rs. 2,650 by the payment of Rs. 150. Similarly, in June of each of the next seven years, that is up to a month before the institution of the suit, the amount due would be brought down to Rs. 2,800 by the rule of damdupat and then to Rs. 2,650 by the payment of Rs. 150.

But the assumption that the plaintiff is entitled to the full higher rate of interest, under S. 73 or S.74, Contract Act, has been made without any consideration whatever. If nothing extra is allowed, that is, if the interest is calculated all through at 9 per cent. the amount due

(1) [1916] 12 N. L. R. 1=32 I. C. 231.

in June 1925, was Rs. 1,936-3-6, never having reached damdupat at all. If we call the interest between the date of the last payment and the institution of the suit Rs. 13-12-6, which is approximately correct, the amount due when the suit was filed would be Rs. 1950.

But the plaintiff is certainly entitled to some compensation for the defendant's failure to perform the contract, and raising the interest on default from 9 per cent. to 12 per cent. is by no means excessive for that purpose. That, however, would make the amount due in June 1925 Rs. 2,818-12-0, and the result is the same as if the rate was 24 per cent. Allowing Rs. 25 as interest for the month after the last payment, we get Rs. 2675 due at the date of the suit.

It is in many cases a hardship arising out of the rule of damdupat that the plaintiff is deprived of interest after filing his suit, perhaps for years. In this case, however, the plaintiff has only himself to thank for the greater part of the delay. On that account also he will get only five-sevenths of his costs in the first Court from the defendant, and will pay the whole of the rest of the costs of both parties in all three Courts.

The decree of the lower appellate Court will be modified into one ordering foreclosure in default of the payment by the 31st January 1928 of Rs. 2,675 plus five-sevenths of the costs incurred by the plaintiff in the first Court minus the whole of the costs of the defendant in the two appellate Courts and two-sevenths of her costs in the first Court. The pleader's fee in this Court will be fifty rupees.

N.K. *Decree modified.*

A. I. R. 1928 Nagpur 127

KINKHEDE, A. J. C.

Sitaramsa—Plaintiff—Applicant.

v.

Amirbax and *another*—Defendants—Non-Applicants.

Civil Revn. No. 68 of 1927, Decided on 26th September 1927, from decree of Small Cause Court Judge, Khandwa, D/-23rd December 1926, in Suit No. 1292 of 1926.

Limitation Act, Arts. 64 and 85—Adjustment of account between parties by debit and credit the balance being only in favour of one party and not shifting on one side or the other—Balance represents future liability and is recoverable in three years though some items of it may be already time barred.

Where an account stated comprises items on both sides and a balance is deducted thereon it being always in favour of one party and not shifting on one party or the other that balance represents the amount of liability for future and is recoverable within three years from the statement of account although some of the earlier items in the account may have been already time barred. [P 128 C 1]

G. R. Deo—for Applicant.

S. B. Gokhale—for Non-applicants.

Order.—As the result of certain past dealings, between the parties, which were adjusted by them, a balance was struck, which showed that, on 6th June 1923, the defendants were liable to plaintiff in the sum of Rs. 514-7-6. Defendant 2, purporting to act for himself and for his father, defendant 1, signed a ruju hisab, and orally agreed to repay with interest the sum found due, at the rate of 1 per cent. per mensem, within one month of the execution of the hisab. Plaintiff filed the present suit for the recovery of Rs. 724-15-3 inclusive of interest up to the date of the suit, viz., 16th June 1926.

Defendant 1 denied his liability on the ground of non-execution and limitation. Defendant 2 admitted the signing of the ruju, but denied that the ruju was an account stated, and urged that only items aggregating Rs. 66-3-9 were within time, and plaintiff was, therefore, not entitled to anything more than that amount on the strength of the ruju. It is significant to note that defendant 2 did not deny the plaintiff's allegations in para. 1 of the plaint about the oral agreement to repay within one month. Plaintiff's claim was decreed for such items as were in time at the date of the execution of the ruju with interest therein, and the rest of the claim was dismissed as barred by time. The claim was wholly dismissed as against defendant 1 for want of execution by him and only partly decreed against defendant 2. In arriving at this conclusion the Court below treated the ruju hisab as a mere acknowledgment, and not as account stated or as a mutual. open and current account. The plaintiff has come up in revision against the decision.

As to defendant 1's liability for the claim no serious attempt was made to show how he was bound by the admission of liability made by defendant 2 in

regard to the balance found due on adjustment of the khata which stood in the name of both on 6th June 1923. The dismissal of the claim as against defendant 1 must, therefore, stand.

The next question is whether the ruju hisab was a mere acknowledgment, or an account stated, or a mutual open and current account. If it was a mere acknowledgment and the items disallowed were advanced on dates long prior to three years of the date of acknowledgment, the dismissal of the claim must hold good. So far as the contention that the account was a mutual open, and current account—suffice it to say that the nature of the dealings is not such that the balance must shift on one side or the other—Art. 85, Lim. Act, does not therefore, apply

As to whether the case comes under Art. 64, Lim Act, I may observe that, where an account stated comprises items on both sides and a balance is deducted thereon, that balance is recoverable within three years from the statement of account, although some of the earlier items in the account may have then been already time barred. If the entries on p. 2 of the hisab bahi were scrutinized, it will be found that, on the day of the settlement, the account was made of items beginning from Fagun Badi 30, Sambat 1975, and ending with 11 Jeth Badi 8, Sambat 1980. The account, on the face of it, thus shows that several items of more than three years standing were taken into consideration in the balance due, without objection on the part of the executant. Interest was also calculated and added on that basis ; and, although, under date Magh Sudh 5, Sambat 1977, a sum of Rs. 115 was debited to the defendant's khata as the price of a pair of bullocks, that item was wiped out by a corresponding credit entry of Rs. 115 as the price of the pair of bullocks as they were returned, under date 6th June 1923. This credit was again squared by a debit under the maveshi khata, i. e., for purchase of cattle. Then again, a debit item of Rs. 69-2-0, on account of havalat of one Budha for a sum of Rs- 50 advanced to him, and interest thereon, from mitti Shravan Sudi 4, Sambat 1977 to Duja Jeth Badi 30, Sambat 1980, also appears debited in the defendant's khata, and, on the strength of that debit, a credit appears to have been given to Budha towards his liability. All this adjustment points to the common intention of the parties, to set off their cross demands against each other, and to strike a balance, in plaintiff's favour, of whatever may be found due to him, by consolidation of all items, whether barred or not barred by time, and to start with a fixed consolidated amount as representing the defendant's liability for the future.

It appears that following upon this common understanding, and with a view to give full effect to the same, the plaintiff credited the sum of Rs. 514-7-6 so found due, and thus squared up the previous account. This, to my mind, is tantamount to a new contract, and, is a substantive cause of action in itself ; so that a suit can be maintained on it. Especially as I find that the plaintiff debited the defendants with the amount of Rs. 514-7-6 under 11 Jeth Badi 8 Sambat 1890, I have no hesitation in holding that the question of some items being then time barred is irrelevant to the case as laid. It is, therefore, very likely that the plaintiff's allegation that the executant of the hisab made a verbal promise to repay the consolidated debt within one month was true and therefore defendant 2 did not dare to deny it.

I, therefore, modify the decision of the lower Court and decree the entire claim against defendant 2 with costs in both the Courts. As defendants 1 and 2 appeared through the same pleader, defendant 1 will not get any separate costs in this Court. Pleader's fee Rs. 15.

S.J. *Appeal allowed.*

A. I. R. 1928 Nagpur 128

FINDLAY, J. C.

Nago—Defendant 4—Appellant.

v.

Tarachand and *others* — Plaintiffs—Respondents.

First Appeal No. 1 of 1927, Decided on 26th September 1927, against decree of 1st Class Sub-Judge, Nagpur. D/- 30th September 1926, in Civil Suit No. 33 of 1924.

(a) *Civil P. C., Sch. 3—Property under Collector's management—Mortgage by the proprietor of the property is not valid.*

The incompetency of the mortgage during the period of the Collector's management only

extends to the property of which the Collector has expressly assumed management: *A. I. R.* 1922 *Nag.* 243, *Foll.* [P 129 C 2]

(*b*) *Transfer of Property Act, S.* 66—*Permanent lease of the mortgaged property by the mortgagor resulting in depreciation of the value of security is not valid.*

Where the permanent lease of the khudkasht land is not given in the ordinary course of management but is granted with the express object of making a large profit for the mortgagors, or seriously depreciating the value of the security which the mortgagees are entitled to then it cannot be an ordinary and reasonable act of ordinary management on the part of the mortgagors: 14 *N. L. R.* 117, *Rel. on.* [P 130 C 2]

M. R. Bobde—for Appellant.

W. R. Puranik—for Respondents.

Judgment.—In the present mortgage suit, the facts of which are sufficiently clear from the lower Court's judgment, the present appellant, who was defendant 4 in the lower Court, was impleaded in view of the fact that he had obtained a perpetual lease of khudkasht field No. 47 of mauza Jolwadi from defendants 1 to 3 and 7. The connected 2 annas 8 pies share of mauza Jolwadi has been released under the decree passed by the lower Court on the ground that at the time the mortgage came into being, the said share was under the management of the Collector. The Subordinate Judge, 1st Class, for reasons which are sufficiently clear from his judgment, has, however, held that the khudkasht field No.47, which was the subject of the present appellant's lease, was liable under the mortgage and it has accordingly been included in the mortgage decree. I am, therefore, solely concerned in this appeal with the question as to whether the inclusion of this field is correct or not.

In this connexion, I have been referred by the pleader for the appellant to para. 6 of the plaintiffs' written statement, dated 10th July 1925. It has been suggested that therein the plaintiffs rested their case on the fact that the 2 annas 8 pies share of mauza Jolwadi mortgaged was not the same 2 annas 8 pies share as was under the control of the Collector at the time being. It is perfectly clear that the plaintiffs' first plea in this connexion was that the mortgagors had a 5 annas 4 pies share in each of the two villages Jolwadi and Bhojgadh and that it was the 2 annas 8 pies share which was unaffected by the Collector's control and which was mortgaged. The lower Court, in its finding on issue 8, has, however, found this point against the plaintiff and there has clearly been no proof that the mortgagors had more than 2 annas 8 pies share in mauza Jolwadi.

It has now been suggested on behalf of the present defendant-appellant, apparently for the first time, that the khudkasht fields Nos. 47, 17 and 9 with a total acreage of 9·14 acres must be the same as the khudkasht fields Nos. 10 and 52 with a total acreage of 9·15 acres, which the lower Court holds were under the management of the Collector along with a 2 annas 8 pies share of mouza Jolwadi. I do not think, however, this contention can possibly be now accepted, offered as it is for the first time in the appellate Court. If we turn to para. 6 of the plaintiffs' written statement, it is perfectly clear that there the latter offered an alternative plea. Even supposing that the contention that the mortgagors owned a 5 annas 4 pies share in the village and that it was the free portion of that share which was mortgaged failed, the plaintiffs clearly offered a further distinct plea that anyhow the rest of the property covered by the mortgage was not included in the Collector's proceedings and that the mortgage would hold good as regards such further property. Now, if the present defendants-appellant's case had been that Nos. 10 and 52 in reality, referred to the same lands as Nos. 47, 17 and 9, I should certainly have expected to find a specific plea from him to this effect in his written statement, dated 24th September 1925. The said written statement is, however, absolutely silent on the point and he therein rested his case on the fact that the lease of field No.47 had been given him in the ordinary course of management and that, in any event, the mortgage having been executed when the Collector's proceedings were pending, the whole of it was void irrespective of the fact whether the subjects covered by the mortgage were all at the time in the hands of the Collector. On this latter point, I see no reason to differ from the decision of Kotval, A. J. C., in *Gangaram* v. *Ramgopal* (1), the incompetency of the mortgage only extended to the property of which the Collector had expressly assumed management.

It has next been urged in this connexion on behalf of the appellant that whatever interest he had in the 2 annas

(1) A. I. R. 1922 Nag. 243=18 N. L. R. 131.

8 pies share, necessarily must be considered as having been under the management of the Collector and that, therefore, khudkasht field 47 came within the said head. I am unable, however, to accept this contention in the circumstances of the present case. Apparently, only specific khudkasht fields, viz., Nos. 10 and 52 of Jolwadi, were under the management of the Collector. The obvious presumption must be that any other khudkasht field not so specified was not affected so far by the Collector's proceedings, and there having been neither allegation nor proof that khudkasht field 47 corresponds to any portion of khudkasht fields 10 and 52, the inference must be that khudkasht field 47 was not under the management of the Collector,

I now pass to the first and second grounds of appeal. The first ground, which is to the effect that the present appellant took the lease of field 47 without notice of the mortgage, has obviously not got the slightest basis. The lease-deed itself states that the field is mortgaged and that the lessors would be responsible to the mortgagees. Even so, however, it has been urged on behalf of the appellant that the fact that the lessee had notice of the mortgage is immaterial, that the lease was one given in the ordinary course of management and that the mortgagors at the time were competent to give such a lease. In this connexion, I am wholly at a loss to understand the finding of the lower Court to the effect that the lease in question was given to the appellant in the ordinary course of management—a finding relating to issue 10 (b). In para. 38 of the lower Court's judgment, where the reasons for that finding are given, you can find no discussion whatever of the relevant question involved.

I accept the principles laid down by Hallifax, A. J. C., in his judgment in *Karu* v. *Pandia* (2), but I find it wholly impossible to apply in a sense favourable to appellant the said principle to the circumstances of the present case. It is impossible to imagine that the giving of this lease of what apparently formed a large portion of the khudkasht field attached to the village share was an ordinary and reasonable incident of village management. The test is, would the mortgagors have been likely to have given this lease themselves if they had known that they would continue indefinitely as the owners of the property ? I think this question must undoubtedly be answered in the negative. The circumstances all suggest that the lease in question was not given in the ordinary course of management, but was granted with the express object of meanwhile making a large profit for the mortgagors, or seriously depreciating the value of the security which the mortgagees were entitled to. In this connexion, I find myself in full agreement with the remarks of Mittra, A. J. C., in *Shankersingh* v. *Hukumchand* (3), at pp. 119 and 120. The present lease was given in perpetuity. If the land was so valuable that a nazarana of Rs. 1,000 could fairly be demanded from it, it is impossible to suppose that the most serious loss would not be directly inflicted on the mortgagees when they subsequently came into the possession of the villages, for all they would receive would be a sum of Rs. 15-4-0 per year rental. The discrepancy between the capital sum of Rs. 1,000 paid, and the yearly rental is sufficiently startling, and when we keep in mind also the fact that the lease was a perpetual one, it seems to me utterly impossible to postulate in the circumstances of the present case that the lease in question was an ordinary and reasonable act of ordinary management of the share on the part of the mortgagors.

The respondents have also raised, apparently for the first time in the course of argument in this Court, the contention that there has been no proof that the mortgagors were entitled to grant the lease and that presumably this power rested with the lambardar. This was a matter for a specific pleading in the lower Court, and I am not prepared to entertain this plea now, but, altogether apart from it, I find it wholly impossible to hold that the lease in question was a bona fide act in the course of ordinary management. Over and above this, there is the undoubted fact that the present appellant had notice of the mortgage and under the lease-deed expressly assumed responsibility with reference thereto. On the facts of the present case, therefore, the said lease not being, in my opinion, an ordinary bona fide one carried through in the course of the ordinary management

(2) A. I. R. 1924 Nag. 226.

(3) [1918] 14 N. L. R. 117=47 I C. 99.

of the village, and the lessee having accepted it on the terms he did, there can. in my opinion, be no question, but that field No. 47 is liable under the decree obtained by the respondents. This appeal is accordingly dismissed. The appellant must bear the respondent's costs. Costs in the lower Court as already ordered.

N.K. *Appeal dismissed.*

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* A. I. R. 1928 Nagpur 131

KINKHEDE, A. J. C.

Ramchandrarao and *others* — Defendants—Applicants.

v.

Mayaram—Plaintiff—Non-applicant.

Civil Revn. No. 98 of 1927, Decided on 26th September 1927, from order of Dist. Judge, Bhandara, D/- 11th January 1927, in Civil Appeal No. 82 of 1926.

* (*a*) *Limitation Act, S. 12—Application for copies of judgment and decree need not be made at the same time provided they are made before the period of limitation.*

The law does not prescribe any particular time for making of applications for copies or require that copies of both decree and judgment must be applied for simultaneously provided they are made before the expiry of the period of limitation prescribed for filing the appeal. The aggregate period taken in obtaining copies of judgment and decree should be excluded when computing limitation, even though applications for those copies were made on different dates. [P 132 C 2]

Where on the dismissal of a suit on 24th August 1926 .the plaintiff applied for a copy of the judgment on 8th September 1926, and, obtained the same on 30th September 1926 and thereafter applied for a copy of the decree on 7th October 1926 and obtained it on 12th October 1926 and the appeal was filed on that day.

Held : that the appeal was not time barred. [P 131 C 2]

(*b*) *Civil P. C., S. 115—High Court will interfere in revision against interlocutory order where principle or jurisdiction is involved.*

Although the High Court does not ordinarily interfere in revision against an interlocutory order still, where matters of principle or jurisdiction are involved it does not necessarily decline to entertain it. [P 131 C 2]

(*c*) *Limitation Act, S. 12 (3)—Period required for obtaining copy of decree may be extended if the application for it is made before time prescribed in S. 12 (3) (obiter).*

(*Obiter*)—Under S. 12 (2) of the Act, when an application is made for copy of a judgment even the period required for obtaining copy of the decree may also be excluded provided the application for the copy of the decree is made before the expiry of the extension of time allowed by S. (12) (3) as time required for obtaining copy of the judgment. [P 132 C 2]

(*d*) *Civil P. C., O. 41, R. 1—Litigant has no option about filing a copy of judgment—Court has to decide.*

Under O. 41, R. 1, Civil P. C., it is not left to the litigant's choice to file or not to file a copy of judgment, but it is the judge alone who can dispense with it. [P 132 C 2]

G. L. Subhedar—for Applicants.

V. Bose and *P. N. Rudra*—for Non applicant.

Order.—This revision raises an interesting question of law. The non-applicant, Mayaram, filed Suit No. 62 of 1925, in the Court of the Subordinate Judge, Balaghat, against the applicants. That suit was dismissed on 24th August 1926. Plaintiff applied for a copy of the judgment on 8th September 1926, and obtained the same on 30th September 1926. Thereafter a copy of the decree was applied for on 7th October 1926, and obtained, on 12th October 1926, and the appeal was filed on that day in the Court of the District Judge, Bhandara. The applicants took a preliminary objection that the appeal was barred by time, but the same was overruled and the case was set down for hearing on the merits. It is against this interlocutory order overruling the objection as to limitation that this revision has been preferred.

The non-applicant raises objection to the maintainability of the present revision on the ground that it is not the practice of this Court to entertain any revision against an interlocutory order. Suffice it to say that, although this Court does not ordinarily interfere, still, where matters of principle or jurisdiction are involved, this Court does not necessarily decline to entertain it. I, therefore, think that the present revision can lie.

Now, as to the merits of this petition for revision : I say that the decision sought to be revised is in accordance with the statute law and must be upheld. I will show how it is so.

The prescribed term of 30 days for filing an appeal against the decree expired on 23rd September 1926 ; but before such expiry the non-applicant applied for copy of the judgment on 8th September 1926, i. e., on 15th day of the delivery of judgment, when he had still to his

credit 15 days out of the prescribed period of limitation (Art. 152, Lim. Act). When, however, he obtained the copy of the judgment on 30th September 1926 the 15 days to his credit had expired, and out of the period of 23 days, which he was entitled to exclude as time requisite for obtaining the copy of the judgment, under Cl. 3, S. 12, Lim. Act, he had still to his credit a period of 16 days. Before the expiry of this period, i. e., when only six days out of it had expired, he, on 7th October 1926, applied for a copy of the decree and obtained it on 12th October 1926, i. e. when he had still four days to his credit out of the aforesaid period. The appeal was filed on the very day. It will thus be seen that the appeal was instituted, on the 49th day from the date of judgment or, excluding the 23 days time required for obtaining the copy of the judgment only, on the 26th day of the period of limitation prescribed by law. If the period of six days which was required for obtaining the copy of the decree were excluded as he is entitled to exclude it, under Cl. 2, S. 12, his appeal would be still within time by six more days. In spite of this state of things, the applicants contended that the appeal was barred by limitation, by reason of the fact that, instead of applying for copy of the decree and of the judgment, simultaneously or at different times within the period of 30 days prescribed by law for appealing, the non-applicant applied first for copy of judgment before the expiry, and then for copy of the decree after the expiry of the said period. It is argued that the non-applicant was not entitled to exclude the time taken up in obtaining a copy of the judgment as he had not first applied for obtaining a copy of the decree. I think this contention is unsound in view of the clear provisions of S. 12, Lim. Act, which entitled him to deduct both the periods of time.

As pointed out by Drake-Brockman, J. C., in *Bagmal* v. *Firm of Jamnadas Potdar* (second appeal No. 434 of 1915) it is a well recognized practice for an unsuccessful litigant to obtain copy of judgment first so that he may consider whether he will appeal or accept failure; it is undoubtedly open to a litigant to postpone applying for copy of judgment and decree till the very last day of the scheduled period. Similarly Mittra. A J. C., in *Sheoram* v. *Chintu* (second Appeal No. 253-B of 1927) held that the law does not prescribe any particular time for the making of applications for copies or require that copies of both decree and judgment must be applied for simultaneously. Accordingly in both those cases the aggregate period taken in obtaining copies of judgment and decree was excluded even though applications for those copies were made on different dates, they were made before the expiry of the period of limitation prescribed for filing the appeal.

In the present case only one application, viz. that for obtaining copy of the judgment was filed within the period of limitation, So, even on the authority of the aforesaid decisions and the provisions of S. 12 (3), Lim. Act, the non-applicant's appeal could be treated as within time, without the necessity of excluding the period required for obtaining the copy of the decree. If the point were necessary for me to decide, I would hold that the non-applicant was entitled to exclude, under S. 12 (2) of the Act, even the period required for obtaining copy of the decree provided he has applied for the copy of the decree before the expiry of the extension of time allowed by S. 12 (3) as time required for obtaining copy of the judgment.

It is, however, argued before me that it is the decree which gives a right of appeal and it is, therefore, necessary to obtain a copy thereof in order to keep that right alive, and that since it is optional with the Court to dispense with the filing of a copy of judgment, the intending appellant should not be held entitled to exclude the time spent by him in obtaining a copy of an optional document. viz., judgment. No doubt under O. 41, R. 1, Civil P. C., every memorandum of appeal must be accompanied by a copy of the decree appealed from (unless the appellate Court dispenses therewith) of the judgment on which it is founded. I need only say that it is not left to the litigant's choice to file or not to file a copy of judgment ; inasmuch as it is not optional with him to obtain its copy or not, and the Judge alone can dispense with it, the judgment cannot be said to be an optional document. It is as essential as the decree. It is, therefore, wholly immaterial in what order the copies are applied for and obtained.

All that is required is that the period prescribed by the specific article of the limitation schedule, with the extension claimable under the provisions of S. 12, Lim. Act, should not have expired before the copies were obtained and lodged with the memo. of appeal. In short the right of appeal must be kept alive, under S. 12 of the Act, until the date the appeal is filed. In this view of the case the revision is dismissed with costs, Pleader's fee Rs. 25.

S.J. *Revision dismissed.*

A. I. R. 1928 Nagpur 133

HALLIFAX, A. J. C.

Govind and *another*—Plaintiffs—Appellants.

v.

Malkarjunappa and *others*—Defendants—Respondents.

First Appeal No. 58-B of 1926, Decided on 16th June 1927, from decree of 1st Class Sub-Judge, Amraoti, D/- 30th June 1926, in Civil Suit No. 52 of 1925.

Interest—Rule of Damdupat explained.

The interpretation of the rule of Damdupat thatthe amount of interest that may be recovered at any time shall not exceed the principal, but that any excess there may be according to the account shall still be recoverable, though not at that time, is directly contradictory of the words of the texts which say that when the interest is equal to the principal, it "ceases" (Gautam) or "stops" (Katyayana): 1 *B. H. C.* 47 and 24 *Bom.* 305, *Foll.* [P 133 C 2]

H. S. Gour and *M. B. Marathe*—for Appellants.

K. G. Deshpande, R. R. Jayawant and *G. G. Hatwalne*—for Respondents.

Judgment.—The question in this case is one of the meaning of the rule of damdupat by which the parties are bound. The suit rested on a mortgage for Rs. 5,000 executed on 25th September 1914. The only payment was one of Rs. 4,865 made on 16th October 1925. On 16th December of that year, that is two months later, the plaintiffs filed the present suit, in which they claimed a decree for Rs. 10,000, asserting that by that time more than Rs. 12,000 appeared due at the foot of the account.

In the plaint it is stated that by the account the amount due to the plaintiffs on 16th October 1925 was Rs. 17,633 which the payment of Rs. 4,865 on that day reduced to Rs. 12,768. By adding interest to that the amount due on the date of the suit, strictly according to account, would be about Rs. 13,456, though it is stated to be slightly less. Anyhow it is more than Rs. 10,000 and the plaintiffs claimed a decree for that sum only.

It was held in the lower Court that the amount due on the mortgage on 16th October 1925 was, by the operation of the rule mentioned, only Rs. 10,000, and this was reduced to Rs. 5,135 by the payment made on that day. A decree was accordingly given for foreclosure on 30th December 1926 in default of the payment by that date of Rs. 5,135 with interest thereon from the 16th October 1925. The total amounted to Rs. 6,585-5-0 and the plaintiffs have appealed, contending that they are entitled to get Rs. 10,000.

The texts on which the rule is based are cited in *Dhondu* v. *Narayan* (1), decided by the Bombay High Court in 1863 and in the judgment of the same Court in *Sukalal* v. *Bapu Sakharam* (2) 36 years later, and they seem to leave no doubt about the matter. The interpretation suggested for the appellants is not easy to understand; it seems to be that the amount of interest that may be recovered at any time shall not exceed the principal, but that any excess there may be according to the account shall still be recoverable, though not at that time. Such an interpretation, reduces the rule to a nullity, in addition to being directly contradictory of the words of the texts, which say that when the interest is equal to the principal, it "ceases" (Gautam) or "stops" (Katyayana).

The appellants themselves admit that if the respondents had paid Rs. 10,000 instead of a little less than Rs. 5,000 in October 1925 the whole debt would have been wiped out, that is that the amount due for interest on that day was Rs. 5,000 and no more. They have made the same admission in claiming no more than Rs. 10,000 in their suit; if, as they contend, a sum of Rs. 7,768 still remained due as interest after the payment in October 1925 (though they were not allowed to recover it at that time), then there would still be more than Rs. 8,000 due to them as interest after the decree they claimed had been satisfied.

Another proof of the impossibility of the suggested interpretation will be found

(1) 1 B. H. C. 47.
(2) [1900] 24 Bom. 305=2 Bom. L. R. 18.

in an attempt to answer the question of the length of the period to be allowed between two recoveries of interest. If only interest equal to the principal can be recovered at one time, but the excess shown in the account is still recoverable later, how soon can that be done? Can it be done the next day or must there be an interval of a week or a month or a year, or need the interval be no more than a minute or two? The plaintiffs themselves left an interval of exactly two months between the payment and the suit.

The two contentions raised in a cross-objection by the respondents were expressly abandoned in this Court, and as the amount decreed in the lower Court has already been paid, it is not necessary to extend the time allowed for redemption. The appeal will accordingly be dismissed and the appellants will be ordered to pay all the costs with the exception of those incurred in connexion with the cross-objection. The pleader's fee in the appeal will be Rs. 350. There will be none for the cross-objection.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 134

MOHIUDDIN, A. J. C.

Muli—Plaintiff—Appellant.

v.

Ganpat—Defendant—Respondent.

Second Appeal No. 280-B of 1926, Decided on 9th February 1928, from decision of Dist. Judge, Akola, D/- 31st March 1926, in Civil Appeal No. 14 of 1926.

Limitation Act, Art. 97—Original decree is not suspended by the presentation of appeal—Limitation runs from the date of the passing of original decree for a cause of action based on that decree.

Under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal and, therefore, the time from which the period of limitation ought to be counted is the date of the decree of the first Court : *A. I. R.* 1918 *P. C.* 151, *Foll.* and 42 *Mad.* 507, *Dist.* [P135 C 1]

N. G. Bose—for Appellant.

K. K. Gandhe—for Respondent.

Judgment.—Muli filed this suit on 31st August 1925, against Ganpat, for the recovery of Rs. 1,800 which consisted mainly of three items, i. e., Rs. 800 paid to defendant on 25th June 1913, Rs. 584 interest, by way of damages from 25th June 1913 to 25th August 1925, and costs incurred in Civil Suit No. 74 of 1915 and Appeal No. 24 of 1918.

The respondent Ganpat sold a portion in survey No. 159 and a portion in survey No. 27 to Muli by means of a sale-deed, and received Rs. 800 out of Rs. 1,000 for which amount the sale was effected. Muli could not obtain possession of the fields after the sale as Gopala and Balwanta obstructed her, and she filed a suit in 1915 against Gopala and Balwanta for partition and separate possession of half-share in the two fields. The suit was dismissed on 10th October 1917, the first appeal was dismissed on 29th September 1922, and the second appeal on 23rd June 1924. In para. 3 of the plaint it was alleged that the cause of action accrued on 23rd June 1924, the date on which this Court decided the second appeal.

The suit has been dismissed as barred by time under Art. 97, Lim. Act, as it was filed on 31st August 1925, more than three years after the judgment by the trial Court, which decided it on 10th October 1917.

Though a number of points were mentioned in the memorandum of appeal but the learned pleader for the appellant has argued only one point about limitation, and has urged that, though Art. 97, Lim. Act. applies to the present case, the period must be counted from the date of the judgment of the first appellate Court. In support of this proposition he has relied on the case, *Sarvothama Rao* v. *Chinnasami Pillai* (1), in which it was held

that the suit was not barred by limitation under Art. 97, Lim. Act, as the consideration failed only when it was finally determined by the High Court in second appeal.

The same point regarding the date of the failure of consideration, for money paid upon an existing consideration, which afterwards fails, came up before their Lordships of the Privy Council in *Juscurn Boid* v. *Pirthichand Lal Choudhury* (2), a few days after the decision of the Madras case, and they observed as follows :

Both Courts have held that the failure of consideration was at the date of the first

(1) [1919] 42 Mad. 507=36 M. L. J. 157=9 M. L. W. 379=49 I. C. 729=(1919) M. W. N. 432.

(2) A. I. R. 1918 P. C. 151=46 Cal. 670=46 I. A. 52 (P. C.).

Court's decree. Their Lordships feel no doubt that, as between these two decrees, this is the correct view ; for, whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal.

It is thus clear that in a suit of this kind the time from which the period of limitation ought to be counted is the date of the decree of the first Court, i. e., 10th October 1917 in this case and, as the suit was filed after more than three years from that date, it is barred by time.

The appeal thus fails and is dismissed with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 135 (1)

FINDLAY, J. C.

Shrawan Mahar—Complainant — Applicant.

v.

Rajeshwar Khandopant Page—Accused —Non-applicant.

Criminal Revn. Appln. No. 336 of 1927, Decided on 5th January 1928.

Criminal P. C., S. 256—Failure to comply causing injustice—Retrial is necessary.

Where the Magistrate had not complied with the provisions of S. 256, Criminal P. C., and the procedure had resulted in a miscarriage of justice,

Held: that the order for retrial was right: *A. I. R.* 1926 *Lah.* 155, *Ref.* [P 135 C 1, 2]

G. R. Pradhan—for Applicant.

Order.—This is an application for revision of an order passed by the Magistrate of the 1st Class, Nagpur, remanding Criminal Case No. 39 of 1927, in the Court of the 2nd Class Magistrate, Ramtek, for further trial. The basis of the order of the remand was the fact that the Magistrate had not complied with the provisions of S. 256, Criminal P. C., and the 1st Class Magistrate was of opinion that the procedure of the 2nd Class Magistrate had resulted in a miscarriage of justice.

All that has been urged in the present application for revision is that the provisions of S. 256, Criminal P. C., are directory and not mandatory, and that the remand of the case for a retrial was unnecessary. I find it unnecessary, in the circumstances of the case, to decide whether, in my opinion, the provisions in question should be considered as merely directory. There is considerable authority for the latter view, e. g., in *Mt. Ghasiti* v. *The Crown* (1), as well as in various unreported cases. Obviously, however, assuming the decision in the Lahore case to be a correct exposition of the law, and assuming what has occured to have been a mere irregularity, the 1st Class Magistrate has further held that the irregularity in question has caused a failure of justice. On the facts stated by the 1st Class Magistrate I am in full agreement with the latter view, and it follows, therefore, that the case has been correctly remanded to the Court of the 2nd Class Magistrate for a retrial. I am unable, therefore, to interfere, and dismiss the application without notice to the non-applicant.

N.K. *Application dismissed.*

(1) A. I. R. 1926 Lah. 155=6 Lah. 554.

A. I. R. 1928 Nagpur 135 (2)

MACNAIR, A. J. C.

Bapuji—Accused—Applicant.

v.

Emperor—Non-applicant.

Criminal Revn. No. 116-B of 1927, Decided on 17th June 1927.

Penal Code, S. 353—Resistence to the process-server in the most open way—Deterrent punishment should not be given.

Very many people are disposed to resist process-servers when their property is attached, and it is necessary to pass deterrent sentences even where such persons are not sure that the attachment is legal. But where the accused acted in the most open way and made an endorsement that he had resisted the process-server. *Held*: a very heavy punishment was not required in order to deter persons from taking such action as the resistence offered was merely a technical assault. It would be different if the action was such that the chance of detection and punishment was very small.

[P 125 C 2, P 186 C 1]

Order—The facts found by the Magistrate are that the applicant resisted a process-server, who was endeavouring to deliver possession of the applicants' standing crops to Pandurang; he used criminal force by catching the process-server's hand and giving him pushes. Mr. Sukthankar, District Magistrate, has suggested that the applicant may have offered resistance under a mistaken idea of his rights.

The counsel for the applicant does not desire to dispute these findings. Very many people are disposed to resist process-servers when their property is attached, and it is necessary to pass determent sentences even where such persons are not sure that the attachment is legal.

But the applicant acted in the most open way and made an endorsement that he had resisted the process-server. A very heavy punishment is not required in order to deter persons from taking such action ; it would be different if the action was such that the chance or detection and punishment was very small. In my opinion a substantial fine would have been sufficient, the resistance offered was merely a technical assault. The applicant has undergone rigorous imprisonment for some months. I therefore reduce the sentence to the imprisonment already undergone.

N.K. *Sentence reduced.*

A. I. R. 1928 Nagpur 136 (1)

KINKHEDE, A. J. C.

Bapu Suryabhan—Defendant—Appellant.

v.

Kisan and *others* — Plaintiffs — Respondents.

Second Appeal No. 440-B of 1926, Decided on 1st November 1927, from decision of 1st Addl. Dist. Judge, Akola, D/- 13th September 1926, in Civil Appeal No. 112 of 1926.

Civil P. C., S. 102 — *Suit for compensation in a Small Cause Court—Plaint returned on the ground that it involved a question of title—Claim decreed by ordinary Court to the extent of Rs.* 10—*Second appeal does not lie.*

Suit for compensation for damage done to plaintiff's property by the wrongful act of the defendant of digging a pit close by and letting water accumulate there was originally presented to the Court of Small Causes but that Court returned it for presentation to the ordinary civil Court on the ground that it involved a question of title. The first Court decreed the claim to the extent of Rs. 10. The decision was appealed against by the defendant but his appeal was unsuccessful.

Held : that a second appeal did not lie : 25 *Bom.* 625 and 32 *Bom.* 560, *Foll.* [P 136 C 1,2]

G. G. Hatwalne—for Appellant.

G. R. Deo—for Respondents.

Judgment.—This is suit for compensation for damage done to plaintiff's property by the wrongful act of the defendant of digging a pit close by and letting water accumulate there. It is said that the plaintiffs' wall got damp with moisture and fell down. Hence the plaintiffs claimed compensation by way of reimbursement of the expenses they are likely to suffer in re-erecting them. The plaint in this suit was originally presented to the Court of Small Causes but that Court returned it for presentation to the ordinary civil Court on the ground that it involved a question of title. The Small Causes Court thus exercised the discretion what the law gave it under S. 23 Provincial Small Causes Courts Act. That order has become final as between the parties.

The plaint was thus entertained by the ordinary civil Court to which it was presented in due course. The first Court decreed the claim to the extent of Rs. 10. The decision was appealed against by the defendant but his appeal was unsuccessful. He has therefore come up on 2nd appeal.

The first question is whether a 2nd appeal lies. On the strength of the rulings in *Vinayak* v. *Krishnarao* (1) and *Kesri Sang* v. *Narain Sang* (2) I hold that the suit is not open to 2nd appeal in view S. 102, Civil P. C.

I am asked to treat the 2nd appeal as revision. The memorandum was filed on the 75th day and ordinarily this Court does not entertain civil revisions presented after the 45th day. I do not see any valid reason to admit this as a civil revision especially as the result thereof would be an affirmance of the decree of the lower appellate Court. The appeal fails and is dismissed with costs.

N.K. *Appeal dismissed.*

(1) [1901] 25 Bom. 625=3 Bom. L. R. 239.
(2) [1908] 32 Bom. 560=10 Bom. L. R. 733.

** A. I. R. 1928 Nagpur 136 (2)

HALLIFAX AND KOTWAL, A. J. Cs.
on difference
MACNAIR, A. J. C.

Kabiruddin — Auction-Purchaser — Appellant.

v.

Krishna Rao and *others* — Decree-holder and Judgment-debtor — Respondents.

Misc. Appeal No. 43 of 1925, Decided on 7th October 1927, from order of Addl. Dist. Judge, Narsingpur, D/- 20th October 1925, in Civil Suit No. 3 of 1922.

** (*a*) *Civil P. C., O.* 21, *R.* 89—*Deposit made after* 30 *days—Court must reject the application though the decree is satisfied in the meanwhile.*

Certain property was sold in execution of a decree to a person other than the decree-holder, and an application to set aside the decree under R. 89, O. 21, Civil P. C., was made by the judgment-debtor after the expiry of 30 days from the date of the sale. The decree had

been satisfied before the date of the application, and the trial Judge set aside the sale, holding that the decree was dead and that there was nothing left for the Court to execute.

Held: that the lower Court was bound to reject the application made under O. 21. R. 89, and therefore to confirm the sale: *A. I. R.* 1922 *Nag.* 248, *Diss.*; *A. I. R.* 1922 *Pat.* 525, *Dist.*; 2 *Bom.* 540 *and* 10 *All.* 83, *not Appr.*; 10 *All.* 166 (*P. C.*), *Expl.* [P 143 C 1]

(*b*) *Interpretation of Statutes—Repealed enactment.*

It is a hazardous proceeding to refer to provisions which have been absolutely .repealed, in order to ascertain what the Legislature meant to enact in their stead. [P 142 C 1]

Abdul Razak and *Sen*—for Appellant.

N. G. Bose—for Respondents.

Opinion

(Hallifax, A. J. *C*—23*rd June* 1927).

The first respondent Krishna Rao attached certain immovable property belonging to the second respondent Datttatray in execution of a decree, and it was sold by auction to the appellant Kabiruddin for Rs. 1,600 on 2nd May 1924. The purchase-money was paid within the time allowed by law. On the day after the sale the judgment-debtor filed an application praying that the sale should be set aside under R. 90, O. 21, Civil P. C. on the ground of material irregularity in publishing it. With the details of the alleged irregularity we are not now concerned.

The Courts were closed for the summer vacation from 11th May to 15th June and on 16th June the judgment-debtor filed an application to have the sale set aside under R. 89, O. 21. This was accompanied by a deposit of Rs. 800 for payment to the auction purchaser and a receipt signed by the decree-holder acknowledging full satisfaction of the decree. The deposit and the application must be considered, in respect of limitation, to have been made on 11th May, but it may be mentioned that the deposit of the Rs. 800 was actually made on 2nd June, which was a Monday and therefore counts as the thirtieth day from 2nd May, the date of the sale.

There has been a sad waste of time and effort over pleas such as that the decree was not really satisfied on 29th May, though the decree-holder said it was, and the judgment-debtor also said so on the following day, and that all that happened on that day was an agreement between the decree-holder and the judgment-debtor and a third person for the payment of the money on some future day, which was eventually carried out, and that R. 89, O. 21, was not satisfied by an acknowledgment of full payment by the decree-holder but required the production of the money in Court. If the decree-holder says his decree is satisfied, it is satisfied and nobody else is concerned with the manner of that satisfaction, whether it is cash or kind or promises or kindness.

Taken by itself then the judgment-debtor's application under R. 89, was well within time and had to be granted. But he had already made an application under R. 90, and till that was withdrawn he was not "entitled to make or prosecute" an application under R. 89. That withdrawal was not actually made till 25th July. It is urged that the withdrawal ought to relate back to the date of the making of the application under R. 89, which should be regarded as itself a sort of automotic withdrawal. That would be impossible according to the plain words of R. 89, but anyhow there was more here than the absence of an express withdrawal; there was an express refusal to withdrawal.

The judgment-debtor drew up two applications on 31st May, of which one was actually presented at once and the other was apparently held up till 16th June. In the first he asked to be allowed to deposit Rs. 800 "for payment to Kabiruddin in case his first application is disallowed." In his second petition of 31st May, which is the same at slightly greater length, he said that if his application under R. 90 succeeded, he would be satisfied (*to thik bai*), but otherwise he prayed that the Rs. 800 might be paid to Kabiruddin, and he repeated that it his previous application succeeded he would withdraw the money himself.

Even on 25th July there appears to have been some attempt in Court to keep the first application alive before it was withdrawn. But, in view of the words of these two petitions, it is quite impossible, by the use of any legal fiction or any stretch of the imagination, to find that the application under R. 90 was withdrawn till after 16th June, to take the earliest possible date. The application under R. 89 was therefore not made

till after 16th June. because it could not be either "made or prosecuted" till then, and that is more than thirty days after the date of the sale.

The only facts with which we are concerned then are that property was sold in execution of a decree to a person other than the decree-holder, and an application to set aside the decree under R. 89, O. 21, was made by the judgment-debtor at some time after the expiry of thirty days from the date of the sale. As it was then timebarred it would seem that there was nothing for the Court to do but to reject it and confirm the sale. The learned Additional District Judge has however followed the published ruling of this Court in *Nilkanth* v. *Yeshwant* (1) as he was bound to do, and has set aside the sale, holding that, as soon as the decree was satisfied, whether before or after the end of the thirty days from the sale, it was dead and there was nothing left for the Court to execute. My learned colleague, who was responsible for the judgment in the case mentioned, is still of opinion that the principles on which it was decided are correct. As I find myself in respectful but complete dissent, it is necessary to state the reasons for that view of the matter, in order that the question may go before a third Judge for decision.

In *Nilkanth* v. *Yeshwant* (1), payment of the decretal sum and of the 5 per cent. of the purchase money was made within thirty days of the sale, but apparently there was no formal written application by the judgment-debtor that the sale should be set aside ; the application seems to have been made verbally by the decree-holder though it was undoubtedly on behalf of the judgment-debtor and at his request. It was held in the lower appellate Court that, as the application under R. 89 had not been made by any person having an interest in the property, the sale could not be set aside and the Court was bound to confirm it. Kotval, A. J. C., was inclined to the view that an application by the judgment-debtor was implied in what actually took place, which, if it may be said with respect, seems to be the only possible view of the case.

My learned brother, however, refrained from deciding the case on that ground because there was another reason which gave the same result. That reason is stated in the following words :

> Where a decree is admitted by the decree-holder to be satisfied it ceases to exist as a decree capable of execution. The very foundation of the powers of a Court to execute a decree, namely the existence of a decree capable of execution, having disappeared, the Court's powers in execution also cease, and confirmation of the sale which is a proceeding in execution cannot be ordered : vide *Khusalchand* v. *Nandram* (2) and *Mulchand* v. *Mukta Prasad* (3).

It may be mentioned that the first of these cases is also published in *Khushal Chand* v. *Nandram* Vol. 35 of the *Bombay Series of the Indian Law Reports* at p. 516.

The reasons for my inability to accept this view of the law are that it directly violates each of three provisions of the statute law and is directly contrary to a judgment of the Privy Council and also has a most inequitable result. The three provisions of the law are Cl. (a), R. 89, O. 21, Civil P. C., Art. 166, Sch. 1, Limitation Act and S. 12, Specific Relief Act. The judgment of the Privy Council is in *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (4).

In the view under discussion a sale may, or rather must, be set aside on payment of the decretal sum at any time before it is confirmed, even after the expiry of the period of thirty days. That wipes out Art. 166, Lim. Act, so far as it refers to R. 89, O. 21, Civil P. C. Also no deposit of 5 per cent. of the purchase-money need be made, whether the payment of the decretal sum is before or after the expiry of thirty days after the sale. That wipes out Cl. (a), R. 89, O. 21.

As for S. 12, Specific Relief Act, the position of the judgment-debtor in such a case is not merely analogous to that of a person who has entered into a contract to sell his immovable property ; it is exactly the same. If does not matter whether he enters into the contract under pressure from a Court or from his creditor himself, without the help of a Court, or from the members of his family or from his own desires. In order to pay off a debt he contracts to sell his property to the auction-purchaser, stipula-

(1) A. I. R. 1922 Nag, 248=18 N. L. R. 134.

(2) [1911] 35 Bom. 516=12 I. C. 572=13 Bom. L. R. 977.

(3) [1888] 10 All. 83=(1887) A. W. N. 287.

(4) [1888] 10 All. 166.

ting that the purchase-money shall be paid within fifteeen days and shall go to his creditor, and further that for thirty days he is to have the option of cancelling the agreement on payment of per cent of the agreed price.

In the case of such a contract made directly and not with a Court 'acting as the agent of the seller, the purchaser, having performed the whole of his part of it, could sue for specific performance, and, if the breach by the seller had occured within thirty days, he would get 5 per cent of the purchase-money under the contract as damages, but, if the breach was later the Court would be bound to order specific performance under the explanation appended to S. 12, Specific Relief Act.

The only difference in the case of a contract made under the orders of a Court is that the Court enforces specific performance summarily in execution proceedings, and there is no necesity for a suit. Even if the incidents of a sale in execution and a private sale were merely analogous and not identical, it seems impossible to hold that anybody can resile more easily from the former than from the latter. That would be equivalent to saying he was less liable to pay money due on a decree than money due on a bond.

In *Zain-ul-Abdin* (4), decided by the Privy Council in 1887, it was held that a sale in execution of a decree which was set aside in appeal later, must hold good if the purchaser was not a party to the decree; it could be set aside, by reason of the decree having ceased to exist, only if the purchaser was a party to the decree or claimed through a person who was. If then the extinction of a decree by its being set aside in appeal, that is to say by its being declared never to have existed at all legally, cannot be allowed to interfere with a sale held under it while it was thought to exist, still less can its death by payment, after valid existence, do so.

Some attempt has been made to distinguish this Privy Council case from cases of the present kind by the fact that the sales in that case had been confirmed. It is true that the sales considered by the Privy Council had been confirmed, even before the decrees had been set aside in appeal, but that fact formed no part of the basis of their Lordship's decision, which would clearly have been the same if the sales had still been awaiting confirmation,

A perusal of the judgments in the cases mentioned in *Nilkanth* v. *Yeshwant* (1), as supporting the proposition that a decree becomes incapable of execution on the payment of the decretal amount to the decree-holder, at any stage of the preceedings and whatever other interests might have become vested in third parties, shows that they do not do so. In *Khusalchand* v. *Nandram* (2) the proposition was outside the case. In *Mul Chand* v. *Mukta Prasad* (3) the purchaser under the decree that was subsequently set aside in appeal, was the decree-holder himself. As was pointed out by the Privy Council in the case already mentioned, and as indeed is obvious, the case of a purchase by a decree-holder is very different to that of one by a staranger to the decree.

Another consideration fatal to the argument that payment of the decree by the judgment-debtor killed it so as to render it incapable of further execution is that, if such payment could have that effect, it had already been killed by the payment made by the auction purchaser, at least to the extent of the purchase-money, it cannot be killed twice over.

In a recent judgment of this Court on this question mention is made of the inherent right of a judgment-debtor and decree-holder to settle the matter of the decree between themselves. They certainly have that right, but no right to interfere with the vested interests of others can arise out of it. If the contract to sell in this case had been a voluntary contract, not a forced contract, the seller would still be at liberty to pay off his creditor and to keep the proceeds of the sale to the third person himsef, but he would not have any right to resile from his contract to sell to that person.

For all these reasons I am of opinion that the lower Court was bound to reject the application made under R. 89, O. 21 as time-barred, and thereafter to confirm the sale in favour of the appellant Kabiruddin. As, unfortunately, my learned brother takes the contrary view, the question must go before a third Judge for decision.

Opinion

(*Kotwal, A. J. C.*, 18*th June* 1927.)

The decision in *Nilkanth* v. *Yeshwant* (1) must be held applicable only in the circumstances stated therein. It was based on the assumption that there was no effective application under R. 89, O. 21, Civil P. C. In the present case also there was no such application.

In both cases the sale had not been confirmed before the decree was satisfied out of Court and the Court informed to that effect. As held by the Bench in *Moroti* v. *Vithoba* (5), the decree-holder and the judgment-debtor had an inherent right to settle the matter between themselves in view of the fact that the sale had not at the moment been confirmed.

I am of opinion that the order of the lower Court is correct and that the appeal should be dismissed and the appellant ordered to bear the costs thereof.

Macnair, A. J. C. — (15*th August* 1927)—The Judges composing the Bench hearing this appeal differed in opinion on a point of law, and under the provisions of the proviso to S. 98 (2), Civil P. C., the appeal has come before me for hearing upon that point only.

The facts with which I am concerned are that property was sold in execution of a decree to a person other than the decree-holder, and an application to set aside the decree under R. 89, O. 21, Civil P. C., was made by the judgment-debtor after the expiry of 30 days from the date of the sale. The decree had been satisfied before the date of the application, and the learned trial Judge, following the published ruling of this Court in *Nilkanth* v. *Yeshwant* (1), set aside the sale, holding that the decree was dead and that there was nothing left for the Court to execute. Hallifax, A. J. C., was of opinion that the lower Court was bound to reject the application as time barred and thereafter to confirm the sale in favour of the auction-purchaser. Kotval, A. J. C, was of opinion that the order of the lower Court was correct.

The reasons given by Kotval, A. J. C., in *Nilkanth* v. *Yeshwant* (1), are :

> Where a decree is admitted by the decree-holder to be satisfied, it ceases to exist as a decree capable of execution. The very foundation of the powers of a Court to execute a decree, namely, the existence of a decree capable of execution having disappeared, the Court's powers in execution also cease, and confirmation of the sale, which is a proceeding in execution cannot be ordered.

None of the counsel who appear before me urge that this reasoning is entirely satisfactory. The opinion expressed by Kotval, A. J. C., in the present case indicates that this reasoning requires modification : he appears to concede that if the decree is satisfied after the sale has been confirmed, the Court has still to exercise powers. But he states that the decree-holder and the judgment-debtor had in this case an inherent right to settle the matter between themselves in view of the fact that the sale had not been confirmed.

At the commencement of execution proceedings the Court is concerned solely with the execution of the decree, but, after confirmation of the sale of immovable property the Court has to deal with questions connected with that sale and must retain some powers until the purchaser is safely in possession of the property sold. It is quite clear that, where the sale proceeds are sufficient to satisfy the decretal debt, the decree-holder can withdraw the money and obtain full satisfaction as soon as the sale has become absolute. And it is equally clear that, after the decree has thus been satisfied, the Court has power to act under Rr. 94 to 101, O. 21, Civil P. C.

It can then be only up to a stage in the execution proceedings that, when a decree ceased to exist as a decree capable of execution, the Court is functus officio. After a certain stage it becomes necessary for the Court to pass orders safeguarding the rights of the auction-purchaser, whether he is the decree-holder or not, although the decree may be satisfied. The Court retains power to grant a certificate to the purchaser, and, after due enquiry, to remove or even commit to jail persons who obstruct his possession.

It cannot then be inferred from the fact that the decree is no longer capable of execution that the powers of the executing Court have ceased : it has to be considered whether it is necessary for the Court to complete any act on which it is engaged. The main contention of the respondent is that, if the decree is satisfied after the auction sale has been held, but before it has been confirmed, the sale, as the Court has no power to comfirm it, fades away in some manner. In my opinion the provisions of R. 92,

(5) A. I. R. 1928 Nag. 43.

O. 21, Civil P. C , show conclusively that this contention is incorrect. The Court has to perform one of two duties namely, ordering confirmation of the sale or ordering that the sale be set aside. The Court through its officer has held the sale, and the sale cannot be left without confirmation or without annulment.

It is urged that the decree-holder and the judgment-debtor have an inherent right to settle the matter between themselves up to the time the sale is confirmed. They certainly have a right to settle the decree-holder's claim, but the effect of such a settlement is merely that the decree is satisfied, and the question still remains whether or not the executing Court retains any powers. I see no reason to think that either party has a right to put an end to the proceedings after the decree is satisfied. The decree-holder in that capacity has no interest in subsequent proceedings : the judgment-debtor had not at an earlier stage any such right. Either party can inform the Court that the decree is satisfied, but neither can deprive the Judge of any power which he may retain after satisfaction of the decree. The point decided in *Ram Prasad Rai* v. *Mahesh Kant* (6) was that a decree-holder had a right to withdraw his application : after the withdrawal the Court had obviously no jurisdiction to take any steps with the object of recovering the decretal debt. In the case I am considering, the object of confirming the sale is not the recovery of the decretal debt, for, if the sale be confirmed, the money will be paid to the judgment-debtor. The decision in the Patna case has no bearing on the question whether the Court has jurisdiction to confirm the sale.

So far my reasoning is independent of the fact that in the case under discussion the property was sold in execution to a person other than the decree-holder. But this fact furnishes another very cogent reason for holding that, although after the sale the decree has been satisfied, the Court has still jurisdiction. It cannot be denied, that after the sale, the auction-purchaser has interests which require consideration. Kotval, A. J. C., refers to *Maroti* v. *Vithoba* (5). In that case the Judges stated :

> All that the auction purchaser loses in a case like the present is the interest on the money which has been locked up in deposit, and this is, in the circumstances, no great hardship.

Even if this statement were correct, there seems no reason why the auction purchaser should be deprived of the interest on his money. But the auction-purchaser, in addition, has entered into a bargain involving some risk. If the bargain had proved unprofitable he would probably have been held to it. If the property had suffered damage immediately after the sale, he could not have claimed that the sale should be set aside on that account. Deprivation of his prospective profits involves in very many cases serious loss to him. The auction-purchaser is before the Court and the Court must have jurisdiction to protect his interests. It is quite clear that the decree-holder and the judgment-debtor have no right to put an end to the proceedings without consideration of the rights of the auction-purchaser.

As Hallifax, A. J. C., points out, the object of the provisions of the Code is clearly that an auction-purchaser in a valid sale should be certain of confirmation unless he receives 5 per cent of the price within 30 days. If the view taken by Kotval, A. J. C., is correct, this object will be defeated. The judgment-debtor can pay the decretal amount into Court under O. 21, R. 1. Such payment will operate as satisfaction of the debt. If it is not convenient to the judgment-debtor to pay the money before the date fixed for confirmation of the sale he can make an application under O. 21, R. 90, and thus delay confirmation. The provisions of O. 21, R. 89, are futile and absurd, if the judgment-debtor can get the sale set aside by payment of a smaller amount at a later period, and I should be very slow to hold that the intention of the Code was such as to render one of the rules futile and absurd. I add that the provision in the Code for the payment of 5 per cent to the auction-purchaser shows that he is considered to have claims which cannot be neglected.

It is argued by the learned counsel for the appellant that a comparison of S. 316 of the Code of 1882 with S. 65 and O. 21, R. 94, of the new Code shows that the Court has power to confirm a sale although the decree does not subsist. S. 316 of the old Code runs :

(6) A. I. R. 1922 Pat. 525 =1 Pat. 232.

When a sale of immovable property has become absolute in manner aforesaid the Court shall grant a certificate stating the property sold and the name of the person who at the time of sale, is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale, and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before: Provided that the decree under which the sale took place was still subsisting at that date.

This clearly means that, even if a sale of immovable property has become absolute, the Court shall not grant a certificate and thereby cause the title to the property to vest in the purchaser unless the decree was subsisting at the date of confirmation of the sale. S. 65 of the new Code lays down that, after the sale of immovable property has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property was sold. R. 94, O. 21 relates to the grant of a certificate. There is no proviso, either in the section or in the rule, excepting a case where the decree has ceased to subsist before the sale becomes absolute. It does seem possible to infer from the omission of the proviso that, once the sale has become absolute, it is immaterial whether the decree subsisted at the date of confirmation. It is, however, a hazardous proceeding to refer to provisions which have been absolutely repealed in order to ascertain what the legislature meant to enact in their stead : (Maxwell on the Interpretation of Statutes, 6th edition, p. 68). I, therefore, prefer not to base my opinion on the omission of the proviso to S. 316 of the old Code. I add that the respondents waver between two positions. At one time they maintain that satisfaction of the decree deprives the Court of jurisdiction: at another time they adopt the view expressed by Kotval, A. J. C., in his opinion, dated 18th June 1927, that, after satisfaction, the Judge has still power to confirm the sale, unless the decree-holder and the judgment-debtor inform him of the fact of satisfaction and exescise a right. The omission of the proviso was necessary if the second position is corrrect: and it is convenient for me to base my opinion on reasons which meet either line of argument.

The doctrine that a Court has no jurisdiction to confirm a sale when there is no longer a decree capable of execution is not a new one, and it is instructive to consider its origin. *Basappa* v. *Dundaya* (7), is the earliest ruling which I have been able to trace. The Judges who decided that case did not consider the points that a Court could not set aside an auction sale, if it had no jurisdiction, and that an auction-purchaser's interest could not be ignored. In *Mul Chand* v. *Mukta Prasad* (3) the decree-holder was the auction-purchaser, and the Judge of the execution Court learnt that the decree had been set aside before the sale was confirmed. Although their Lordships based their decision on the ground that the Judge had no jurisdiction to confirm the sale, the sentence

> I do not think that a Court executing a decree ought to make an order under such circumstances confirming a sale

indicates that they were influenced by the consideration that confirmation was opposed to equity. In my opinion, had their Lordships, Straight and Brodhurst, JJ., had the advantage of reading the ruling of the Privy Council in *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (4), they would have based their decision that the sale should be set aside on a different principle. Their Lordships of the Privy Council expressed their opinion that a sale to a decree-holder purchaser could be set aside even after confirmation, if the decree was reversed in appeal, and this opinion could not have been based on want of jurisdiction of the executing Court at the time of the sale or confirmation. There seems no doubt that their Lordships considered that the principle now enunciated in S. 144, Civil P. C., should be applied.

I have given careful consideration to unreported decisions in which Judges of this Court held that a Court has no jurisdiction to confirm a sale when there is no longer a decree capable of execution, and it appears to me that several of these decisions have been influenced by the consideration that, in *Mul Chand* v. *Mukta Prasad* (3), this doctrine was the basis of what is clearly an equitable decision. In my opinion the provisions of S. 144, Civil P. C., are applicable in a case such as *Mul Chand* v. *Mukta Prasad* (3). The Court has still jurisdiction when a decree is reversed, but it will, on the application of the judgment-debtor, set aside the sale if the decree-

(7) [1877] 2 Bom. 540.

holder is the purchaser, because it is possible to place the parties in the position which they would have occupied but for the decree.

My opinion, therefore, is that, after the trial Judge had been informed that the decree had been satisfied, and had been asked by the decree-holder and the judgment-debtor to take no further step, he had still power to confirm or to set aside the sale. That is the point of law on which the referring Judges differed. It is urged before me that S. 151, Civil P.C., can be applied and the sale can be set aside. It is sufficient for me to say that I must confine my opinion to the point on which the Judges differed. I have no reason whatever to think that the Judges desire my opinion on the scope of S. 151, Civil P. C.

Macnair, A. J. C.—(*13th September* 1927). I understand that the words "he had still power to confirm or to set aside the sale" in lines 4 and 5 of the last paragraph, of my opinion have led to difficulty. I therefore, desire to substitute the following paragraph for para. 13:

Hallifax, A. J. C., was of opinion that the lower Court was bound to reject the application made under R. 89, O. 21, as time barred and thereafter to confirm the sale in favour of the appellant Kabirruddin. Kotval, A. J. C., was of opinion that confirmation of the sale could not be ordered, because the Court's power in execution had ceased, *Nilkanth* v. *Yeshwant* (1); or because the decree-holder and the judgment-debtor had an inherent right to insist that the Court should not confirm the sale. I have discussed the reasons given by Kotval, A. J. C., for disagreement with the opinion of Hallifax, A. J. C., and consider that they are invalid. In argument before me it was not contended that, if the Court was not prevented from confirming the sale for the reasons stated by my brother Kotval, R. 92, O. 21 permitted the Court to take any other action except that stated in the opinion of my brother Hallifax. R. 92, read with R. 89, appears to me perfectly clear, and I am, therefore, of opinion that, in accordance with this rule, the lower Court was, in the circumstances stated bound to reject the application and, therefore, to confirm the sale. It has been urged before me that S. 151, Civil P. C., can be applied and the sale can be set aside. It is sufficient for me to say that this is a question on which my opinion has not been asked. I have no reason whatever to think that the referring Judges desire my opinion on the question whether or not the Judges should in this particular case exercise their inherent power and refuse to follow the provisions of O. 21, Sch. 1, Civil P. C.

Judgment.—An attempt was made at the final hearing of this appeal to urge, on behalf of the respondents, that the sale should be set aside under the inherent powers of the Court to prevent injustice mentioned in S. 151, Civil P. C, or that they should be allowed to revive their application under R. 90, O, 21, now that one under R. 89 has failed. There is no substance in these contentions and anyhow it is much too late to raise either of them.

In accordance with the opinion stated by the trial Judge, to whom the case was referred, the order of the lower Court will be set aside and the three sales held on 2nd May 1924 will be confirmed. The costs of the appellant in both Courts will be paid by both respondents. The pleader's fee in this Court will be a hundred and fifty rupees.

D.D. *Order set aside.*

A. I. R. 1928 Nagpur 143

FINDLAY, J. C.

Sadasheo Ramji Bende—Appellant.

v.

Gopala Patil—Respondent.

Second Appeal No. 183 of 1926, Decided on 27th January 1927.

C. P. Tenancy Act, S. 62—Part of holding compulsorily acquired — Steps not taken by Government officials to have the rent reduced— Landlord can initiate proceedings to get the rent reduced.

If there is any failure on the part of the land acquisition officials to take the necessary steps, it is open to the landlord to initiate the necessary proceedings under S. 62 to have the rent of the holding proportionately reduced when a part of it is compulsorily acquired by Government. [P 144 C 1]

D. T. Manjalmurti—for Appellant.

M. D. Khandekar—for Respondent.

Judgment.—I have heard counsel for the appellant in this case but found it unnecessary to call on to the respondent's pleader to reply. It is perfectly clear to my mind that the present plaintiff-appellant has mistaken his remedy in the present case. It is not denied that portions of fields Nos. 64, 67 and 68 were

acquired by Government in 1923, and it is equally clear from the lower appellate Court's judgment that the rent of the holding has been accordingly proportionately reduced.

The present plaintiff-appellant for some reason or other, which it is difficult to understand, urges that it was for the defendant to take the initiative in having the rent reduced under S. 62, Tenancy Act, but it is perfectly clear that it was also open to the landlord to initiate proceedings under the said provision. As a matter of fact, p. 71, Land Acquisition Manual, lays down the proper procedure to be followed in a case like the present and if there was any failure on the part of the land acquisition officials to take the necessary steps, it was open to the present plaintiff-appellant to initiate the necessery proceedings under S. 62, C. P. Tenancy Act. I know of no reason why it was peculiarly incumbent on the tenant to move in the matter and, in any event, neither law nor equity would justify this Court in decreeing the plaintlff-appellant's claim against the defendant--respondent when it is admitted and clear that the whole rent is now not in reality leviable from him in view of the diminution of the area of his holding.

I, therefore, see no reason to interfere; and dismiss the present second appeal. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 144

HALLIFAX AND MOHIUDDIN, A. J. Cs.

Sialkot Mission—Applicant.

v.

Sir Bisheshardas Daga and *others*—Non-applicants.

Misc. Judl. Appln. No. 23 of 1927, Decided on 16th January 1928.

Civil P. C., O. 47, R. 4 — Review—Decision fixing the price of redemption of property — Review for asking the price of improvement made in that property by the applicant is not the proper remedy but remedy is one under T. P. Act, S. 51.

Where a judgment fixed the price of redemption of property held by the applicant at a certain sum but an application for review was presented for the addition to that sum of the price of improvements made in the property by the applicant, who was a purchaser of the property without notice of the mortgage:

Held: that the way to get it was not by asking for a review of the appellate judgment in a case in which not a word was said about the matter in either Court. The proper course was to make a demand on the opposite party for one of the alternatives mentioned in S. 51 T. P. Act and if he refused, the demand would be enforced by a suit. [P 144 C 2]

B. K. Bose and *V. Bose*—for Applicant.

W. Y. Deshmukh — for Non-applicants.

Order.—The applicant for a review has entirely mistaken his remedy. The judgment in question fixed the price of redemption of property held by the applicant at a certain sum, and the present application is for the addition to that sum of the price of improvements made in the property by the applicant, who is a purchaser of the property without notice of the mortgage. He would seem to be entitled to that money under S. 51, T. P. Act, though that section was not mentioned in the course of these proceedings ; but the way to get it is not by asking for a review of the appellate judgment in a case in which not a word was said about the matter in either Court. The proper course, on which we understand the applicant has started since filing this application, is to make a demand on the opposite party for one of the alternatives mentioned in S. 51, T. P. Act ; if he refuses, the demand can be enforced by a suit.

Further, a Court-fee of Rs. 10, paidon the application for a review, is insufficient. The relief sought is measured by the value of the improvements made in the property by the applicant, which is said to be of the sort mentioned in Art. 17 (vi) of the schedule of the Court-fees Act, that is to say a relief of which it is not possible to estimate the money value. That is manifestly incorrect, and indeed it is admitted by counsel for the applicant not only that it is possible to estimate the money value of the improvements but that it has been ascertained, not merely estimated, to be Rs. 395, for which sum a demand supported by vouchers has been sent to the opposite party.

The application for a review of judgment is rejected and the applicant is ordered to pay the costs of the opposite party, which will include a pleader's fee of fifteen rupees.

N.K. *Application rejected.*

A. I. R. 1928 Nagpur 145

FINDLAY, J. C.

Balaji and *others*—Defendants 1 to 5 —Applicants.

v.

Ballabhdas—Defendant 10 — Non-applicant.

Civil Revn. No. 201 of 1926, Decided on 3rd February 1928, from order of Dist. Judge, Chhindwara, D/- 29th March 1926, in Civil Suit No. 7 of 1924.

Civil P. C., O. 1, R. 10, and O. 22, R. 10—Suit for foreclosure—Subsequent mortgagee also made party — Preliminary decree obtained—Subsequent mortgagee making payment and applying to make the decree final by transposing him as a plaintiff—He can be so transposed—Transfer of Property Act, S. 74.

Both under O. 1, R. 10, or under O. 22, R. 10, Civil P. C., the substitution of a subsequent mortgagee sued as one of the defendants to a foreclosure suit as a plaintiff is permissible and indeed is the logical consequence of the provision contained in S. 74, T. P. Act: 27 *All.* 325; *A. I. R.* 1922 *All.* 153 and *A. I. R.* 1927 *Mad.* 631, *Dist.*: *A. I. R.* 1926 *Nag.* 84; and 12 *N. L. R.* 50, *Ref.* [P 146 C 1]

M. B. Niyogi and *G. R. Pradhan*—for Applicants.

G. L. Subhedar, M. R. Bobde and *G. R. Trivedi*—for Non-applicant.

Order.—The five applicants have applied to this Court in revision against an order of the District Judge, Chhindwara, dated 29th February 1926, in Civil Suit No. 7 of 1924. In that suit preliminary decree for foreclosure in respect of the mortgaged subjects had been passed by the District Judge on 29th July 1924. The present non-applicant, Ballabhdas, was joined as defendant 10 in the suit by virtue of his being a subsequent mortgagee of the property in suit. The preliminary decree in question was in Form 6, Appx. D, Civil P. C. The present non-applicant was given the prior right to redeem up to the 29th January 1925; in case he failed to do so, defendants 2 to 5 and defendants 1, 6 and 7 were respectively given the right to redeem up to a further date, the 29th April 1925. Within the six months time allowed to the non-applicant he deposited in Court the decretal amount and, on 19th January 1925, filed an application praying that, in view of this deposit, his name should be substituted in place of those of the plaintiffs and that a final decree for foreclosure should be passed against the remaining defendants. The district Judge sanctioned the application and allowed the non-applicant's name to be substituted as a plaintiff in the case. Against this order, therefore, the present five defendants-applicants have filed the present revision.

It has been urged on their behalf that the lower Court had no power under O. 1 R. 10, Civil P. C., to make the transposition it did in the circumstances of the case. I have been referred to the well-known decision of their Lordships of the Privy Council in *Gopi Narain Khanna* v. *Babu Bansidhar* (1), and it has been suggested that, on the strength of this case, the District Judge's procedure in allowing the transposition of the nonapplicant was wrong and illegal. It has been suggested in the first instance that, in the circumstances, the final decree which followed as a result of the District Judge's order is at variance with the preliminary decree; that the preliminary decree only directed payment by the defendants to the plaintiffs and that there was no direction inter se for foreclosure as between the defendants. In addition to the Privy Council case quoted above the applicants have relied on a decision of Banerji and Gokul Prasad, JJ., reported in *Shib Lal* v. *Muni Lal* (2) as well as on a decision of the Madras High Court reported in *Kotappa* v. *Raghavayya* (3). These decisions, however, seem to me hardly to the point in the present instance. At the time the transposition complained of was allowed by the District Judge, it is clear that the mortgage suit was still pending. There was no completed decree in the case, and the preliminary decree might be described as an inchoate one: cf. *Digamber* v. *Ganpat* (4). The Privy Council decision quoted above was, needless to say, passed before the present Civil Procedure Code was enacted, and the considerations, on which their Lordships relied in coming to the decision they did in that case seem to me no longer to hold good. With all deference it would appear to me that the Judges of the Madras High Court, who decided the case just quoted, ignored the fact of the all-important change of procedure which had been introduced as

(1) [1905] 27 All. 325=32 I. A. 123=2 A.I.J. 336=8 Sar. 799 (P. C.).
(2) A. I. R. 1922 All. 153=44 All. 67.
(3) A. I. R. 1927 Mad. 631=50 Mad. 626.
(4) [1916] 12 N. L. R. 50=33 I. C. 496.

regards the decree final in mortgage suits by the new Civil Procedure Code. The Privy Council case quoted is, in my opinion, inapposite for the simple reason that their Lordships only held therein that the subsequent mortgagees could not be substituted as decree-holders for the purpose of carrying out the execution of the decree.

In the present case, the question is whether the non-applicant can be substituted as a plaintiff for the purpose of obtaining the final decree in the case, For my own part, I entertain no doubt but that, both under O. 1, R. 10, or under O. 22, R. 10, Civil P. C., the substitution of the present nonapplicant as a plaintiff was permissible and indeed was the logical consequence of the provision contained in S. 74, T. P. Act. I am aware of the Bench decision of this Court in *Suryabhan* v. *Renuka* (5), but that case is not really to the point. It cannot be denied that the present nonapplicant had a right to bring a separate suit, but it seems to me that he also had the alternative of adopting the procedure he did, so long as that was done before the decree final had been passed. Reading, in short, S. 74, T. P. Act, with the rules of the Civil Procedure Code, quoted above, I am of opinion that the District Judge was correct in allowing the transposition of parties he did. There is no question in the present instance of the nonapplicant tacking on his own mortgage to the decree in suit. All he acquires thereunder by his payment of the decretal amount is the right which the original plaintiffs held against the defendants.

For these reasons I am of opinion that the order of the District Judge is a correct one, and the present application is dismissed. The applicants must bear the nonapplicant's costs.

N.K. *Application dismissed.*

(5) A. I. R. 1926 Nag. 84.

A. I. R. 1928 Nagpur 146 (1)

HALLIFAX AND MOHIUDDIN, A. J. Cs.

Commissioner of Income-tax—Applicant.

v.

Mohomad Nurulla Khan—Non-applicant.

Misc. Ref. No. 7 of 1927, Decided on 8th December 1927, made by the applicant.

Income-tax Act (11 *of* 1922), *S.* 9—*Income taxable under Income-tax Act.*

The rents realized from the tenants of Kosgaon and Dhotra villages, situate in the Dominions of His Exalted Highness the Nizam and brought into Dewalghat in Berar, are taxable under the Income-tax Act, though these villages form part of one single jagir consisting of four villages which jagir was granted revenue free to the ancestors of Nawab Mohammad Salamullah Khan, Khan Bahadur, C. I. E., and owing to distribution of territories two of them, i. e., Kosgaon and Dhotra, happened to go to Nizam's territory. [P 146 C 2]

D. N. Chowdhary—for Applicant.

A. V. Khare and *W. B. Pendharkar*—for Non-applicant.

Order.—The question of law referred by the Commissioner of Income-tax is stated as follows :

Whether the rents realized from the tenants of Kosgaon and Dhotra villages, situate in the Dominions of His Exalted Highness the Nizam and brought into Dewalghat in Berar are taxable under the Income-tax Act, in view of the fact that these villages form part of one single jagir consisting of four :villages which jagir was granted revenue free to the ancestors of Nawab Mohammad Salamullah Khan, Khan Bahadur, C.I.E., and in view of fact that owing to distribution of territories, two of them, i. e., Kosgaon and Dhotra, happened to go to the Nizam's territory.

The last phrase is an incorrect statement of fact, as the two villages did not happen to go to the Nizam's territory, but happened to stay there, while the other two happened to go to Berar. But neither that nor any of the other facts stated has anything to do with the question of the exemption from income-tax of the income derived from the villages and brought into Berar, nor has any other fact or consideration been stated which can be regarded as even relevant to it. The answer is that the income in question is taxable under the Income-tax Act.

N.K. *Reference answered.*

A. I. R. 1928 Nagpur 146 (2)

FINDLAY, J. C.

Balaji and *others*—Defendants—Appellants.

v.

Ballabh Das—Plaintiff—Respondent.

First Appeal No. 100 of 1926, Decided on 7th November 1927, against order of Dist. Judge, Chhindwara, D/- 2nd July 1926, in Civil Suit No. 7 of 1924.

Civil P. C., O. 34, R. 3—Final decree passed —Appeal against a connected order—The same Court-fees, as on any appeal from a final decree, should be paid—Court-fees Act, Sch. 2, Art. 11.

The final decree under R. 3 stops the litigation, and anyone desiring to appeal against the connected order must clearly pay Court-fees as in any other appeal from a final decree : 35 *All.* 476 and 22 *Bom. L. R.* 811, *Foll.*

[P 147 C 1 and 2]

M. B. Niyogi and *G. R. Pradhan*—for Appellants.

G. L. Subhedar, M. R. Bobde and *G. R. Trivedi*—for Respondent.

Order.—The appellants, who were defendants 1 to 5 in the lower Court, have filed the present appeal against the order of the District Judge, Chhindwara, dated 2nd July 1925, granting decree final of foreclosure in favour of defendant 10, Ballabhdas, who is respondent in this appeal. Preliminary decree had been granted on 29th July 1924, the said Ballabhdas being given a final right to redeem. The grounds of appeal are that as respondent had made no application under O. 34, R. 3 (2), Civil P.C., the lower Court had no jurisdiction to make the decree final and that no notice to appellants had issued before decree final was passed. The third ground, viz., that the lower Court should have awaited the decision of this Court in *Balaji* v. *Ballabhdas* (1), before granting decree above, can be easily disposed of. On the said revision, the lower Court's order of substitution of defendant 10 was questioned, but that order necessarily merges in the order for final decree and can only now be questioned in the appeal therefrom.

The respondent has raised a preliminary objection to the effect that ad valorem Court-fee should be paid on the petition of appeal, and the decisions in *Bajrangi Lal* v. *Mahabir Kunwar* (2) and *Jankibai* v. *Chimna* (3), have been relied on in this connexion. On behalf of the appellants it has been sought to distinguish these cases on the ground that they relate to final d crees for sale under O. 34, Rr. 4 and 5, Civil P.C., while here we are concerned with R. 3 idem. I am unable to see that any difference of principle arises in the matter. The final decree under R. 3 equally stops the litigation and anyone desiring to appeal against the connected order must clearly pay Court-fees as in any other appeal from a final decree.

The appellants seek to question the respondent's very right to obtain a decree final and this relief can already be valued in money. I am of opinion, therefore, that an ad valorem fee is payable on the petition of appeal and I order accordingly. I allow time until 1st December 1927, for making up the deficiency in Court-fees and thereafter further orders will be passed.

N.K. *Order accordingly.*

(1) A. I. R. 1928 Nag. 145.
(2) [1913] 35 All. 476=21 I. C. 493=11 A.L.J 801.
(3) [1920] 22 Bom. L. R. 811=57 I. C. 579.

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* A. I. R. 1928 Nagpur 147

KOLHATKAR, A. J. C.

Ramchandra Jat—Plaintiff — Appellant.

v.

Seth Bhawaniram—Defendant — Respondent.

Second Appeal No. 547 of 1927, Decided on 12th April 1928, against order of Dist. Judge, Hoshangabad, D/- 26th July 1927.

(a) Landlord and Tenant—Mortgagee from tenant is not liable for rent to landlord though mortgage provides for such payment and though mortgagee has paid rent voluntarily to the landlord.

The relationship of landlord and tenant does not exist between a landlord and a mortgagee from tenant. It is either privity of contract or privity of estate which brings such relationship into existence. Even if there be a stipulation in the mortgage-deed for payment of rent by the mortgagee direct to the landlord, it would bind only the parties to the transaction of the mortgage. Being not a party to the transaction, the landlord cannot avail himself of such a stipulation in the mortgage and insist upon payment of rent by the mortgagee. As regards the privity of estate, it arises only when the whole of the tenant's interest in the holding is assigned and not where a subsidiary interest like that of a mortgagee is carved out of the tenant's interest. A sale of the holding would constitute such an assignment of the tenant's interest and would render the purchaser liable for payment of rent despite the absence of privity of contract. Voluntary payment of rent by the mortgagee to the landlord would not *per se* fasten such a liability on him : 13 *C. P. L. R.* 19 ; 40 *Mad.* 1111; and 30 *Mad.* 410,; *Foll.* [P 148 C 1, 2]

(b) Jurisdiction — Revenue Court — No relation of landlord and tenant—Revenue Court can neither decree payment of rent nor sale of holding for default.

It is the existence of the relationship of landlord and tenant between the parties which confers jurisdiction upon a revenue Court to

entertain and try suits for rents including a prayer for sale of the holding in default of payment. [P 148 C 2]

M. N. Jog—for Appellant.

Fida Hussain—for Respondent.

Judgment.—The respondent-defendant Seth Bhawaniram is a mortgagee in possession of the absolute occupancy field No. 80, area 39·15 acres, rent Rs. 45, situated in patti No. 1 of mauza Bhainsdehi in Seoni Malwa tahsil, while the appellant-plaintiff, Ramchandra, is the sadar lambardar of the village. The latter sued the former, in the Court of the Additional Subordinate Judge, for recovery of the second kist of Samwat 1982 with interest thereon and in default of payment for sale of the absolute occupancy holding. The Court of first instance awarded the claim in full. On an appeal being preferred by the defendant, Bhawaniram, the learned District Judge held that the relation between landlord and tenant did not exist between the parties to the suit and consequently the defendant, disputing his liability for payment of rent, could not be held liable to pay the arrears of the rent to the plaintiff. In this view he reversed the decree and dismissed the suit.

The plaintiff has now come up in second appeal and it is urged on his behalf that the defendant being a mortgagee in possession was liable to pay rent to the lambardar and that in any event a decree for sale of the absolute occupancy holding should have been passed against the defendant. As regards the first part of this contention, it may be observed that I am not referred by the appellant's learned counsel to any authority supporting his contention, nor am I aware of any case affirming the proposition of law to the effect that a mortgagee in possession of a holding can be legally held liable for payment of rent thereof. On the other hand the case *Venkatrao* v. *Kohlu Gond* (1), quoted in the judgment under appeal, lays down that the relationship of landlord and tenant does not exist between a malguzar and a person taking a usufructuary mortgage from a tenant. It is either privity of contract or privity of estate which brings such relationship into existence. In the present case there is admittedly no privity of contract between the parties in regard to payment of rent. Even if there be a stipulation in the mortgage-deed for payment of rent by the mortgagee direct to the lambardar, it would bind only the parties to the transaction of the mortgage. It has no such binding effect as between the defendant and the lambardar who was not a party to the said transaction. Being not a party to the transaction the lambardar cannot avail himself of such a stipulation in the mortgage and insist upon payment of rent by the mortgagee. As regards the privity of estate it arises only when the whole of the tenant's interest in the holding is assigned and not where a subsidiary interest like that of a mortgagee is carved out of the tenant's interest. A sale of the holding would constitute such an assignment of the tenant's interest and would render the purchaser liable for payment of rent to the lambardar despite the absence of privity of contract : vide the observations of Wallis, C. J., in *Thethalun* v. *Eralpad Rajah* (2) and the case *M. K. Saldanha* v. *Subraya Hebbara* (3). There being neither privity of contract nor privity of estate in the present case, the relationship of landlord and tenant cannot come into existence and the defendant cannot in consequence be held personally liable to pay rent to the lambardar. Voluntary payment of rent by the defendant to the lambardar would not per se fasten such a liability on the former. For all these reasons I hold, in concurrence with the learned District Judge, that the relationship of landlord and tenant does not exist between the plaintiff and the defendant in the present case and that the latter is consequently not liable for the rent sued for.

As regards the second part of the contention: the plaintiff would have, in spite of the absence of privity of contract or privity of estate, been entitled to a decree for sale of the holding against the defendant who holds possession thereof ; but the above finding respecting the non-existence of relationship of landlord and tenant between the parties takes away, as urged by the respondent's learned counsel, the jurisdiction of the revenue Court which tried this suit, to pass such a decree. It is the existence of the relationship of landlord and tenant between the parties which confers jurisdiction upon a revenue Court to entertain

(1) [1900] 13 C.P.L.R. 19.

(2) [1917] 40 Mad. 1111=40 I.C. 841=32 M.L.J. 442.

(3) [1907] 30 Mad. 410=17 M.L.J. 258.

and try suits for rent between a landlord and his tenant, and absence of such relationship is, therefore, fatal to the whole claim including that for sale of the holding : vide proviso to S. 106, C. P. Tenancy Act, 1920. The claim for sale of the holding is, therefore, not competent. For reasons set forth above I dismiss the appeal with costs. Counsel's fee will be Rs. 15.

D.D. *Appeal dismissed.*

A. I. R. 1928 Nagpur 149 (1)

PRIDEAUX, A. J. C.

Raje Udajiram—Defendant 1—Appellant.

v.

Rajeshwar Trimbakrao and *others*—Plaintiff and Defendants 2 to 5—Respondents.

First Appeal No. 3-B of 1925, Decided on 25th January 1928, from decree of Addl. Dist. Judge, Akola, D/- 4th April 1921, in Civil Suit No. 19 of 1912.

Civil P. C., S. 151—Laches may disentitle a party to relief under S. 152—Civil P. C., S. 152.

Although there is no limitation for a case under S. 152, no amendment should be allowed by the Court either under S. 152 or S. 151, where laches may, in the particular circumstances of the case, disentitle a party to relief under S. 152. [P 149 C 2]

Judgment.—This judgment also disposes of First Appeal No. 4-B of 1925.

On 23rd June 1922, treating these two appeals as civil revisions, I gave the facts of the case. Then, on the 9th January 1925, for reasons given, disposing of an application for review, I held that the application must succeed as both the applications should not have been admitted as revisions because an appeal lay from the amendment of the decree. I, therefore, set aside my order of the 23rd June 1922 and directed that both the revisions may now be treated as appeals and stamped accordingly, and that, on their being so stamped, they would be heard. I have now heard the appeals. The arguments that were advanced at the hearing of the revisions have been repeated, and the only question is whether the order of the lower Court, making the amendment, is tenable or not.

I am very clearly of opinion that S. 152, Civil P C., does not apply, as this is not a case of a clerical error, or an arithmetical mistake, nor yet an error arising from any accidental slip or omission. There is no limitation for a case under S. 152, but it has been held that no amendment should be allowed by the Court either under this section or under S. 151 where laches may, in the particular circumstances of the case, disentitle a party to relief under S. 152 ; and here it must be remembered that the decree was passed in May 1914, and it was not until 12th February 1920 that the plaintiff made an application under S. 152.

Again, in my opinion, the case does not come under S. 151. It has been held in *Balmukund Marwari* v. *Basanta Kumari Dasi* (1) that limitation in an application under this section is governed by Art. 181, Sch. 1, Lim. Act, which lays down three years. But it is immaterial to go into the question of limitation, as I am of opinion that S. 151 does not apply.

The result is that I set aside the amended order of the lower Court. The appellant will get his costs in First Appeal No. 3-B of 1925 from the respondent.

In First Appeal No. 4-B of 1925, the plaintiff and defendants 2 to 5 object to the frame of certain amendments allowed by the lower Court and ask for certain changes. That appeal fails and is dismissed with costs, the appellants paying the respondent's costs. I fix Rs. 50 in each case as pleader's costs.

N K. *Appeal dismissed.*

(1) A. I. R. 1925 Pat. 1=3 Pat. 371 (F. B.).

A. I. R. 1928 Nagpur 149 (2)

GULAM MOHIUDDIN, A. J. C.

Jagannath Ramkishan—Defendant—Appellant.

v.

Mt. Laxmi Bai—Plaintiff—Respondent.

Second Appeal No. 369 of 1925, Decided on 21st February 1928, from decision of Dist. Judge, Nimar, D/- 6th May 1925, in Civil Appeal No. 21 of 1925.

C. P. Tenancy Act, S. 65—S. 65 does not apply to sub-tenants.

Section 65, Tenancy Act, does not say that it will apply to sub-tenants also and, therefore, a sub-tenant can neither claim suspension nor remission of his rent because his landlord may so claim it under S. 65 of the Tenancy

Act. The tenure of a sub-tenant is governed by the terms as settled between him and the tenant from whom he holds. [P 150 C 1, 2]

G. R. Deo—for Appellant.

Judgment.—The appellant Jagannath had taken fields Nos. 6 and 8 from Mt. Laxmi Bai, for Sambat 1977, i. e., 1920-21, on a rent of Rs. 125 payable on 15th April 1925. As defendant did not pay the amount as stipulated Laxmi Bai filed this suit for the recovery of Rs. 147-8-0 which is made up of Rs. 125 and interest at 1 per cent. per mensem.

The first Court held that fields Nos. 6 and 8 were leased to the defendant for Sambat 1977 on a rent of Rs. 125 which was to be paid on 15th April 1921 ; that the rent of Sambat 1977 was suspended, but there is no evidence to show as to when it was to be paid ; that plaintiff cannot take advantage of the period of suspension ; and that the claim is barred by time. The lower appellate Court has held that when revenue is suspended under S. 65, Tenancy Act, rent is also suspended, and as the word "tenant" includes sub-tenants also, the period for the payment of rent by the sub-tenant will also be extended.

It has been proved that defendant was given a sub-lease for a year and Rs. 125 was to be paid on 15th April 1921. The suit for the recovery of this amount ought to have been filed on 15th April 1924, but it was filed on 18th September 1924, and the plaintiff alleged that the revenue for 1920-21 was suspended and half was ordered to be paid on 15th April 1922 and half on 15th April 1923 and, therefore, her cause of action arose on 15th April 1922 and 15th April 1923.

The question to be considered is as to whether a sub-tenant who holds land on such terms as may be agreed between him and his landlord, can claim the benefit of S. 65, Tenancy Act, regarding the rent, which he has to pay to his landlord. It is clearly laid down in S. 38, Tenancy Act, that :

> except as otherwise provided a sub-tenant shall hold on such terms as may be agreed between him and his landlord.

From this it is clear that unless there is some other provision in the Tenancy Act, which affects a sub-tenant, he will hold on such terms as may be agreed between him and his landlord. S. 65, Tenancy Act, does not say that it will apply to sub-tenants also and, therefore, a sub-tenant can neither claim suspension nor remission of his rent, because his landlord may so claim it under S. 65, Tenancy Act. The tenure of a sub-tenant is governed by the terms as settled between him and the tenant from whom he holds, and, as in this case, the agreement was to pay the rent by 15th April 1921, it could have been realized on that date and the tenant could not have claimed postponement on account of suspension of rent and he could not possibly refuse payment if there was remission of rent. The sub-tenant having agreed to pay a definite sum, which may be more or less than the rent, which the tenant has to pay to the landlord, and having agreed to pay it on a certain date, must pay it on that date. The date which was agreed in this case was 15th April 1921, and as the suit was filed after 15th April 1924, it is barred by time.

The appeal, therefore, succeeds and is allowed, and the plaintiff's suit is dismissed. As the appellant took a false plea in the trial Court, and has only succeded on a plea of limitation in this Court, he shall bear his own costs.

N.K. *Appeal allowed.*

A. I. R. 1928 Nagpur 150

PRIDEAUX, A. J. C.

Nathu Bowa—Defendant—Appellant.

v.

Pandurang and *another*—Plaintiffs —Respondents.

Second Appeal No. 549 of 1926, Decided on 28th November 1927, from decree of Addl. Dist. Judge, Chanda, D/- 19th Aug. 1926, in Civil Appeal No. 6 of 1926.

(a) *Civil P. C., S. 100—Question whether a certain person in a hereditary joshi is a question of fact.*

The question whether a particular person is a hereditary Joshi of a village, entitled to do the Joshi's duties of the village and to exclude anybody else from doing so, is a question of fact, not of law, and the finding of the lower appellate Court cannot be opened in second appeal. [P 151 C 1]

(b) *Civil P. C., S. 9—Watan—Office of hereditary Joshipana exists in C. P. — Watandar Joshi can sue for his dues.*

The office of hereditary Joshipana exists in Central Provinces as separate from Berar, and a Watandar Joshi in the Central Provinces proper can sue for his dues: *S. A. No. 172 of 1917, Foll.* [P 151 C 1]

G. G. Hatwalne—for Appellant.

D. T. Mangalmurti—for Respondents.

Judgment.— The plaintiffs in this case stated that they are Watandar Joshis of mauza Ekarjuna and entitled as such to perform the religious ceremonies of the villagers. The defendant was said to have officiated at certain religious ceremonies which the plaintiffs should have been called upon to perform, and they, therefore, sued to recover Rs. 8 by way of damages. The plaintiffs obtained a decree in the first Court which has been confirmed in appeal, directing the defendant to pay to the plaintiffs Rs. 8 as damages: the decree also restrains the defendant perpetually from acting as Joshi and interfering with the plaintiffs' right. Against the lower appellate Court's decision the present appeal has been filed.

There was a previous litigation between the parties in Suit No. 304 of 1922 in the Court of the Munsif, Warora, and one of the issues framed in that case was:

Whether the plaintiffs are Watandar Joshis of mauza Ekarjuna.

That issue was found in the affirmative; and both the lower Courts in the present case find that that decision acts as res judicata and prevents the defendant from re-agitating the matter. It is here argued in second appeal that the finding as regards the Joshipana of the village is one of law, not of fact, and that the defendant is entitled to reopen the matter and to obtain another finding on it. It seems to me that the question whether a particular person is a hereditary Joshi of a village, entitled to do the Joshi's duties of the village and to exclude anybody else from doing so, is a question of fact, not of law; and I have no hesitation in upholding the finding of the Courts below on this point. It is then contended that the office of hereditary Joshipana does not exist in these provinces as separate from Berar, and that no Watandar Joshi in the Central Provinces proper can sue for his dues. But this is not so. Second Appeal No. 172 of 1917, decided by the Judicial Commissioner on 11th of April 1918, shows that a suit for Joshipana income is maintainable in the Central Provinces proper.

The decision of these two points decides the appeal as argued: it fails and is dismissed with costs. The appellant will pay the respondent's costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 151

KINKHEDE, A. J. C.

Waman—Defendant—Appellant.

v.

Vishnu—Plaintiff—Respondent.

Second Appeal No. 4-B of 1925, Decided on 1st September 1926.

(a) *Limitation Act, Art.* 144—*Alienation by the eldest managing member—Art.* 144 *applies.*

Where the alienation complained of is by the eldest managing member of a coparcenary of the joint family property and not of the property belonging to the minor by his guardian, such a case is governed by Art. 144: 12 *N. L. R.* 12, *Foll.* [P 151 C 2]

(b) *Pre-emption—Pre-emption of joint family property—Transaction can be avoided for want of legal necessity.*

The right of pre-emption is a right of substitution, so that the name of the original vendee has to be considered as deleted from the sale-deed and that of the pre-emptor substituted in his place with effect from the date of his fulfilling the obligation as to payment of the pre-emption price according to the terms of the decree. Therefore a pre-emptor of the property of a joint family must take the property subject to the right of the minor coparcener to avoid the transaction on the ground of want of legal necessity. [P 152 C 1]

(c) *Hindu Law—Father's antecedent debt—Legal necessity need not be proved.*

The proof of antecedent debts which dispenses with the necessity of proving legal necessity for a sale must be father's antecedent debts and not those incurred by a managing member other than the father: *A. I. R.* 1924 *P. C.* 50; *A.I.R.* 1924 *All.* 465; *A.I.R.* 1924 *All.* 309 and *A. I. R.* 1924 *All.* 551 (*F.B.*), *Foll.* [P 152 C 1]

W. R. Puranik and *A. D. Mande*—for Appellant.

V. Bapat—for Respondent.

Judgment.—The defendant-appellant raises four points in this second appeal: (1) limitation under Art. 44; (2) bar of res judicata by reason of decision in C. S. No. 195 of 1918 (Ex. D-2); (3) legal necessity need not be proved by a successful pre-emptor; (4) no question of legal necessity arises where the sale is for antecedent debts.

I will dispose of these grounds seriatim:

(a) As to limitation the alienation here complained of is by the eldest managing member of a coparcenary of the joint family property and not of the property belonging to the minor by his guardian. To such a case Art. 144 Limitation Schedule, ought to apply: see *Asaram* v. *Ratan Singh* (1).

(b) The plea of bar of res judicata is a belated plea. No proper pleadings or facts constituting the bar of res judicata having been made or established in the

(1) [1916] 12 N. L. R. 12=32 I.C. 242.

trial Court, the lower appellate Court was justified in refusing to entertain that plea at the stage of appeal.

(c) The plea that a pre-emptor need not prove legal necessity for the sale in favour of the vendee is novel and on the face of it unsound. The right of pre-emption is a right of substitution so that the name of the original vendee has to be considered as deleted from the sale-deed and that of the pre-emptor substituted in his place with effect from the date of his fulfilling the obligation as to payment of the pre-emption price according to the terms of the decree. He must take the property subject to the right of the minor coparcener to avoid the transaction on the ground of want of legal necessity.

(d) The fourth question raised is concluded by authority. The proof of antecedent debts which dispenses with the necessity of proving legal necessity for a sale must be father's antecedent debts and not those incurred by a managing member other than the father: *Brij Narain* v. *Mangala Prasad* (2), *Anantoo Kalwar* v. *Ram Prasad Tewari* (3), *Bhim Singh* v. *Ram Singh* (4), *Gajadhar* v. *Jagannath* (5).

A point not specifically covered by any of the grounds, but which could be plausibly argued under ground 4 that the legal necessity need not be proved at least to the extent of Rs. 210 because that sum was paid towards the satisfaction of the father's antecedent debt is argued before me on the strength of the evidence of D. W. 1 and Ex. D-1. The question as to the existence of this debt of the father and its satisfaction out of the consideration of the mortgage for Rs. 700 was specifically raised by the defendant in his written statement. The first Court found that the debt was borrowed by the father, but that the same was paid off in Samat 1967: see para 7 of the first Court's judgment. The lower appellate Court accepts the entries in the account books of the Harankhed shop as evidence of Ganoo's liability, but draws the inference thereupon that the debt "was long paid off by the plaintiff's" brother and the money that was paid off on Kartik Badi 11 of 1970 was due by the brothers on the bonds executed by them: vide para 6 of the lower appellate Court's judgment.

This finding is based on a misreading of the documentary evidence and must be set aside. A careful examination of the entries of Ganoo's Khataoni from 1965, 1967 Samat and kird, p. 2, and also of Tukaram's new khata at p. 7 of the khataoni for the Samat year 1967 and the entries in the rojnamas clearly show that on Poush Sudhi 6 of 1967 Rs. 200 were paid towards the satisfaction of the old debt of Rs. 295 and for the balance of Rs. 149-4-0, which consisted of Rs. 125, the balance left due under the old bond and Rs. 24-4-0 on account of a fresh pro-note of Rs. 22-8-0 (executed in satisfaction of father's previous pro-note for Rs. 17-8-0) plus Re. 1-12 0 interest thereon a fresh bond for Rs. 100 and a pro-note for Rs. 49-4-0 were executed on Poush Sudhi 8 and, therefore, credit was given towards the khata. This would show that the sum of Rs. 210- paid on Kartik Badi 11 of 1970 Samat was towards the satisfaction of the bond debt of Rs. 125 and pro-note of Rs. 17-8-0 in lieu of what the pro-note of Rs. 49-4-0 came to be executed in due course.

Thus the whole of the payment of Rs. 210 was on account of father's antecedent debts. This, together with Rs. 90 on account of interest at Re. 1 p. c. p. m., comes to Rs. 300 on the date of the sale-deed dated 26th April 1917. The defendant had thus a charge on the plaintiff's share for this amount on the date of the sale. If the plaintiff seeks to recover back possession of the one-third share belonging to himself he must bear this burden and pay it before he can recover his alienated share from the vendee or his pre-emptor, the defendant. As the defendant has enjoyed the profits of the land I do not think I should ask the plaintiff to pay any interest to him cn this sum.

I, therefore, modify the decree of the lower appellate Court by directing that the defendant shall be entitled to recover Rs. 300 from the plaintiff as a charge on the one-third share for the joint possession of which he has been granted a decree. The appeal stands otherwise dismissed with costs. As the revision appeal is a divided one I order each party to bear his own costs.

N.K. *Decree modified.*

(2) A.I.R. 1924 P. C. 50=46 All. 95=51 I. A. 129 (P.C.).
(3) A.I.R. 1924 All. 465=46 All. 295.
(4) A. I. R. 1924 All. 309=46 All. 301.
(5) A. I. R. 1924 All. 551=46 All. 775 (F.B.)

A. I. R. 1928 Nagpur 153

KINKHEDE, A. J. C.

Deolia and *others*—Defendants — Appellants.

v.

Raje Janardhan Shriniwas—Plaintiff —Respondent.

Second Appeal No. 98-B of 1926, Decided on 29th August 1927, from decree of Spl. Addl. Dist. Judge, in Civil Appeal No. 205 of 1924.

(a) *Civil P. C., S.* 100 — *Proper effect of a proved fact is a question of law.*

The proper effect of a proved fact is a question of law, and, therefore, the question whether a tenancy is permanent or precarious, is a legal inference from facts and not itself a question of fact : *A. I. R.* 1927 *P. C.* 102, *Foll.* [P 155 C 1]

(b) *Lease—Kabuliyat by itself does not operate as a lease.*

A kabuliyat does not by itself operate as a lease, nor would its acceptance by the person owning the premises, be sufficient to confer the title of a lessee upon the executant. [P 156 C 1]

(c) *Berar Land Revenue Code, S.* 78 (4) — *Landlord has right to enhance rent payable by the tenant of antiquity.*

It is not always the case that permanency of tenure must necessarily carry with it permanency or fixity of rent. The Berar Land Revenue Code has, by enacting sub-S. (4), S. 48, expressly reserved the right of the landlord to enhance the rent payable by the tenant of antiquity, subject, of course, to its being just and reasonable : 5 *N. L. R.* 100, *Foll.* [P 156 C 2]

(d) *Berar Land Revenue Code, S.* 78, *sub-S.* (4)—*Tenant of antiquity — Payment of enhanced rent by, does not take away the right to claim permanency of tenure.*

The mere circumstance that a tenant has paid, in the past, an enhanced rent to the landlord, would not take away from him the right to claim permanency of tenure, or, to say that he is a tenant of antiquity. Similarly, by a departure of an ephemeral character from a uniform course of conduct, he could not be "deemed to have lost" his status of a tenant of antiquity, if he had acquired any, and in no case could he be thereby debarred from proving, in answer to a suit for ejectment, that the tenancy of the land in question could be treated as one of antiquity, and that he was, therefore, not liable to ejectment. [P 156 C 2 ; P 157 C 1]

(e) *Civil P. C., S.* 100—*Concurrent finding — Lower appellate Court forming its opinion on legal effect of some of the documents — Correctness of its opinion can be challenged in second appeal.*

If the lower appellate Court forms its conclusions by confining its attention to the legal effect of some of the documents forming only a portion of the evidence on record, it is open to the appellants in second appeal to challenge the correctness of the appellate decision on that ground, even though it may be one which confirms the decision of the first Court. [P 157 C 2]

(f) *Berar Land Revenue Code, S.* 78 (2) — *Presumption under, has no reference to the individual — Tenancy of antiquity distinguished from annual tenancies.*

The presumption which S. 78 (2), Berar Land Revenue Code, authorizes a Court to draw has no reference to the individual ; it relates to the period as regards the intended duration for which any particular land is held in tenant right. It is this peculiar incident of antiquity, namely, of the duration of the tenancy being co-extensive with the duration of the tenure of the landlord, which is of the essence of every tenancy of antiquity, and which distinguishes it from the other class, namely, of annual tenancies. It attaches to the land, and must run with and remain attached to it in whosoever's hands it may be, for the time being. If the lands are heritable, transferable and devisable by will, they may have changed hands from time to time and gone into the hands of a defendant just a few days before suit ; in spite of that they must still retain all their incidents including incident of antiquity, if that is one of their incidents. The words of S. 78 (2) of the Code do not seem to take account of the identity of the person, nor of the mode in which the land goes from one present holder to another, so long as the same is held under a title derived from the previous holder thereof. It neither says that the title of the tenant must be by devolution on succession only and by no other mode such as transfer, bequest &c., nor that the consent of the landlord is necessary for its validity. [P 158 C 1]

(g) *Berar Land Revenue Code, S.* 78 (2) — *Antiquity—Meaning explained — It should not be taken in its commonly accepted meaning of absolute antiquity.*

The word " antiquity " in S. 78 (2), Berar Land Revenue Code, must be construed with reference to the nature of the history of the part of the country where the land is situated and to the possibility of getting evidence, and not in its commonly accepted meaning of absolute antiquity : 5 *N. L. R.* 100 ; 16 *Bom.* 646 ; 7 *N. L. R* 100 ; 18 *Bom* 22 ; 14 *N. L. R* 11 ; *S. A. No.* 151-*B of* 1915 ; 34 *Cal.* 902 (*P. C.*) ; *A. I. R.* 1922 *Bom.* 25 ; *A. I. R.* 1922 *Bom.* 402 ; *A. I. R.* 1927 *Bom.* 270, *Discussed and Rel. on.* [P 160 C 2]

P. C. Dutt—for Appellants.

M. B. Niyogi—for Respondent.

Judgment.—This is an appeal against the decision of the Special Additional District Judge in Civil Appeal No. 205 of 1924, arising out of Suit No. 103 of 1919 filed by the plaintiff-respondents against defendants Deoba, Dajiba and Raoji for their ejectment from fields bearing 26 and 27 respectively known as Piplacha and Malacha, situate at Kasba Warrah Jahagir of which they are the jahagirdars.

The first Court decreed the plaintiffs' claim for ejectment and mesne profits on the ground that the defendants were annual tenants and that their tenancy was validly determined by notice to quit. The defendants' appeal was dismissed as bar-

red by time, but this Court condoned the delay and remanded it for disposal on the merits. The Special Additional District Judge who since heard the same confirmed the trial Court's decree. The defendants have, therefore, come up in second appeal urging several grounds.

The peculiarity of this case is that defendant 1, Deoba, his father Nago and uncle Shanker had executed kabuliyats (Exs. P-2, P-3, P-6 to 8, P-61 and P-62) in respect of the fields in suit during the period 1901-05 in plaintiff's favour. On their strength mainly, the first Court came to the finding that the defendants were annual tenants holding under annual leases. The last of these leases was for the year 1905-06 for which Ex. P-8, D/- 28th July 1905, was executed by defendant Deoba. This document contains an express agreement that on the expiry of one year the land will be given back to the lessor, and that it was optional with him to relet it thereafter. All the kabuliyats are on printed forms of one pattern and contain similar stipulations. These kabuliyats have been duly proved by oral evidence to be genuine. The first Court, therefore, held that defendant 1's father, Nago, first held the fields under the kabuliyat (Ex. P-2) which is dated 15th April 1901, and that after him his son, defendant 1, Deoba, himself held some times one and some times both the fields and executed kabuliyats. It, therefore, concluded that the defendants cannot say that they are tenants of antiquity as contemplated by S. 78 (2), Berar Land Revenue Code That their tenancy was governed by their own special contracts and they cannot go behind them. Their tenancy being treated as determined by valid notice to quit under S. 79 (2) of the said Code and a decree was passed against them accordingly.

In this view of the case the first Court does not appear to have considered the further pleas of these defendants that they were tenants of antiquity. The Special Additional District Judge concurred with the first Court and found that the defendants and their predecessors-in-title held the fields in suit under annual leases referred to above. With regard to the plea of their being tenants of antiquity, he observed that the fact that they gave annual kabuliyats in more recent years gave a direct lie to their story on the point. After making an assumption that they were tenants of antiquity prior to 1901, he proceeded to hold that that character

would be deemed to have been lost by reason of the fresh agreements entered into by them from 1901 to 1905.

He also held that the defendants were not at all the tenants of antiquity. In coming to this latter conclusion the learned Additional District Judge referred to the entries in Prati book (Ex. P. 24) of the year 1871 wherein field 27 was shown as held by one Raghu, son of Mahadji Dhangar, and not by defendants' forefathers, and further with the help of Ex. P. 46, a lavnipatrak for 1857, and Exs. P-33 to 45 which are nafargats and lavnipatraks for the previous years down to 1850 he remarked that the defendants' predecessor-in-title, one Lalu, for the first time appeared as a tenant in 1857, but that his name did not appear in the previous years records. The nafargats and lavnipatraks which were more than 30 years old, were presumed to be genuine, and held to have been kept regularly in the ordinary course of business by the jahagirdars, and to constitute good presumptive proof of the facts stated in them. Finally, he concluded that the village having been held by plaintiffs in jahagiri rights for the last over 300 years, and the defendants' tenancy having been commenced after a definite time, i. e., 1857 A. D , they could not be held to be tenants of antiquity under S. 78 (2), Berar Land Revenue Code. The correctness of these conclusions is disputed in this appeal on several grounds.

Before proceeding to discuss the rest of the grounds, I think, I must dispose of ground 7, which raises a new question of law as well as of fact. The contention is that the appellants have acquired a right of occupancy in the land, and must not, therefore, be ejected. On being asked to explain the facts which supported this contention, the learned counsel for the appellants said that it was based upon the facts that survey settlement was introduced in the jahagir, and consequently, S. 221, Berar Land Revenue Code being applicable, his clients became occupants and as such they were entitled to remain on the land in perpetuity, so long as they paid the jahagirdar's dues on account of rent or revenue. The plaintiffs-respondents' pleader objected to this contention be-

ing allowed to be raised at this stage of second appeal, on the ground that it did not form the subject of any definite pleadings or issues, and that his clients would be prejudiced. He pointed out with reference to several provisions of the Berar Code that to entertain the new plea several facts not to be found on record will have to be assumed, and, prominently amongst them, that the jahagirdar had applied for the introduction of survey settlement in the jahagir. As the appellants' counsel thereupon refrained from making a definite assertion that survey settlement was introduced in the jahagir, the arguments were expressly confined to the other points. Ground 7 thus drops out and I need not give any decision thereon.

At this stage I may dispose of also the objection raised on behalf of the respondents to the effect that the decision of the Additional District Judge being one of fact this Court could not under S. 100, Civil P. C, entertain the second appeal. I have no difficulty in overruling this contention of respondents' pleader in view of the following very recent pertinent observations of their Lordships of the Privy Council in *Dhanna Mal* v. *Moti Sagar* (1) in regard to the objection taken before them against similar interference on second appeal by the Lahore High Court with the District Judge's judgment that the defendants' tenancy was permanent.

> Now their Lordships would be the last to abridge the effect of Ss. 100 and 101, Civil P. C., or weaken the strict rule that on second appeal an appellate Court is bound by the findings of fact of the Court below. They are well aware, moreover, that questions of law and of fact are often difficult to disentangle. It is clear, however, that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to them, in a case like the present, to be a legal inference from facts and not itself a question of fact.

Ground 2, which challenged the validity and legality of the notice served on the appellants, and ground 4, which raised the bar of limitation, were not pressed. Similarly, ground 5 was not argued. On ground 8, which challenged plaintiffs' right to claim mesne profits, no separate argument was addressed. It succeeds or fails according as ground 1 is decided in favour of, or against, the appellants. Ground 3 disputes the legal effect of Exs. P-2, P-3 P-6 to 8, P-61 and P-62. Before proceeding to consider grounds 1 and 6 I think it desirable to dispose of ground 3.

As stated above Exs. P-2, P-3, P-6 to 8, P-61 and P-62 contain express stipulations for vacating the land at the end of the year of the lease because of the other stipulation that the land is to be held for one year certain. The first Court treated these kabuliyats as embodying special contracts and conclusive as against the defendants and went to the length of holding that

> the defendants cannot say that they are tenants of antiquity..... and they cannot go behind them.

The Additional District Judge, unlike the Subordinate Judge, did not confine his decision to the legal effect of these kabuliyats only, but going into the question of the defendants' status came to the conclusion that their

> tenancy having commenced after a definite time, i. e., 1857 A. D., they cannot be held to be tenants of antiquity under S. 78 (2), Berar Land Revenue Code .....

Undoubtedly, in coming to this conclusion, the Additional District Judge, allowed his mind to be influenced by the fact that the defendants gave annual kabuliyats in more recent years, and even observed that it gave a direct lie to their story, and held that the status of antiquity, if there be any, must be deemed to have been lost by reason of the fresh agreements." I must say that the decision on the main question of the defendants' claim to the antiquity of their tenancy has, to a very great extent, been materially prejudiced by the view taken by the Courts below regarding the legal effect of these kabuliyats. The learned counsel for the appellants argued that the admissions, incorporated in the kabuliyats, to the effect that the lands were taken under annual leases for one year certain with an express agreement to vacate the same at the end of the year, were on the face of them erroneous and not binding on his clients, in view of the Additional District Judge's own finding as to their long-continued possession both before and after the period of the kabuliyats. The argument in short comes to this : that a tenant of antiquity does not lose his status as such by giving an annual kabuliyat and agreeing to vacate the land, just as his agreement

(1) A. I. R. 1927 P. C. 102=8 Lah. 573=54 I. A. 178 (P. C.).

to pay an enhancement does not affect his status under the law.

It will be seen that the Courts below looked upon the kabuliyats as documents creating annual leases, whereas, since a lease is a transfer and as such must obviously be made by the transferrer, i.e., the owner of the land, and by his own volition, it is clear that a kabuliyat executed by tho occupier or cultivator of the land is insufficient to create the transfer, and to clothe the person giving the kabuliyat with the status of a transferee, i.e., lessee. In short, a kabuliyat does not by itself operate as a lease, nor would its acceptance by the person owning the premises, be sufficient to confer the title of a lessee upon the executant. I am not, therefore, prepared to give to a kabuliyat, the same legal effect which a document of lease executed by the lessor, can have, under law, as being a step to bring into existence a valid lease of land for a certain period. It cannot, therefore, in my opinion, operate as a new contract of tenancy substituted by common consent in place of the original contract so as to lead to the inference that the future relations of the parties would, thereafter, be regulated with reference to the terms of that contract, rather than of the previously existing or original contract. In short, the kabuliyats in question cannot operate as a novatio between the parties, especially as there is no evidence on record to show that the tenant first surrendered the land and then took the first lease in 1901 and fulfilled from year to year to the new engagements embodied in them, by actually vacating the land on the expiry of each year's lease, and then entering into possession after taking a fresh lease during each of the years 1901-05. The stipulation for vacating the land may in the absence of such evidence be said to have been regarded by the parties as a dead letter or merely a formal stipulation and, therefore, of no effect.

Although these kabuliyats do not, according to my view, operate as new annual leases dispensing with the necessity of enquiring into the claims advanced by the defendants to the status of antiquity as erroneously held by the first Court, they can still be treated as so many pieces of admissions by the defendants which go to support the plaintiffs' assertion that they are merej annual tenants under them. Viewed in this light they are capable of being rebutted by counter-evidence. They at the most merely prove a new practice or conduct amounting to a temporary departure, for a compara'ively shorter period of five years, from the previous, consistent and uniform course of conduct followed during the much longer period which preceded it. Had this departure from the uniform course of conduct been continued down to the time when the notices to quit were served and been accompanied by proved acts of vacating and re-entering into possession of land at the end and the beginning of each year's lease, it would have had great significance in the trial of this case Since, however, this practice of giving kabuliyat had only an ephemeral existence, as it were, and the landlord must be deemed to have discontinued it, it is not entitled to much weight, or at any rate, its legal effect cannot be such as to outweigh the inference that is deducible from its discontinuance and from the fact of the absence of a similar course of conduct during the rest of the very long period during which the defendants have been holding the lands without kabuliyats or pattas. In short, the departure could be regarded as amply rebutted by the uniform course of conduct which preceded it, and by the discontinuance of the practice.

I say that it is not always the case that permanency of tenure must neoessarily carry with it permanency or fixity of rent. Courts have, no doubt, been induced to draw the inference of absence of permanency of a tenure, from the fact of the tenant having paid or agreed to pay rent with enhancement from time to time, but that cannot be an invariable rule applicable to all tracts and under all conditions. The Berar Land Revenue Code has, by enacting sub-S. 4, S. 78, expressly reserved the right of the landlord to enhance the rent payable by the tenant of antiquity, subject of course, to its being just and reasonable: cf. *Maruti* v. *Jagannath* (2). As in my opinion the mere circumstance that a tenant has paid in the past an enhanced rent to the landlord would not take away from him the right to claim

(2) [1909] 5 N. L. R, 100=2 I. C. 996.

permanency of tenure or to say that he is a tenant of antiquity. Similarly, by a departure of an ephemeral character (which is evidenced by the execution of kabuliyats for a few years) from a uniform course of conduct, he could not be "deemed to have lost" his status of a tenant of antiquity, if he had acquired any, and, in no case, could he be thereby debarred from proving, in answer to a suit for ejectment, that the tenancy of the land in question could be treated as one of antiquity, and that he was, therefore, not liable to ejectment. I am not sure that the Additional District Judge approached the question from the right perspective in considering the legal effect of the tenant's conduct in giving the kabuliyats.

The Additional District Judge has, moreover, not discussed the believable oral evidence tendered by the defendants in support of their plea of permanency of tenure or antiquity of the tenancy, nor has he discussed or explained away the direct support which that evidence has derived from the oral evidence of some of the plaintiffs' own witnesses. He confined his attention only to the legal effect of the kabuliyats and of certain entries in prati book (Ex. P-24) and lavnipatrak for the year 1857 (Ex. P-46), and of the absence of all mention of the name of the defendants' predecessors in title in the nafargats and lavnipatraks of years prior to 1850 (Exs. P-33 to 45), and on the strength of this material, drew conclusion that :

> the defendants' tenancy having been commenced after a definite time (i. e. 1857 A. D.) they cannot be held to be tenants of antiquity under S. 78 (2), Berar Land Revenue Code. . . .

The lower appellate Court was not justified in doing so, although the first Court on the view it took of the situation could confine its attention of the kabuliyats by Nago or the defendants themselves. The first Court's finding that Nago first held the fields under kabuliyat (Ex. P-2) dated 15th April 1901 and that after him Deoba held sometimes one and sometimes both the fields and executed kabuliyats, may have afforded a ground to that Court to at once jump to the conclusion that the defendants cannot say that they are tenants of antiquity. Consequently with this finding it could be assumed that the first Court found no necessity to appraise the value of the oral and documentary evidence on record, with a view to ascertain how far the inference of antiquity was deducible therefrom. If this finding of the first Court about Nago's first holding the land under Kabuliyat (Ex. P-2) of the year 1901 has any meaning, it shows that that Court regarded Nago's tenancy as having commenced for the first time in 1901 under the express contract to hold it for one year. If the first Court had considered the rest of the evidence and rejected the part of it which seemed to support the defendants' contention and accepted the other part thereof as supporting the plaintiffs' case, then there was room for thinking that the finding was based on such evidence as the Court thought fit to believe ; but in the absence of any such discussion by the trial Court, if the lower appellate Court were also to omit to discuss or consider whatever evidence there was on record on the defendants' side, and if it were to form its conclusions by confining its attention to the legal effect of some of the documents forming only a portion of the evidence on record, I do not see why it should not be open to the appellants in second appeal to challenge the correctness of the appellate decision on that ground, even though it may be one which confirms the decision of the first Court. The faulty procedure on the part of the Judges of the two lower Courts has resulted in a failure on their part to draw the proper conclusions regarding the legal rights of the parties, and this being an error of law and procedure, it is open to this Court, to interfere with it, especially as the error has prejudiced the rest of the judgment, and to arrive at its own independent conclusions after duly considering the evidence, both oral and documentary, in the light of the probabilities of the case.

But this is not all. There is a still graver error of law on the part of the lower appellate Court as I will presently show. It has completely misconceived and misread the evidence, and thus what was the real evidence of antiquity has been misunderstood as evidence showing the commencement of the tenancy. On this ground also, the appellate decision cannot be sustained. I will show where this misconception of evidence lies, and how it has vitiated the trial

of the most important issue in the case. Before doing this I must show how the plaint and pleadings are defective. (The judgment then discussed the defects in the plaint and dealing with the legal effect of several exhibits with regard to the antiquity of the tenancy, proceeded.) The presumption which S. 78 (2), Berar Land Revenue Code, authorizes a Court to draw has no reference to the individual ; it relates to the period as regards the intended duration for which any particular land is held in tenant right. It is this peculiar incident of antiquity, namely, of the duration of the tenancy being co-extensive with the duration of the tenure of the landlord, which is of the essence of every tenancy of antiquity, and which distinguishes it from the other class, namely of annual tenancies. It attaches to the land, and must run with and remain attached to it, in whosoever's hands it may be, for the time being. If the lands are heritable, transferable and devisable by will, as I have no doubt they are, they may have changed hands from time to time and gone into the hands of a defendant just a few days before suit ; in spite of that they must still retain all their incidents including incident of antiquity, if that is one of their incidents. The words of S. 78 (2) of the Code do not seem to take account of the identity of the person, nor of the mode in which the land goes from one present holder to another, so long as the same is held under a title derived from the previous holder thereof. It neither says that the title of the tenant must be by devolution or succession only and by no other mode such as transfer, bequest etc., nor that the consent of the landlord is necessary for its validity.

Nor is there any evidence on record to prove any special usage of the jahagir in question to show that no one can come on the land except with the consent or direct intervention of the landlord, or the tenancies must be surrendered to the landlord as a condition precedent to the incoming tenant's acquiring the rights of the outgoing tenant in respect of such lands. If the respondent's argument were correct, then no person who gets the land by transfer or by foreclosure, will be entitled to resist the landlord's claim, or, raise the defence of antiquity, which, on the face of it, seems absurd. In short, the defence is not merely personal, and the mere absence of the name of the present holder or of his ancestors in the jahagirdar's papers is of no consequence. (The judgment then traced the history of the jahagir in question and proceeded.) So far as this Court is concerned it will be found that in *Maruti* v. *Jagannath* (2) Skinner, A. J. C., left the question, whether an antiquity of 30 to 40 years only is sufficient to meet the requirements of S. 78 (2), Berar Land Revenue Code, undecided, although the case of *Kalidas* v. *Bhaiji* (3) was cited before him. In that case a jahagirdar had sued his tenants for rent after service of notice of enhancement. But as the suit was held not maintainable on other grounds, Skinner, A. J. C., considered it unnecessary to decide the point. *Pandu* v. *Udhojirao* (4) was a case coming from the Warra Jahagir from which the present case also arises. It was found there that the tenancy commenced in 1872 A.D. In view of that finding Batten, A. J. C., held that there was no uncertainty as to the date of the commencement of the tenancy, and applying the cases of *Kalidas* v. *Bhaiji* (3) and *Lakshman* v. *Vithu* (5), held that there was no room for the presumption contemplated by S. 78 (2) of the Berar Code, to arise.

The case of *Ganpat* v. *Sambha Sheo* (6) was a decision by a Bench of this Court consisting of Battan and Prideaux, A.J.Cs. It was from a jahagir village held by the jahagirdar for nearly 200 years. The defendant was held by the first Court to have been in possession by himself and by his predecessors for at least 40 years. His plea, however, was that he was an ante alienation tenant ; but the first appellate Court, without coming to any specific decision as regards the length of the tenancy, while finding that the plaintiff's family had held the village for 200 years, held that there was no proof that the tenancy was equally old, and further, that, in the most favourable view of the case, the defendant fell under the class of tenants referred to in S. 78 (2), whose antiquity of tenure prevented arbitrary ejectment, though the rent was liable to be enhanced to a just

(3) [1892] 16 Bom. 646.
(4) [1911] 7 N. L. R. 100=11 I. C. 693.
(5) [1894] 18 Bom. 221.
(6) Second Appeal No. 170 — B of 1913, decided on 31st October 1914.

and reasonable figure. The Bench Judges observed in that case that though the first Court found that the defendant-appellant had been in possession since 1874, a period of 40 years, the lower appellate Court came to no definite decision on the subject ; and that it was, therefore, necessary to direct that Court to decide, amongst other questions, what length of tenancy had been proved. With regard to the respondent landlord's argument based on *Kalidas* v. *Bhaiji* (3), which was a case under the analogous S. 83, Bombay Land Revenue Code, that the mere fact that the tenancy was 40 years old did not warrant the appellant being brought within the purview of S. 78 (2) Berar Land Revenue Code, the Judges observed that the factors determining the applicability of the section may, however, differ so greatly in the district in which that case arose from those obtaining in Berar that they were not inclined to allow that decision to sway their opinion. The Judges who took this view had, by reason of their long service in Berar and wide experience of Berar case, a close acquaintance with the wording of the several land systems in vogue there, and were in a position also to lay down authoritatively in the said case, that the word "antiquity" in S. 78 (2), Berar Land Revenue Code, must be construed with reference to the nature of the history of the part of the country where the land is situated and to the possibility of getting evidence, and not in its commonly accepted meaning of absolute antiquity.

Their following observations lay down the real test to be applied in such cases. They say the question to be considered by a Judge is :

> Does the antiquity take the tenancy into a period where due evidence of its commencement and duration is not available ? Is it sufficiently antique to go back to a time where neither party can be expected to get evidence on the subject. If the tenant, for the burden of proof lies on him, can take the commencement of his tenancy into the mist of antiquity, however recently those mists may have existed, the landlord must show that S. 78 (2) does not apply.

In the absence of any record of a period prior to 40 years and of any enquiry regarding existing tenants by the inam certificate officer, and presumably judging the facts so far as they were then found by the Courts below in the light of the test thus laid down they held in that case, as pointed out in *Parashram* v. *Bapu* (7), by Mittra, A. J. C., (who was the counsel for the appellant in the case of *Ganpat* v. *Sambhasheo*) that

> where possession for more than 40 years is shown, the tenant might be protected by S. 78, Cl. 2.

In this connexion, it may be pertinent to state here that the Courts below had come to the conclusion that Ganpat's tenancy was governed by S. 78 (2), and, as the remarks of the Bench Judges show, that finding was not appealed against and was, therefore, treated as binding as against the jahagirdar.

> The finding in that case was not inconsistent with the possibility of the tenant being on the land for even more than 200 years,

as remarked by Mittra, A. J. C., in the aforesaid case.

In *Parashram* v. *Bapu* (7), the tenants were of an ijara village where all land was uncultivated in 1867 when the ijara was granted and no lists of ante ijara tenants was or could be prepared. The defendants in that case also did not claim to be ante ijara tenants but asserted that they got a permanent lease 50 years ago. Though their plea of the grant of permanent tenancy was negatived by the Courts below they were held entitled to protection under S. 78 (2). It was obviously a case in which the Courts were in a position to find definitely that there was no cultivator in the village before the grant of the ijara and thus to conclude that the tenancy did not exist in 1867. The case was thus distinguishable from *Ganpat* v *Sambhasheo* (6), but indistinguishable from *Prahlad* v. *Ganpat* (8), where also the tenancy was shown to have commenced between 1867 and 1870 and Prideaux, A J. C., held the tenant not entitled to the benefit of S. 78 (2) of the Berar Code.

> The result of this decision is that S. 78 (2) is practically inapplicable to ijara villages.

Mittra A, J. C's observations at the bottom of p. 114 of the same ruling to the effect that

> the section does not contemplate proof of the commencement of the tenancy in a particular year much less of a particular date

are of very great importance. If official records exist and prove with certainty that the tenancy commenced after a period for which such records exist, the task of the Court is rendered easier, and all that the Courts have to find in such

(7) [1918] 14 N. L. R. 111 (114)=42 I. C 631.
(8) Second Appeal No. 151-B of 1915.

cases is whether it can be definitely held with certainty that the tenancy did not commence till after a certain year for which the official record exists, because evidence of the commencement of the tenancy cannot in that case be said to have been lost by reason of its antiquity.

But where no official records exist, the task is rendered very difficult as there is room for manipulation on eithar side. No satisfactory oral evidence as regards the original contract of tenancy, is ordinarily likely to be forthcoming on either side and whatever evidence may be given is not either satisfactory or ample and is very often meagre, especially when the facts to be proved relate to a period going beyond living memory. Under such circumstances, inferences have to be drawn from the conduct of the parties and their predecessors, the long length of possession extending beyond living memory, the transmission of the land by succession or by transfer or will from one person to another, the recognition of the successor, transferee, or legatee, as a tenant in place of the outgoing tenant, and the acceptance of uniform or normal rent or revenue from the actual cultivator for the time being, with or without enhancement, according as the value of the holdings measured by their sale price may or may not have increased. The presence of improvements on the land, is also a circumstance which ordinarily weighs with the Judge in drawing the proper inferences of permanency, antiquity or otherwise, of the tenancy, if the same (improvements) be of long standing or were ante litem motam. It is such circumstances that justify the inference of permanency: cf. *Naba Kumari Debi* v. *Behari Lal Sen* (9). If the jahagirdar maintains systematic records kept in the regular course of business of his jahagir, showing the names of cultivators of holdings with clear specifications of lands held, and rents and revenues paid by them, that is of some help in determining the question of the commencement of the tenancy, and the duration of the period of the tenancies, provided, the information contained in those records is clear enough to prove by itself the identity of the lands to which and the cultivator to whom they refer, with the land sued for and the person sued, or if the records are not sufficiently clear to prove such identity beyond doubt then independent cogent evidence must be forthcoming to prove the same. If such evidence about the identity be wanting (unless the defendant has admitted it) the aforesaid documentary evidence on the jahagirdar's side may after lapse of time not be quite satisfactory evidence of the commencement of the particular tenancy in question, or of the duration of the period of such a tenancy.

So then, according to the interpretation which has obtained in our Court, the term "antiquity" is only a *relative* term and has reference to the history of the tract where the land is situate and to the possibility of getting evidence and is not a remote or absolute antiquity. In other words, "however, recently these mists of antiquity" may have come into existence, the tenant might be held entitled to the protection, if it could be extended to him consistently with the history of the tract where his land is situate and with the possibilities which may exist for both parties to get evidence in support of their respective versions.

I may at this stage advert to the decisions of the Bombay High Court under S. 83, Bombay Land Revenue Code, from which our S. 78 (2) was copied. The case-law under that section ought to serve as a good guide to us for interpreting the corresponding section of the Berar Code. Although there has been some divergence of views as to the length of possession sufficient to keep the tenancy into obscurity, there are cases under the Bombay Land Revenue Code where the benefit of the presumption was given or denied to the tenant according as it was held proved or unproved that the tenancy had commenced in a particular year or within a particular period. In *Chikko* v. *Sidnath* (10), it was held that the tenancy having commenced in a particular year the presumption of a permanent tenancy did not arise under S. 83, Land Revenue Code, 1879. That was a decision in a Letters Patent appeal against the decision of Macleod, C. J., reported in *Shidnath* v. *Chikko* (11), in which the learned Chief Justice held at p. 536 of 23 *Bom. L. R.* as follows:

> But if he can show that he has been on the land so long that the commencement of his

(9) [1907] 34 Cal. 902 (908)=6 C. L. J. 122=11 C. W. N. 865 (P. C.).

(10) A. I. R. 1922 Bom. 25=46 Bom. 687.

(11) A. I. R. 1921 Bom. 454.

tenancy cannot be ascertained, then the presumption under para. 2, S. 83 arises, and it was held in *Ramchandra* v. *Anant* (12), that even although it was proved that the origin of the tenancy was of a later date than the lessor's tenure, still the presumption would arise, provided, as I take it, that the actual date of the origin was not known. ''

In *Narayan* v. *Pandurang* (13), it was held, commenting on the cases above quoted, by Fawcett, J., that

the presumption operates when owing to the antiquity of tenancy, you cannot fix on any particular point or period of time as that at or within which the tenancy commenced. Once you get a particular time, as in this case, you get years 1830 to 1850 between which the tenancy must have begun, then there is a commencement with a certain period which bars the presumption arising.

Pratt, J., also held that the presumption applies only when the time, i. e., rather the date or the commencement of the tenancy, is not proved by satisfactory evidence.

This question very recently again came up before the same High Court in the case of *Shripadbhat* v. *Rama Babaji* (14), and it was decided by a Bench consisting of Fawcett and Patkar, JJ., that

where a tenancy is shown to have originated at some time between 1758 and 1857, a presumption can arise, under S. 83, Bombay Land Revenue Code, that the tenancy is permanent. The period of a century is too long and indefinite a period to constitute satisfactory evidence of the commencement of a tenancy within the meaning of the section.

In this case of *Shripadbhat* v. *Rama Babaji* (14) the land was granted in inam to plaintiff's forefather in the year 1757 by the then Maharaja of Kolhapur. The defendant, Rama, claimed that he was a permanent tenant of the lands, his tenancy having originated some time between 1758 and 1857. The trial Court held that the defendent was a permanent tenant and accordingly dismissed the suit. Plaintiff, therefore, came to the High Court. On his behalf it was contended firstly, that since the defendant's family admittedly came on the lands after the granting of the inam to the plaintiff's family, that circumstance was sufficient to hold that there is satisfactory evidence of the commencement of the tenancy being some time between 1758; secondly, that mere length of possession is not sufficient to raise the presumption under S. 83, Bombay Land Revenue Code, if the commencement of the tenancy is proved; and thirdly, that it is not necessary to prove that the tenancy commenced in a particular year, but it is sufficient if the origin of the tenancy can be traced back to a definite period. In support of these contentions plaintiff relied upon the aforesaid cases of *Ramchandra* v. *Anant* (12) and *Narayan* v. *Pandurang* (13) and urged that in the circumstances of the case the presumption under S. 83, Bombay Land Revenue Code, was negatived. Fortunately, the later case came before a Bench of which Fawcett, J., who decided the earlier case of *Narayan* v. *Pandurang* (13) was also a member.

Fawcett, J., explained the case of *Narayan* v. *Pandurang* (13) and observed that

the tenancy in question can certainly claim to be of antiquity in view of the fact that it may have gone back to the year 1758, if not earlier, and it is in consequence of that antiquity that I think there is an obscurity as to the commencement of the tenancy. I quite agree that logically Mr. Desai for the appellants can contend that a period of a hundred years falls within the view taken in *Narayan* v. *Pandurang* (13), but, as there mentioned, some reasonable limits must be applied, and I think that, at any rate, a period of hundred years is too long to satisfy that condition.

Patkar, J., also quoted with approval Fawcett J.'s observations at pp. 9 and 10 in *Narayan* v. *Pandurang* wherein the following remarks regarding *Ramchandra* v. *Anant* are made as showing that it laid down the law as to presumption about commencement of tenancy correctly.

* * * there is no reason to differ from the view taken in *Ramchanda Narayan Mantri* v. *Anant* (12) that the mere fact of a tenancy having commenced subsequent to the landlord's tenancy does not prevent the application of S. 83, because there may be cases where, in spite of that, the commencement of the tenancy is in obscurity.

In deciding the case of *Ramchandra* v. *Anant* (12) the previous decisions in *Gangabai* v. *Kalpa* (15), *Kalidas* v. *Bhaiji* (3) and *Laxman* v. *Vithu* (5), were taken into consideration and in spite of them it was held that the inference of antiquity was justifiable wherever the origin of the tenancy was unknown. No doubt, the case of *Ramchandra* v. *Anant* was criticised in *Chikko* v. *Shidnath* (10), with a view to show that the phrase ''commencement of the tenancy'' in S. 83 refers to the time and not to the terms of the tenancy. In that case, no satisfactory evidence of the commence-

(12) [1891] 18 Bom. 433.
(13) A. I. R. 1922 Bom. 402=47 Bom. 4.
(14) A. I. R. 1927 Bom. 270.
(15) [1885] 9 Bom. 419.

ment of the tenancy appeared on the record, but, on the strength of the evidence of one Ganesh Baba Savant it was held that the tenancy being at least 80 years old the first appellate Court was entitled to draw the inference that the tenancy was of a very ancient date, and that its commencement could not be ascertained, and that it was by reason of antiquity that no satisfactory evidence of the origin of the tenancy was forthcoming, and, therefore, S. 83 applied to the case. So the authority of that decision stands confirmed by the most recent decision of *Shripadbhat* v. *Rama* (14).

I have already weighed the evidence in the light of the test above laid down, and have no hesitation in coming to the conclusion that the evidence adduced on the defendants' side, so far as it goes, proves long length of possession, and that consistently with the history of this jahagir, there is no possibility of getting satisfactory evidence as to the commencement of the tenancy and the duration of period of the tenancy, and that this inability of the parties to adduce satisfactory evidence in support of their versions is due to the fact that the origin of the tenancy is shrouded in the mist of obscurity. Even the jahagirdar's documentary evidence is found lacking in cogency and does not apply accurately to the facts necessary to be proved for establishing either the commencement of tenancy or the period of the intended duration of the tenancy in any particular instance. Having dissected it in relation to the facts of the case in hand, I have found it deficient in point of identity as stated already.

As pointed out above, even the plaintiffs' pleadings were defective and naturally the evidence is found wanting in cogency. No serious attempt was made at the stage of pleadings on either side to state who the parties to the original contract of tenancy were, what lands designated by their distinctive marks or names or other identifying description were then set out, and why the defendants were or must or must not be deemed to be the successors-in-interest of the original tenants. When this defect was pointed out to the learned pleader for the plaintiffs-respondents, he had to frankly admit that, owing to this want of allegation and proof of identity the plaintiffs' interest would be highly prejudiced and prayed that the case may be remanded to give him a fresh opportunity to supply the defect. The defendants-appeallants' counsel being opposed to the remand, and naturally so after this hard fight for eight long years since 1919, I could not give effect to this request. I have, therefore, no alternative but to dismiss the suit as laid and give the defendants the benefit of the provisions of S. 78 (2), Berar Land Revenue Code, to which they are legally entitled in the present state of the record.

I, therefore, allow the appeal, and reversing the decree of the lower appellate Court, dismiss the suit with costs in all the three Courts and direct that the defendants shall get their costs throughout from the plaintiffs.

N.K. *Appeal allowed.*

A. I. R. 1928 Nagpur 162

KINKHEDE, A. J. C.

Mohammad Hayat Khan—Accused—Applicant.

v.

Emperor—Non-applicant.

Criminal Revn. No. 319 of 1927, Decided on 10th February 1928, from decision of the Sess-Judge, Nimar, D/- 27th October 1927, in Criminal Appeal No. 57 of 1927.

Criminal P. C., S. 342—Provisions are mandatory—Breach of the same vitiates such portion of the trial as is subsequent to the stage where it occurred.

The imperative provisions of law as regards the examination by the Court must be complied with, irrespective of the question whether the non-compliance has or has not prejudiced the accused on the merits. Filing of written statement by accused does not dispense with his examination by Court. [P 164 C 1, 2]

Where after the examination of the accused there was cross-examination of the prosecution witnesses, but there was no further examination of the accused,

Held: that the judgment was vitiated by breach of S. 342: *A. I. R.* 1923 *Cal.* 196 and *A. I. R.* 1925 *Nag.* 44 (*F. B.*), *Foll.*

Held: further, that this illegality did not vitiate the whole case so as to necessitate a trial de novo, but it only affected such portion of the trial as was subsequent to the stage where it occurred. [P 164C 2]

M. V. Joshi, *W. R. Puranik* and *A. Razak*—for Applicant.

G. P. Dick and *M. B. Niyogi*—for the Crown.

Order.—This order will also govern Criminal Revision No. 327 of 1927.

These cases arise out of a prosecution for an offence under S. 409, I. P. C,, and for abetment thereof started against Muhammad Hayat Khan and Ramlal respectively on the basis of information lodged by the Secretary, Municipal Committee, Khandwa, with the District Superintendent of Police, Nimar. The proceedings commenced on 25th March 1927, and ended in the convictions of both the accused. The Sessions Judge has also upheld them in appeal. Hence these revisions by the two applicants.

On 3rd January 1928, the Advocate for the accused Muhammad Hayat Khan put in certain additional grounds and furnished a copy thereof to the counsel for the Crown. One of these grounds urges that after the examination of the accused there was cross-examination of the prosecution witnesses, but that there was no further examination of the accused, and the judgment was, therefore, vitiated by breach of S. 342, Criminal P. C. As this question raises an important point affecting the legality of the conviction, I think, I had better deal with it in the first instance. In order to understand the relevancy of the arguments addressed on this point, I think a resume of the proceedings of the trying Magistrate is necessary and I proceed to give it below.

The examination of 16 prosecution witnesses having been finished the accused were examined on 6th May 1927, and charges were framed against both the accused on that date, and after their plea of not guilty was recorded, they were asked to communicate to the Court the names of the witnesses for the prosecution whom they would like to call for further cross-examination. For this purpose time was granted to them till 7th May 1927, and on that day they intimated all the sixteen prosecution witnesses to be recalled for further cross-examination. They were thus recalled and further cross-examined; but after the further cross-examination of some of them was over, a fresh batch of prosecution witnesses, viz., P. W. 17 to P. W. 20 was examined on 6th July 1927. Prosecution witness No. 10, Nathuram, who was left over on 6th July 1927, was further cross-examined the next day. Thereafter Muhammad Amin Khan, Sub-Inspector of Police, was examined, as witness 1, for the Court and cross-examined both by the prosecution and the defence the same day. The Magistrate was for the time being of opinion that the District Superintendent of Police and the Civil Surgeon should also be examined as Court witnesses and fixed the case for 15th July 1927 for that purpose. Mr. Mandloi (P. W. 20) was also ordered to attend the Court that day with certain documents. But 15th July being a local holiday the case was adjourned to the next day the 16th.

On that day the Magistrate recorded the following order in his order-sheet:

> On going through the record I have decided not to examine the two Court witnesses at this stage. Accused are further examined. They also file their written statements. The defence recorded. Case for the 18th instant for filing certain documents by Mr. Mandloi.

On 18th July Mr. Mandloi (P. W. 20) was further cross-examined, re-examined and discharged. The accused filed list of 25 persons as their defence witnesses, and 26th and 27th July were fixed for their examination. But nothing was done on 26th. On 27th defence witnesses 1 to 6 were examined, cross-examined and discharged. Out of these Nos 1 to 3 were for the accused, Ramlal, and Nos. 4 to 6 were for the accused Muhammad Hayat Khan. After these witnesses were examined, the Magistrate, with what he construed as the consent of Mr. Hifazat Ali, who conducted the defence of the accused Muhammad Hayat Khan now and then, called and examined one Abu Bakre, as Court witness 2, and, after examining one more witness D W. 7 for the defence, adjourned the hearing till the next sitting for the examination of the rest of the defence witnesses, who were examined as D. W. 8 to D. W. 11. On that day an application was put in by Mr. Hifazat Ali submitting that the order sheet entry dated 27th July 1927, mentioning that C. W. 2 was examined with his consent, was incorrect, and that the real fact was that the Court suddenly expressed an intention to examine Abu Bakre as a Court witness, and looked at Mr. Hifazat Ali, who thereupon simply said that the Court may do as it pleases. It was pointed out that this attitude of Mr. Hifazat Ali was wrongly construed by the Magistrate as an express consent, whereas, it was only meant to show that the accused could not object to the examination of any person as a Court witness. Strangely enough on this ap-

plication no orders disposing of it have been passed by the Magistrate.

It will thus be seen that the examination of the accused took place first on 6th May 1927 and then on 16th July 1927. It is also clear that on none of these days could the examination of all the prosecution witnesses be said to be concluded. The words "have been examined" in the expression "after the witnesses for the prosecution have been examined" as used in S. 342, Criminal P. C., have been interpreted in a Full Bench decision of this Court to mean examined-in-chief, cross-examined and re-examined and to include any also cross-examination of the prosecution witnesses after the charge, if the accused has recalled them for such examination under S. 256, Criminal P.C.: *Local Government* v. *Maria* (1). It, therefore, follows that it is after that stage is reached that the law makes it obligatory for the Magistrate to question the accused generally on the case, for the purpose of enabling him to explain any circumstances appearing in the evidence against him, which must necessarily mean that the prescribed examination of the accused by the Court must take place, before he is called on his defence. In the present case that stage was not reached, at any rate till 18th July 1927, when the last prosecution witness Mr. Mandloi (P. W. 20), was further cross-examined, re-examined and discharged. But, as we know, the accused were already examined on the 16th July before such stage. The examination, as it stood, was no compliance with the imperative requirements of law. Nor did the filing of the written statements by the accused dispense with such examination by Court. Under these circumstances there was need for further examination of the accused on the 18th July, or, at any, rate, on the 27th July, before they were called on to begin their defence evidence. This omission on the part of the Court to question the accused generally on the case, must in view of the reported decision of the Full Bench above referred to, be treated as an illegality which vitiated the convictions of the appellants.

It is sufficient for purpose of these revisions to hold that the imperative provisions of law as regards the examination by the Court must be compied with, irrespective of the question whether the non-compliance has or has not prejudiced the accused on the merits : cf. *Mozahur Ali* v. *Emperor* (2), and *Local Government* v. *Maria* (1).

A further question arises for decision at this stage, namely, whether this illegality has vitiated the whole case so as to necessitate a trial de novo, or it only affects such portion of the trial as is subsequent to the stage where it occurred. I think that in the circumstances of this case, the proceedings subsequent to the stage reached after the completion of the cross-examination and re-examination of P. W. 20, must be deemed to have been vitiated, because, it was at that stage and before the accused were called upon to enter on their defence, that they were entitled to be questioned generally on the case by the Court, under the latter part of S. 342 (1), Criminal P. C. For obvious reasons the illegality could not vitiate proceedings which were already had before it. The two examinations of the accused on 6th May 1927, and 16th July 1927 could, at the most, be looked upon as being only the optional examination contemplated by the first part of S. 342(1) and not the imperative examination prescribed in the latter part of the said section. I have, therefore, no doubt that the convictions and sentences as passed in this case by the trying Magistrate, without full compliance with the aforesaid imperative provision of law, cannot be maintained. The decision in appeal also upholding such convictions and sentences must ipso facto fall to the ground. I, therefore, setting aside the convictions and sentences passed against both the applicants, direct that the trial of the case be resumed by the trying Magistrate from the point where the examination of the last prosecution witness, viz., P.W. 20, was concluded. It is further directed that the Magistrate shall now question the accused generally on the whole case as required by the latter part of S. 342 (1), and then call upon them to enter on their defence. This necessarily limits the prosecution side to such evidence as is already on record and precludes it from adducing any further evidence in the case, and wipes out from the record all the evidence of the defence witnesses and also of the

(1) A. I. R. 1925 Nag. 44=20 N. L. R. 174 (F. B.).

(2) A. I. R. 1923 Cal. 196=50 Cal. 223 (227).

Court witness No. 2 examined in their midst. But, so far as the witnesses for the accused are concerned, I must, in view of the fact that they have already examined a large number of them, give them the option to let the evidence already taken stand as it is, or to examine their witnesses over again, and even to call such new witnesses as they may desire to call, if they find that it serves their interest to do so. After the trial is concluded the Magistrate shall then dispose of the case on the merits according to law.

In this view of the case it becomes unnecessary to deal with the other matters raised and argued in this Court.

The accused who are on bail have been already ordered to present themselves before the District Magistrate, Khandwa, on the 14th instant to know the orders of this Court. That officer will please fix a date for the appearance of the accused, and direct them to appear on that day before the trying Magistrate for taking their further trial in the case.

N.K. *Case remanded.*

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* A. I. R. 1928 Nagpur 165

HALLIFAX, A. J. C.

Bhujangrao—Plaintiff—Applicant.

v.

Baliram—Defendant—Non-applicant.

Civil Revn. Appln. No. 158-B of 1927, Decided on 23rd December 1927.

* (a) *Civil P. C., O. 9, R. 6—Ex-parte decree—Matters to be proved by evidence—Court must state them in form of issues.*

In every ex-parte case the Court must consider whether there are any matters that ought to be proved by evidence in addition to having been proved by the admission of the defendant and, if it finds that there are, it must state them definitely, preferably in the form of issues.

[P 166 C 1]

(b) *Practice—Adjournment.*

Refusal to postpone the hearing for an hour or two to give time for a party to appear can be hardly called proper. [P 165 C 2]

M. R. Bobde—for Applicant.

Order.—The plaintiff Bhujang Rao, who applies for revision, filed a suit in the Small Cause Court of Ellichpur on two promissory-notes against one Baliram Thakore. On the day fixed for the final disposal of the suit, the plaintiff appeared (by pleader) and the defendant put in no appearance at all. The plaintiff had no witnesses present, and the learned Judge gave the following judgment :

The point for decision is whether the two pronotes in suit are genuine. I find them not proved and dismiss the suit for want of evidence.

The plaintiff's application in this Court states the following facts, which would probably not justify revision : When the case was called at 12-47 P. M. the plaintiff's pleader informed the Court that he had not turned up and asked for a postponement of the hearing till later in the day, which was refused ; the plaintiff and his witnesses, who had been delayed on their journey, did in fact turn up within half an hour of the hearing. An application for the restoration of the suit was drawn up the same day, but it was seen that that could not be granted as there had been a decision on the merits, not a dismissal in default.

The refusal to postpone the hearing for an hour or two can hardly be called proper, but that need not be discussed as the decision on the merits is entirely wrong. Under R. 5, O. 8, Civil P. C., (and also under S. 58, Evidence Act, which lays down the same rule, at the end in the same words) the Court was bound to treat every allegation in the plaint as proved, except any that in its discretion it might require to be proved by evidence.

It is certainly the usual practice, arising out of a vague general memory of this rule, for the Court in all ex-parte cases to call upon the plaintiff to " prove his case." Such an order is usually taken to mean that the plaintiff has to give evidence of some of the admitted facts. The facts to be so proved are never stated and nowhere defined, though they are generally taken vaguely to include the execution of any document on which the suit is based or the payment of the consideration for the agreement in question or of something of that sort.

There is never anything more definite than that, and in this case there is not even that much. Indeed the dismissal of the suit " for want of evidence " amounts to a finding that the plaintiff knew before the Court even began to consider the matter, exactly what the points were which the Court would require him to prove by evidence if the defendant failed to appear, and intentionally refrained from producing evidence on them, so that he probably had none and, therefore, his allegations on them are probably untrue.

This procedure, which is almost invariably followed, is entirely traditional, like that in cases that are called proceedings under S. 145, Criminal P. C.; it has no connexion with any provision of law that exists or ever has existed except that the tradition arose out of a slovenly application of one. The Court does not even purport to exercise its discretion, nor to state what would be the result of that exercise if it were made, that is, the facts that have to be proved by evidence.

If anything more were required to show that the whole of this procedure is regarded as a meaningless formality, it is to be found in the fact that the evidence accepted as sufficient almost invariably consists of nothing but a formal repetition by the plaintiff or one of the plaintiffs, as a witness, of some of the statements made in the plaint in reference to the points on which he or his pleader supposes the Court requires such formal evidence. Cases indeed are not uncommon in which the suit has been dismissed because the plaintiff guessed only some of the points and left out one or two.

It ought not to be necessary to state the proper procedure, but it is. In every ex-parte case the Court must consider whether there are any matters that ought to be proved by evidence in addition to having been proved by the admission of the defendant and, if it finds that there are, must state them definitely. Such matters will be found in few cases and will be seldom more than one or two in any case. They can be most conveniently stated in the form of issues. In this case it was quite clear that there was not one of the allegations in the plaint of which there was any reason to require the plaintiff to give proof in addition to its admission by the defendant. This the defendant has made still clearer by his failure to appear in this Court to answer the application for revision.

The decree of the lower Court is accordingly set aside. In its place a decree will issue ordering the defendant to pay to the plaintiff the sum of Rs. 246-10-6 with interest thereon at 2 per cent. per mensem from 18th February 1927 to the date of payment, and also all the costs incurred by him in the suit and in these proceedings. The pleader's fee in this Court will be Rs. 20.

N.K. *Decree set aside.*

A. I. R. 1928 Nagpur 166

KINKHEDE, A. J. C.

Ramkumar—Plaintiff—Applicant.

v.

Kushalchand Ganeshdas and *others*—Defendants—Non-applicants.

Civil Revn. No. 65-B of 1927, Decided on 10th December 1927, from decree of 2nd Class Sub-Judge, No. 1, Akola, D/- 7th January 1927, in Civil Suit No. 217 of 1919.

(*a*) *Civil P. C., O. 32, R. 9—Reference made to the arbitrators by next friend of a minor—Minor's desire to continue the arbitration proceedings after attainment of majority not ascertained—Court must remove the next friend.*

Where the minor attains majority during the arbitration proceeding, failure on the part of the next friend to ascertain whether the minor desired to continue the arbitration proceedings upon the reference made during his minority amounts to a failure of duty on the part of the next friend within the meaning of R. 9, O. 32, and it is the duty of the Court to remove the next friend on that account: 27 *Mad.* 377, *Foll.* [P 167 C 1]

(*b*) *Civil P. C., Sch. 2, para. 10 — Failure to give notice to the parties vitiates judgment.*

Omission to give notice to the parties constitutes a grave and material irregularity in the exercise of Court's jurisdiction, and his judgment is liable to be set aside on that account: 11 *Mad.* 144 and 20 *All.* 474, *Foll.* [P 167 C 2]

(*c*) *Civil P. C., O. 32, R. 14—Application under—Court not acting upon it — Decree is invalidated.*

Where the plaintiff made an application to the Court stating that he became major, and that he wanted to continue the suit as a major and he further requested an opportunity to give evidence in support of his objections, but the presiding officer ignored the petition.

Held: that the decree was invalidated: 15 *W. R.* 37 (*P. C.*) 18 *All.* 422 and *A. I. R.* 1925 *Rang.* 238;, *Foll.* [P 168 C 1]

(*d*) *Stamp Act, S. 29 (g)—Award must be on a stamp paper—Arbitrator is responsible to see that the award is engrossed on a stamp paper.*

Unless and until an award is engrossed on a stamp paper it has no validity and cannot operate as an award. It has no valid existence and the Court cannot be justified in looking at it, or in acting upon it far less, can it pass a decree in terms thereof. The executant of the award being the arbitrator, under S. 29 (g) Stamp Act, it is his duty primarily to direct any of the parties to provide him with necessary stamp, and to see that he does not deliver or publish his award on a plain paper, and thus save himself from the blame attaching to him of having evaded the stamp law [P 168 C 1]

(*e*) *Award—Reference made by a minor's next friend without leave of the Court has an important bearing on validity of award.*

How far a reference can be made by a minor's next friend without the leave of the Court ex-

pressly recorded in the proceedings is a question which has an important bearing on the validity of the award. [P 167 C 1]

A. V. Khare and *W. B. Pendharkar*—for Applicant.

M. B. Niyogi—for Non-Applicants.

Order.—I think this revision must be allowed. The 2nd Class Subordinate Judge No. 1, Akola, must understand that there are very grave responsibilities devolving on him by virtue of his office as the presiding officer of a Court of justice. He must bear in mind that there is something like procedure laid down by law for the proper disposal of a case and that he is bound to respect it and cannot act arbitrarily and whimsically as he pleases. The applicant is the widow of the original plaintiff Shrikisan ; on his death, she was placed on record as his heir and legal representative (vide order-sheet dated 5th September 1922.) Her age then was 14 as the amendment in the title of the suit shows. The reference to the arbitration was made on her behalf by her next friend as per application dated 29th October 1925, when she was still a minor. How far the reference could be made by a minor's next friend without the leave of the Court expressly recorded in the proceedings was a question which had an important bearing on the validity of the award. Similarly, how far the manner in which the enquiry was held by the arbitrator affected the validity of reference and of the award was also a matter worthy of consideration : cf. *Sanyasi Rao* v. *Venkata Rao* (1).

She attained majority some time in 1926, i. e., during the pendency of the suit and necessarily of the arbitration proceeding. Nobody took care to ascertain just then from her whether she desired to continue the suit, as soon as she attained majority. This necessarily involved the question whether she desired to continue the arbitration proceedings upon the reference made during her minority. There was thus a failure of duty on the part of the next friend within the meaning of R. 9, O. 32, Civil P. C., and it was the duty of the Court to remove the next friend on that account : cf *Doraswami Pillai* v. *Thungaswami Pillai* (2).

In any case, there was or could be no doubt that at the date of the award which is dated 30th November 1926, and which was filed into Court on 1st December 1926, she had attained majority and it was the duty of the pleader engaged by the next friend to bring the fact to the notice of the Court at once ; and then her next friend should have been discharged after notice as required by O 32, R. 12 (5), Civil P. C. She had the option to make her own election, either to go on with the suit and accept the award, or to repudiate the same wholly or partially. On such election being made, the title of the suit had to be first corrected; thereafter, the proceedings for filing the award, and passing a decree in terms thereof, or for superseding the reference, or remitting the award etc. had to be commenced. Until the proceedings pending before the Court were regularized and brought into conformity with law, and, plaintiff who had attained majority was properly shown on the record as willing to carry on the litigation to a termination in her own name, I may say the Court was not justified in calling upon her to file her objections, if any, to the filing of the award. In fact, it was the duty of the Court to first put the house, so to say, in proper order, as a preliminary to the reception of the award; but the procedure followed by the learned Judge is so materially irregular that the decree passed by him without serving notice and following the proper procedure is vitiated, and it must be set aside. If he had cared to turn his eyes to para. 10, Sch. 2, he would have at once known the requirements of law which he was bound to comply with. He had to see whether the arbitrator had filed the award in Court

> together with any depositions and documents which have been taken and proved before him.

He would also have been able to see therein the imperative provision for giving notice of the filing to the parties. Art. 158, Lim. Act, also makes this clear. There is a deplorable dereliction of duty on the Judge's part which constitutes a grave and material irregularity in the exercise of his jurisdiction, and his judgment is, therefore, liable to be set aside, for want of such notice : cf. *Rangasami* v. *Muttusami* (3) and *Chatarbuj Das* v. *Ganesh Ram* (4).

Even though the plaintiff made an application to the Court stating that she

(1) A. I. R. 1923 Mad. 301=47 Mad. 30.
(2) [1904] 27 Mad. 377.
(3) [1885] 11 Mad. 144.
(4) [1898] 20 All. 471=(1898) A. W. N. 132.

became major, the Court seems to have taken no notice of her prayer that she wanted to continue the suit as a major plaintiff. This was on 7th January 1925. By the same petition she requested also an opportunity to give evidence in support of her objections but the presiding officer ignored the petition. Unmindful of the serious invalidating consequences which his refusal to grant the prayer in the petition would involve, he straightway proceeded to reject it, and thinking that he could dispose of the suit by passing a decree in terms of the award and describing plaintiff as still a minor acting through a next friend, summarily decided the objection as if they were mere questions of law, and, without taking any evidence, made the award the rule of the Court on 7th January 1927. This seriously invalidates his decree and even an appeal might have lain against it: cf. *Maharajah Joymungal Singh Bahadur* v. *Mohan Ram* (5), *Ibrahim Ali* v. *Mohsin Ali* (6), and *Dawoodji & Son* v. *Sherman* (*A. I. R.* 1925 *Rang.* 238).

The Judge thus had the satisfaction of having washed his hands off the case and I cannot help remarking that he indeed secured for practically statistical purposes one disposal to his credit in respect of a big complicated suit pending on his file ever since 26th November 1919. The Judges of civil Courts must realize that justice cannot be broken on the wheel of statistics in this slipshod manner. The real merit of a Judge lies in his turning out work of good quality and not showing large disposal merely for statistical purposes. I wish the Judge in this particular case had realized this ere long in the course of his sufficiently long tenure of office as a Judge and resisted the temptation to puff up statistics of his Court by such a disposal.

The objections which were filed by Mr. Athavle, pleader, on plaintiff's behalf, on 23rd December 1926, were, if I may say so, premature and even incompetent, as plaintiff who was then major could presumably not be duly represented by him under the appointment made by her next friend, as that authority had legally come to an end as soon as plaintiff attained majority and the guardian ipso facto ceased to represent her and to act as her next friend for the purposes of the suit unless the aforesaid pleader had taken care to obtain a fresh power from plaintiff herself. In short, the whole proceeding was in a state of muddle. If the Judge had bestowed more careful thought to the case and to its special requirements at that stage, in view of the altered state of things, I dare say he would surely have come to realize the difficulties of the situation, and may possibly not have landed himself, or the plaintiff. at any rate, in still greater difficulties, by making the award the rule of the Court in his great anxiety and haste to terminate the proceedings by somehow disposing of the objections and going to the length of even holding that they were barred by limitation. If I may venture to say so, I think that, until the notices prescribed by para. 10, Sch. 2, Civil P. C., were given to the parties, there was no obligation on them to file any objections. How far the several objections raised to the filing of the award were likely to affect the validity of the award is a matter on which I advisedly refrain from expressing any opinion at this stage. I am drawing the attention of the Judge to the several defects in his procedure and to the requirements of law in the hope that this will enable him to remedy the defects, at least now, if it were possible for him to do so, and thus to bring his proceedings within the strict rules of procedure sanctioned by law as far as possible.

As I find that the procedure of the Court below is full of material irregularity in the exercise of its jurisdiction, and principally that of rejecting the plaintiff's application dated 7th Jaunary 1927 was highly irregular, I have no alternative but to set aside the decree, and re-open the proceedings and remand the case for proper disposal thereof according to law with advertence to the above remarks The Court below must now formally ascertain from the plaintiff on what date she attained majority; whether she is willing to continue the suit in her own name or is desirous of even abandoning it, either wholly or partially, and if so to what extent; and further, whether she elects to affirm the arbitration proceedings initiated and conducted in her name by her next friend and her agents, partly during her minority and partly after she at-

(5) 15 W. R. 37 (P. C.).
(6) [1896] 18 All. 422=(1896) A. W. N. 137 (F. B.).

tained majority, and so far as the proceedings after majority are concerned, whether she had as a matter of fact expressly authorized anybody to act on her behalf. The notices of the filing of the award prescribed by the statute must now be given to the parties, and they should be called upon to file their respective objections, if any, to the award, and to the passing of the decree in terms thereof. Before doing so it will be necessary for the Judge to see that a proper and duly stamped award is before him.

In this connexion I may draw the lower Court's attention to the fact that the award in question is unstamped. Unless and until it is engrossed on a stamp paper it has no validity and cannot operate as an award. As it stands at present it has no valid existence, so to say, and the Court could not be justified in looking at it; far less, could it pass a decree in terms thereof. The executant of the award being the arbitrator, under S. 29 (g), Stamp Act, it was his duty primarily to direct any of the parties to provide him with the necessary stamp, and to see that he did not deliver or publish his award on a plain paper, and thus save himself from the blame attaching to him of having evaded the stamp law. It will, therefore, be necessary for the Court to remit the award to the arbitrator under para. 14, Sch. 2, Civil P. C., to enable him to pass the necessary order for providing him with the requisite stamp paper for re-writing and engrossing the award thereon, and then submitting it to the Court, after publishing the same to the parties, within a time to be fixed by it, for further action.

In the peculiar circumstances of the case I do not think it fit to award costs of one party against the other in this Court, as both parties are to blame for the faulty procedure. Costs in the Court below will follow event.

N.K. *Revision allowed.*

A. I. R. 1928 Nagpur 169

MOHIUDDIN, A. J. C.

Champat Gambhirji—Defendant—Appellant.

v.

Shri Bala Saheb Sansthan— Plaintiff —Respondent.

Second Appeal No. 26-B of 1926, Decided on 19th November 1927, from decree of Dist. Judge, Amraoti, D/- 24th October 1925, in Civil Appeal No. 29 of 1925.

(*a*) *Civil P. C., S.* 11—*Res judicata—Directly and substantially in issue.*

Decision on a point not directly and substantially in issue cannot operate as res judicata in a subsequent suit. [P 171 C 1]

(*b*) *Berar Land Revenue Code, S.* 78 (2)—*Tenancy* 48 *years old at the date ofsuit—Tenant is not protected under S.* 78 (2

Where the tenancy was traced to have commenced in 1874, i.e. only 48 years before the suit.

Held: the tenant could not be called a tenant of antiquity and was not entitled to protection under S. 78 (2).

B. K. Bose, V. C. Deshpande and *F. E. Sanjana.*—for Appellant.

M. B. Niyogi and *K. V. Brahma*— for Respondent.

Judgment.—The plaintiff-respondent, who is the manager of the institution Shri Bala Saheb Sansthan, instituted this suit in 1922 against Champat for ejectment from fields Survey Nos. 2, 19 58, 61, 82, 84 and 85 and for mesne profits. Plaintiff is the jagirdar of mauza Jamgaon and owner of the fields in suit. These fields, except 5as-4p share of Survey No. 19, are alleged to have been in the possession of defendant's maternal grandfather Sonba, who held them as an annual tenant. Sonba died in 1916 and Champat is in possession since 1916. In civil suit No. 58 of 1921 a decree for arrears of rent for three years 1918-19 to 1920-21 was passed. The defendant again failed to pay his rent, and a notice under S. 78, Berar Land Revenue Code, was given. He was also served with a notice to vacate the land by the end of March 1922 as required by S. 79, Berar Land Revenue Code, and as he failed to do so, this suit has been filed.

Champat denied plaintiff's right to take possession and stated that he was not an

annual tenant. Ho stated in para. 3 of his written statement that Raoji and Sonba, joint brothers, were in possession of the field as ante-jagir tenants paying uniform rent to the jagirdar at survey rates and that the predecessor-in-title of the plaintiff had claimed enhancement of rent and possession of six of the fields in suit in 1887, but that relief was not granted, and that the decision in civil Suit No. 214 of 1887 operates as res judicata.

The plaintiff's suit has been decreed in both the lower Courts, and the defendant has filed this second appeal, putting forward two grounds in his memorandum of appeal. The first ground is that the present suit is barred on account of the decision in suit No. 214 of 1887, and the second ground is that the defendant has been proved to be a tenant of antiquity.

I will take up the second ground first, and see if the appellant has been proved to be a tenant of antiquity and, therefore, protected from ejectment. The learned District Judge, in para. 8 of his judgment, has carefully traced the origin of the several fields in dispute, and has pointed out that the earliest year when Raoji came into possession of some of the fields in dispute, that is, Nos. 2, 58, 61, 62, and 84 was in the year 1874. Other fields, that is, 82 and 85, came into his possession in 1876 and 1883. Field No. 19 was under cultivation of Udaji in 1873 and was entered as inam under the cultivation of the jagirdar from 1880 to 1895. The tenancy having commenced from 1874 and after that year, that is, only 48 years before the filing of the suit, is not such as is entitled to protection under S. 78 (2), Berar Land Revenue Code. I, therefore, hold that the appellant is not a tenant of antiquity, and is liable to be ejected.

Exhibit D-3 is the copy of the proceedings in civil suit No. 214 of 1887, of the Court of Civil Judge, Amraoti, from 13th May 1887 to 30th July 1887, and Ex. D-4 is the copy of the judgment and decree, dated 30th July 1887, and these were filed by the defendant. The record of the original case is also in the file of this case. The suit was filed on 28th April 1887. No abstract of the plaint is given in the place meant for it in the record. It is, therefore, not possible to find out as to what was stated in the plaint. The judgment gives the substance of the plaint as follows :

> Plaintiff sued to eject defendant from Jamgaon fields Nos. 2, 57, 61, 82, 84 and 85 and recovery of Rs. 277-8-0, double the amount of rent, and Rs. 11-12-0 on account of cesses payable by defendant, on the ground that defendant had failed tc execute kabuliyat (agreement) to pay rent desired by plaintiff. He stated that he had sent a notice to defendant on 8th May 1886 calling upon him to execute an agreement (kabuliyat) or to leave the field stating that he would be liable to pay double the amount of rent payable by him in case of noncompliance.

Proceeding of 30th June 1887 shows that Mr. Mudholkar made the following statement on behalf of defendant :

> That his client was read to pay rent at Government assessment and gave a notice to that effect to the manager of the temple saying that the amount due from defendant was deposited with Sawalmal Marwadi of Amraoti, and plaintiff could take it any time from him (puts in printed notice marked A). The fields are defendant's ancestral property and have been in his ancestor's possession from a time prior to the grant of the jagir and, therefore, plaintiff has no right to ask for a higher rate of rent than that fixed by the Revenue Survey Department. The plaintiff has no right to establish a new system of kabuliyat on pain of ejectment and enhancement of rent. Defendant and his ancestors have improved the land, sunk wells, and planted trees at their own expense and plaintiff is not entitled to oust them and under no circumstances can the present suit for ejectment lie.

Plaintiff's agent replied on the same date that he did not wish to oust defendant but wanted him to execute a kabuliyat.

The following issues were framed :

> (1) Is plaintiff entitled to oust defendant notwithstanding his readiness to pay rent at the rate demanded by plaintiff on the sole ground that defendant failed to execute a kabuliyat ?
>
> 2. Can he under the above circumstances enhance the rate of rent at his will ?

Ex. D-4 is the judgment, and, the relevant portion runs as follows :

> Plaintiff's pleader failed to produce any law or ruling in support of his client's claim. As a rule a tenant cannot be ousted but for arrears against defendant. Plaintiff, in his statement before Court, admits that he does not want to oust defendant. Under these circumstances I decide issue 1 against the plaintiff. As for the issue, 2 I am of opinion that plaintiff has no right to claim rent at enhanced rate. Non-execution of kabuliyat is no ground for enhancement of rent. I, therefore, decide the issue 2 against plaintiff.

The plaintiff's claim for possession of fields was dismissed and a decree for rent was passed.

Nothing definite was alleged in the written statement dated 17th July 1924 as to why the judgment in Suit No. 214

of 1887 operated as res judicata, and similarly the memorandum of appeal filed in the lower appellate Court did not state the reason definitely, but it is argued now that plaintiff was bound in 1887 to set forth all the grounds then available to him for ejectment, and, not having done so, he cannot bring this suit. The first Court in para. 6 of its judgment has held that

> the points now in issue were not directly and and substantialiy in issue then and they were not decided at all;

and the learned District Judge, in para. 7 of his judgment, has rightly pointed out that :

> the nature and length of the tenancy was neither necessary for the decision of that case nor was it in fact referred to or decided.

It is quite clear from the proceeding, dated 30th June 1887, that the plaintiff did not wish to oust the defendant and, therefore, the question regarding the status of the tenant, about which the defendant had made a statement, but about which the plaintiff was not called upon to reply and which was not put in issue, was not a question which was directly and substantially in issue between the parties in the former suit. According to Expl. 3, S. 11, Civil P. C., the matter must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly by the other. There was no such admission or denial on behalf of the plaintiff. It has been argued that for succeeding in a suit for ejectment, the status of the tenant might and ought to have been made a ground of attack, and, as it was not so done, it cannot be gone into now, but, in that suit the plaintiff never wanted to eject the tenant but only wanted him to pay enhanced rent and execute a kabuliyat. The question of status was not directly and substantially in issue in the former suit and could not have been made a ground of attack in that suit. Therefore, the present claim of the plaintiff is not barred by res judicata, on account of the decision in the former suit No. 214 of 1887.

The appeal, therefore, fails and is dismissed with costs. Costs in the lower Courts will be paid as already directed.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 171

FINDLAY, J. C.

Venkat Rao—Plaintiff—Appellant.

v.

Collector of Nagpur—Respondent.

First Appeal No. 35 of 1927, Decided on 13th December 1927, from order of Addl. Dist. Judge, Nagpur, D/- 28th November 1926, in Misc. Judicial Case No. 49 of 1925.

Civil P. C., S. 35—Awarding greater or less costs than are normally applicable to a particular suit—Reasons should be stated.

In normal circumstances, the Court has under the Civil Procedure Code a wide discretion in awarding costs, but when a discretion is exercised in the way of allowing greater or less costs than are normally applicable to a particular suit, the reasons for passing any special order thereanent in the connected judgment or order should be stated.

[P 171 C 2, P 172 C 1]

W. H. Dhabe—for Appellant.

V. D. Kale—for Respondent.

Judgment.—The facts of this case are sufficiently clear from the lower Court's order and I am only concerned here in the present appeal by Venkat Rao with the question of costs. It has been urged on behalf of the appellant that costs have been wrongly calculated and that he, in particular, has been saddled with Rs. 505-12-0. It may at once be stated that the pleader for the respondent has admitted that the inclusion of the same item of Rs. 5-12-0 in the amount of costs payable by all four applicants was a mistake and the applicant-appellant is only liable for Rs. 1-7-0 thereof, viz., a fourth part. The applicant-appellant's case is that, under the orders contained in Judicial Commissioner's Circular II-4, P. 8, the fees should have been calculated at one-fourth of the ordinary rates and that thus the applicant-appellant would be liable for one-fourth of Rs. 500, viz., Rs. 125, which, together with Re. 1-7-0 makes a total of Rs. 126-7-0.

On behalf of the respondent it has been urged that it is not for the Court to interfere with a discretion which has been duly exercised by the lower Court. I can find no proof, however, that there was any deliberate or conscious exercise of discretion by the lower Court in the matter. In normal circumstances, the Court has, under the Civil Procedure Code, a wide discretion in awarding costs, but when a discretion is exercised in the

way of allowing greater or less costs than are normally applicable to a particular suit, one expects to find mention thereof and of the reasons for passing any special order thereanent in the connected judgment or order. I see no reason, therefore, for allowing costs at full rates in the present case, whereas, under the circular order applicable, normal costs at a quarter rate should ordinarily be allowed. The present appeal, therefore, succeeds and the lower Court's order as to costs will be modified by the substitution of Rs. 126-7-0 for Rs. 505-12-0 in the amount payable by the appellant Venkat Rao to the Collector.

A further argument was, however, advanced on behalf of the present appellant in the petition of appeal to the effect that only a single set of costs should have been allowed to the Collector in respect of all four applicants ; in other words, in this case the applicant-appellant would only be liable for Rs. 25 costs, being a quarter of the amount of Rs. 100 which I have held the Collector is entitled to recover. In the connected case of Sitaram Krishna Padhay, some argument was offered by his counsel in support of this position, which, however, seems to me to be an utterly untenable one. It cannot be said that the four applicants had any joint or common interest in the plots concerned, although the cases were, for convenience sake, tried together. Each case stood or fell on its own merits, and the allegations offered by the different applicants differed greatly in detail. The cases are only too obviously ones to which R. 11, Civil Circular has no application whatever, and this contention of the appellant is an utterly untenable one.

I may add that it has been suggested on behalf of the respondent that no appeal lay in connexion with the mere matter of costs such as we are concerned with in the present case, and an old decision *Sreemutty Bamasoondaree Dabee* v. *W. Werner* (1), has been referred to in this connexion. I do not, however, find it necessary to discuss this question for the simple reason that, if no appeal lay, it would have been competent for this Court to entertain the present appeal as an application for revision and there would have been every ground, if any question of limitation arose, for giving the benefit of S. 14, Lim. Act, to the present appellant.

(1) 22 W. R. 136=13 B. L. R. 189.

The lower Court's order, will, therefore, be modified as stated in para. 2 above. In view of the partial success and partial failure of the appellant in this Court, costs here will be borne as incurred.

N.K. *Appeal partly allowed.*

A. I. R. 1928 Nagpur 172

HALLIFAX, A. J. C.

Emperor

v.

Govinda Kunbi and *others*—Accused.

Criminal Revn. No. 230-B of 1927, Decided on 16th December 1927, reported by Sess. Judge, Amraoti, on 30th November 1927, in Criminal Revn. No. 65 of 1927.

Criminal P. C., S. 439—Revisional powers are for correction of injustice.

Powers of revision are given to second appellate Court for the correction of injustices, and not for the correction of mere illegalities.

[P 172 C 2]

Order.—The learned Sessions Judge who reported this case omitted to sign the report, and began his order by speaking of the complainant Mahadeo by the name of the accused Motiram. The falsity of the complaint is beyond doubt, even if it had been confined to an accusation of bigamy, as it is proved that the girl was never married to Mahadeo. But anyhow it is clear that she never lived for a day with him after the wedding, if it ever took place, and never even visited his village and he knew nothing about her, not even where she and her parents were living, till he heard that she had been married to Motiram six years later. The order for the payment of compensation for such an obvious attempt at black-mail is so clearly just that this Court would certainly refuse to interfere with it in revision even if there were some technical flaw in it. It has apparently to be said again that powers of revision are given to this Court for the correction of injustices, and not for the correction of mere illegalities.

But one of the many things that the learned Sessions Judge has left out of sight was that Mahadeo accused Motiram and the others of kidnapping the girl from lawful guardianship and also

of doing so for the purpose of compelling her to marry Motiram against her will or in order that she might be forced or seduced to illicit sexual intercourse with him. There can be no doubt about the utter falsity of that, if only because of the fact that her lawful guardian at the time was her father, as is explained in S. 361, I. P. C. That the Magistrate did not mention either of those offences in the processes issued against the accused and did not enquire into them makes no difference; all five were accused of them very specifically by the complainant Mahadeo.

The learned Magistrate's reason for not ordering the payment of compensation to the girl's father and uncle as well as the rest was presumably the consideration that if the marriage with Mahadeo ever took place they knew all about it. That contradicts the finding that that marriage never took place, a finding in which, on an examination of the evidence, I concur, and compensation should have been awarded to Govinda and Sitaram as well, even in the view that the accusation was one of bigamy only. But the other two accusations—one more serious than that of bigamy and the other equally so—were undoubtedly false against the lawful guardian of the child and his brother-in-law, and they should have been awarded compensation for them. As has been said, the fact that the original summonses mentioned only S. 494, I. P. C., makes no difference.

It may be mentioned that in the judgment of the Magistrate as well as in the reasons recorded in the Sessions Court for reporting the case it has been said that the only person who could be guilty of bigamy was the girl, then about eight years of age; the learned Magistrate adds that "the others would be abettors." But S. 114, I. P. C., says that such persons "shall be deemed to have committed" the act abetted. The recommendation by the Sessions Court, that the order for the payment of compensation should be set aside, was clearly made without any consideration of when and why the powers given to this Court by S. 439, Criminal P. C., ought to be used, and can be accepted. The records will be returned

N.K. *Order accordingly.*

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* A. I. R. 1928 Nagpur 173

PRIDEAUX AND KINKHEDE, A. J. Cs.

Narayandas Bhagwanji & Co.—Plaintiff—Appellant.

v.

Kalyanji Mawaji & Co.—Defendant—Respondent.

First Appeal No. 45-B of 1927, Decided on 13th Dec. 1927, against decree of 2nd Addl. Dist. Judge, Akola, D/- 23-8-1927.

* (*a*) *Civil P. C., O. 23, R. 3—Award on reference without Court's consent in pending suit—Award can be treated as adjustment by consent—Power under O. 23, R. 3 is not overridden by Civil P. C., Sch. 2, para. 20.*

If in a pending suit the parties go to a private arbitrator without the consent of the Court, the award cannot be enforced as an award, but there is nothing to prevent the Court from giving effect to the award, as if it was an adjustment by common consent. The power given by para. 20, Sch. 2, Civil P. C., cannot override the general power given to parties under O. 23, R. 3, Civil P. C., to adjust their disputes by a lawful compromise at any time after the institution of the suit: *A. I. R.* 1927 *P. C.* 204 and *A. I. R.* 1926 *Nag.* 405, *Foll.* [P 174 C 1]

* (*b*) *Civil P. C., O. 23, R. 3—Declaratory suit—Compromise containing direction to pay certain amount by one party to another can be incorporated in the decree.*

Even in declaratory suits a compromise directing one party to pay a certain sum of money to the other party can be recognized by the Court and such a provision can be included in the operative part of the decree: *A. I. R.* 1927 *P. C.* 204, *Foll.*

[P 175 C 1]

A. V. Khare—for Appellant.

M. B. Niyogi—for Respondent.

Judgment.—The present appellant instituted suit No. 12 of 1927, in the Court of the 2nd Additional District Judge, Akola, against the present respondent for a declaration that the accounts between them were settled, and that his liability thereunder did not extend beyond a certain amount. During the pendency of the suit, the parties thought fit to refer the matters in dispute between them to the arbitration of a private arbitrator. This they did without the knowledge and consent or intervention of the Court. The reference and the arbitration proceedings and even the award were made, completed and declared and even partly given effect to before the date fixed for the hearing of the suit which was 16th August 1927. The result was that when the plaintiff-appellant's suit came on for hearing, on that date, the defendant-respondent produced the award and, by a formal application made to the Court, prayed that the same be filed and a decree

in terms thereof be passed in his favour. The Court took down statements and heard the parties and recording the terms of the award passed a decree in terms thereof.

This appeal is against the decree so passed in terms of the award on the basis of the defendant's application. The reference to the arbitrator not having been made through the intervention of the Court, it is contended that the Court was not competent to pass any decree on the basis of the award. The only provision under which it could have been filed and made the rule of the Court was, we think, para. 20, Sch. 2, Civil P. C. The application made by the defendant-respondent on 16th August 1927 could have been treated as one so made, but the Court failed to notice the particular provisions under which it could be entertained and to register it as a suit. However, this omission does not invalidate the decree as we will presently show.

As pointed out by this Court in *Namadarkhan* v. *Nanhoo* (1), if in a pending suit the parties go to a private arbitrator without the consent of the Court, the award cannot be enforced as an award, but there is nothing to prevent the Court from giving effect to the award as if it was an adjustment by common consent. We are of opinion that the power given by para. 20, Sch. 2, Civil P. C., cannot override the general power given to parties under O, 23, R. 3, Civil P. C., to adjust their disputes by a lawful compromise at any time after the institution of the suit.

It is, however, contended before us that the terms of the adjustment or compromise go beyond the scope of the suit which merely seeks a declaration and, therefore, it could not have been proper for the Court below to pass a decree incorporating the direction of the award to the plaintiff to pay a definite sum of Rs. 9,000 to defendant, in the absence of a suit by the defendant to enforce the award. We do not think this contention can prevail in view of the principle held applicable to such cases by their Lordships of the Privy Council in *Mehdi Ali Khan* v. *Chaudhri Ghanshiam Singh* (2). There, as also here, the suit was one for a declaration, and the defendant, who was the appellant before their Lordships of the Privy Council, was anxious, like the plaintiff-appellant in this appeal, to get out of the adjustment which was brought about during the pendency of the suit by the good offices of some third person who presumably filled the character of private arbitrators, like Sheoji Jewandas of this case, to whom the parties to the litigation referred their differences for arbitration.

We may also note here that the terms of the award of the arbitrator, or of the adjustment arrived at by agreement between the parties acting for themselves, or settled for them by a third party chosen by them,

> are such as to be susceptible in every detail to an effective order in the nature of specific performance against any party to the compromise who seeks to escape from his obligations thereunder

as remarked by their Lordships of the Privy Council. It was, therefore, fully competent to the lower Court, not only to record the entire compromise, but also to pass a decree in accordance therewith. It is pertinent to note that the appellant has actually given effect to the award by making the immediate part payment of Rs. 3,700 odd to the respondent which the award directed him to make and thus so accepted its binding character as to be precluded from seeking "to escape from his obligations thereunder."

It is, however, argued before us that the adjustment of the subject-matter of the present suit would not necessarily embrace an operative direction to pay a sum of Rs. 9,000 to the defendant, as to pass a decree incorporating such an operative direction would be to travel beyond the scope of the suit; because, if the strict letter of O. 23, R. 3, Civil P. C., were followed, the operative part of the decree must be properly confined to the actual subject-matter of the existing litigation. The argument practically comes to this: that the direction to pay to defendant the amount in which the plaintiff is found indebted to him, though embodied in the decree must be excluded only from the operative part of the decree as the subject-matter of the suit as laid can admit of only a declaration as to the extent of such indebtedness being given. No doubt there is the authority of *Hemant Kumari* v. *Midnapur Zamindari Co.* (3) to support this contention, but we think that the latest pronouncement of their

(1) A. I. R. 1926 Nag. 405=23 N. L. R. 100.
(2) A. I. R. 1927 P. C. 204.
(3) A. I. R. 1919 P. C. 79=47 Cal. 485 (495)=46 I. A. 240 (P. C.).

Lordships of the Privy Council in *Mehdi Ali Khan* v. *Chaudhri Ghanshiam Singh* (2), is a more direct authority applicable even to declaratory suits, which justifies the inclusion of such direction even in the operative part of the decree than the former one.

The appeal fails and is dismissed with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 175

HALLIFAX, A. J. C.

Kamod Singh—Applicant.

v.

Khemkaran—Non-applicant.

Misc. Petn. No. 81 of 1927, Decided on 10th December 1927, on a reference made by Dist. Judge, Chhindwara, on 25th November 1927.

Legal Practitioners Act (18 *of* 1879), *S.* 27—*Pleader's fee—Matters to be considered.*

The proper sum as pleader's fee is what is actually paid or what might reasonably have been paid, whichever is less. The rules under the Legal Practitioner's Act are a good general guide to the sum that might reasonably have been paid, but no more. There are several factors to be considered in fixing the pleader's fee, in addition to the valuation of the suit, and even that must be its real value, not the arbitrary or artificial valuation which is often sufficient for all other purposes. [P 175 C 1, 2]

Order.—The use of Latin words in legal matters is seldom more convenient than sticking to one or other of the three languages which are prescribed for use in the Courts of the Central Provinces and Berar, and then only slightly, but it gives rise to many inconveniences in many cases. Apart from that, it is hardly consistent to speak of this Court taking action of its own motion in moving it to do so by the submission of records with the suggestion that the taking of that action should be considered.

The idea underlying the application made in the District Judge's Court is that the only pleader's fee that can be allowed as between party and party is the sum calculated to the last pie on the valuation of the suit according to the rates stated in the rules made under the Legal Practitioners Act. In most cases that was a wholly improper sum to allow under the old rules and it is so in many cases under the amended rule. The proper sum is what was actually paid or what might reasonably have been paid, whichever is less. The rules are a good general guide to the sum that might reasonably have been paid, but no more.

The fee allowed in the District Judge's decree was Rs. 152-8-0, and that calculated according to the rules then in force on the stated valuation of the property in dispute was Rs. 52-8-0. It was by accident that the common absurdity was avoided of a Judge solemnly stating in the decree that the pleader's fee which, in his opinion, was paid or ought to have been paid was a sum ending in a number of pies not even making an integral number of pice. It is, however, obvious that neither sum was the proper sum to allow, and indeed that the learned Judge who passed the decree never considered it was or thought about the matter at all. There is then no more reason for reducing the Rs. 152-8-0 to Rs. 52-8-0 than for raising the Rs. 52-8-0 to Rs. 152-8-0. Indeed, if any change ought to be made, the very first would be the removal of the odd Rs. 2-8-0 at the end.

There are several factors to be considered in fixing the pleader's fee, in addition to the valuation of the suit, and even that must be its real value, not the arbitrary or artificial valuation which is often sufficient for all other purposes In this case the dispute was over the right to separate possession of a half of 74·67 acres of land, and the pleader's fee allowed in this Court was Rs. 200. Before any amendment of the decree of the lower appellate Court can be possible it must be shown that the sum of Rs. 152-8-0 is more than was paid or might reasonably have been paid by the plaintiff to his pleader in that Court, not merely that the arithmetical process by which the Judge nominally (and his Reader actually) arrived at that sum was wrongly applied.

Even if there were any apparent cause for altering the decree, that could probably be done only in a review, and an application for that was time barred when the present application was presented. But there is no such cause at all ,and I decline to interfere.

N.K. *Application rejected.*

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* A. I. R. 1928 Nagpur 176

FINDLAY, J. C. AND PRIDEAUX, A. J. C.

Shanker Rao and *others*—Plaintiffs—Appellants.

v.

Gyanba and *others*—Defendants—Respondents.

Second Appeal No. 243 of 1925, Decided on 7th December 1927, from decree of Dist. Judge, Bhandara, D/- 30th April 1924, in Civil Appeal No. 51 of 1924.

* (*a*) *C. P. Land Revenue Code, S.* 188 (2) (*c*) —*Term "collect village profits" explained.*

The term "collect the village profits" in S. 188, sub-S. (2)(c), includes profits said to have been derived by cosharers in the village from excess *sir* and khudkasht land in their possession. [P 178 C 1]

* (*b*) *Cosharer—Suit by a cosharer for profits against lambardar — Other cosharers need not be made parties even if he claims profits from excess* sir *and khudkasht land in their possession.*

A cosharer in a malguzari village is entitled to include in a suit for village profits, which he brings against the lambardar, profits derived from excess *sir* and khudkasht land in the possession of other cosharers in the village without joining the latter as parties in the suit : 38 *All.* 223, *Foll.* [P 178 C 1]

M. R. Bobde—for Appellants.

P. A. Pandit—for Respondents.

Order of Reference

The plaintiffs-appellants filed the present suit against the defendants-respondents for village profits mouza Pimpalgaon for the years 1329 to 1332. In these years the plaintiffs held varying shares in the village in question, and Kisan, of whom the defendants-respondents are the representatives, was admittedly lambardar of the village during these years.

One of the main questions for decision in this appeal relates to the plaintiff's claim for their share of income derived by the various cosharers in the village from excess *sir* and khudkasht land in their occupation, and the rental assessed on the *sir* and khudkasht land has been made the criterion by which the alleged profits in question should be assessed. The question for consideration is whether such rental assessment of *sir* and khudkasht land should be taken into account in estimating the profits in question, and the further question arises as to whether it was necessary for the proper decision of this matter to join the other cosharers in the suit or not. The defendant's original plea in this connexion apparently was that, in practice, the rental of *sir* and khudkasht land was not taken into account in calculating village profits, but the Judge of the first Court referred to the suit brought by Kisan, lambardar, in 1911 (cf. P. 16 and P. 17) in which he claimed contribution from other cosharers in respect of the assessment of the land revenue he had to meet, and in that case he did include the *sir* and khudkasht land assessment in his claim. The Judge of the first Court was pressed by the defendants to make the other cosharers a party and he refused to do so. He held, however, that the defendants having failed to prove that it was the practice not to include the rental in question in the village profits account, the plaintiffs were entitled to include this item also in their claim.

On the case going to the Court of the District Judge on appeal, the latter was of opinion that the plaintiffs could claim the proportion of the rental of the *sir* and khudkasht land only from those cosharers who were in possession of such land in excess of their respective shares in the village. Further, the plaintiffs having failed to join these cosharers in the suit, the plaintiffs in the present suit could only claim their share of rental of excess *sir* and khudkasht land of which the defendant Kisan vas in possession. There being no proof on this point, the District Judge reversed the finding of the first Court thereon and refused to allow this item of the plaintiffs' claim. Around this item arises the most important controversy in the present appeal, and it has been suggested on behalf of the appellants, on the strength of the decision in *Ganga Singh* v. *Ram Sarup* (1), that the plaintiffs were entitled to include the item in question in their claim, even without making the other cosharers parties. The decision in question of Richards, C. J., and Muhammad Rafiq, J., was, of course, directly concerned with the Agra Tenancy and U. P. Land Revenue Acts, the incidents of which differ considerably from those of corresponding legislation in these provinces. It was pointed out by the learned Judges in the said case that, if the lambardar is the agent of the cosharers for the purpose of bringing a suit for rent, he would appear to be equally their agent for the purpose

(1) [1916] 38 All. 223=33 I. C. 119=14 A. L. J. 252.

of bringing a suit against the cosharers who held *sir* and khudkasht land in excess and who had refused to allow the *sir* and khudkasht which they so held to be taken into account. In *Bishambhar Nath* v. *Bhola* (2), a contrary view was taken by Knox and Griffin, JJ., these learned Judges holding that a lambardar was not the agent of the cosharers generally so as to be entitled to sue on their behalf to recover profits due to some of them from other cosharers holding *sir* and khudkasht lands in excess of their proper shares. The judgment in question was a brief one, and the decision really proceeded on the one finding that the Court knew of no authority derived from either statute or custom which conferred such a power as that asked for upon the lambardar. In differing from this decision, the Judges, in the later Allahabad case quoted, laid stress on the definition of "lambardar" contained in the Land Revenue Act. That definition reads as follows :

A cosharer of a mahal appointed under this Act to represent all or any of the cosharers in that mahal.

In the corresponding C. P. legislation, the definition of "lambardar" contained in S. 2 (6), Land Revenue Act, reads as follows :

The proprietor of a mahal appointed to discharge the duties imposed on a lambardar by this Act.

Section 188 (2) (c), C. P. Land Revenue Act, lays down that the lambardar shall

collect the village profits and render an account of the same to the proprietors within six months of the close of the agricultural year

and it further gives him express power to

institute suits and take other proceedings relating to the exercise

of the various powers laid down in the said section in question.

In view of the fact that the wording of the connected legislation in these Provinces differs considerably from the legislation applicable in the Allahabad cases quoted, it seems to me that a somewhat interesting point of law arises in the present case. I do not desire at present to commit myself on the question and I am of opinion that it is desirable that the point mentioned should be considered by a Bench of this Court. The question for consideration may be framed as follows :

Is a cosharer in a malguzari village entitled, in a suit for village profits, which he brings against the lambardar, to include therein profits said to have been derived from excess *sir* and khudkasht land in the possession of various cosharers in the village without joining the latter as parties in the said suit ?

The further question involved is whether the term "collect the village profits" in S. 188, sub-S. 2 (c), C. P. Land Revenue Act, includes and contemplates the case of profits said to have been derived by cosharers in the village from excess *sir* and khudkasht land in their possession.

I accordingly refer this matter to a Bench which will consist of the 2nd Additional Judicial Commissioner and of the Judicial Commissioner.

Opinion

The question referred for our decision by Findlay, J. C., is as follows :

Is a cosharer in a malguzari village entitled, in a suit for village profits, which he brings against the lambardar, to include therein profits said to have been derived from excess *sir* and khudkasht land in the possession of various cosharers in the village without joining the latter as parties in the said suit ?

The matter has been discussed at some length by Findlay, J. C., in his referring judgment of 7th December 1927 and, after hearing counsel, we now find ourselves in a position to give our opinion on the point referred to us. Under S. 188 (2) (c), Land Revenue Act, 1917, it is the duty of the lambardar to collect the village profits and render an account of them to the proprietors within six months of the close of the agricultural year. In our opinion, into this account, profits of excess *sir* and khudkasht land held by the proprietors must enter, as they undoubtedly form one item of the village profits. The lambardar thus being bound to collect such profits of excess *sir* and khudkasht land is, in our opinion, responsible to account therefor to any or all of the cosharers unless he can show circumstances over which he has no control, which have prevented or have justified his nonrealization thereof.

In the present case, we may add that Kisan, the predecessor of the defendants-respondents in Suit No. 20 of 1911 actually included such profits of excess *sir* and khudkasht land in a suit for accounts against the proprietors. It has been urged on behalf of the respondents that the circumstances in that suit were

(2) (1912) 34 All. 98=12 I. C. 920=8 A. L. J. 1215.

different, as it was virtually a suit for contribution with reference to the revenue being larger than the rental value of the village. We are not able to see that this distinction is in any way a vital one. Clearly, the present plaintiff is entitled to claim his share of profits from the lambardar, and into this item profits those of excess *sir* and khudkasht land held by individual proprietors must be included, nor do we think that it is necessary or desirable that the other cosharers in the village should necessarily be joined in a suit like the present one. Such a course would lead to great complications as, in the case of other cosharers, many other questions connected with different causes of action might rise which such other co-sharers, from their point of view, could rightly contend, should be decided, if they were impleaded as defendants.

We find ourselves, in short, in agreement with the decision of Richards, C. J., and Rafiq, J., in *Ganga Singh* v. *Ram Sarup* (1) and we are of opinion that the term "collect the village profits" in S. 188, sub-S. (2) (c), C. P. Land Revenue Act, includes profits said to have been derived by cosharers in the village from excess *sir* and khudkasht land in their possession. We further hold that a cosharer in a malguzari village is entitled to include in a suit for village profits, which he brings against the lambardar, profits derived from excess *sir* and khudkasht land in the possession of other cosharers in the village without joining the latter as parties in the suit. We answer the reference accordingly.

N.K. *Reference answered.*

A. I. R. 1928 Nagpur 178

MOHIUDDIN, A. J. C.

Ganesh Parsad—Plaintiff—Appellant.

v.

Bhawani Pershad and *another*—Defendants—Respondents.

Second Appeal No. 124 of 1926, Decided on 18th January 1928, from decree of Dist. Judge, Jubbulpore, D/- 4th January 1926, in Civil Appeal No. 51 of 1925.

C. P. Tenancy Act, Sch. 2, Art. 1—Article is applicable to the lessee of an absolute occupancy tenant—Art. 1 applies to claims for joint possession.

Article 1, Sch. 2, C. P. Tenancy Act, is applicable to the lessee of an absolute occupancy tenant. In such a case the lessee is the person who holds land of the tenant and is, or but for a special contract would be, liable to pay rent to him. [P 179 C 1]

A right to joint possession being a lesser right than that of exclusive possession is included in the special provision of limitation relating to the exclusive right and therefore the limitation prescribed by Art. 1 or Sch. 2 Tenancy Act will apply alike to claims for exclusive joint possession: *A. I. R.* 1926 *Nag.* 305, *Ref.*; 4 *N. L. R.* 120, *Dist.* [P 179 C 1]

H. S. Gour—for Appellants.

B. K. Bose and *N. G. Bose*—for Respondents.

Judgment.—The facts of the case so far as they are relevant for the decision of this appeal are these. The appellant and respondent 1 are brothers. As stated in the plaint they became joint lessees of certain absolute occupancy lands 'by inheritance. On 22nd May 1922, respondent 1 transferred his own rights as well as those of the appellant in the lease to respondent 2, who thereupon dispossessed the appellant on the same day from the said lands. The appellant then filed the suit out of which this appeal arises on 24th June 1924. He claims joint possession of the property to the extent of his half-share and 'Rs. 942-8-0. as his share of profits from the land for 1922-23 and 1923-24.

The suit was dismissed on the ground that it fell under Art. 1, Sch. 2, C. P. Tenancy Act 1920, and was barred by time as it was not filed within two years of the dispossession. The lower Court upheld the view of the trial Judge. It is now urged before me that the article quoted above does not apply to the facts of the present case and also that the running of limitation was checked by the appointment of a receiver on 3rd November 1922 in Civil Suit No. 57 of 1922 by Mt. Rani Dulaya, the mother of the appellant and respondent 1 against all the parties to the present appeal in respect of the same fields. This receiver's possession continued till 23rd January 1924.

As regards the first point it is urged that in the case of the present lease there is no holding within the meaning of sub-S. 4, S. 2, C. P. Tenancy Act, and that Art. 1, Sch. 2, of that Act does not therefore apply. On behalf of the respondent I am referred to the decision in *Parmanand* v. *Madhorao* (1) on this point. I am of opinion that Art. 1 of

(1) A. I. R. 1926 Nag. 305=22 N. L. R. 46.

the schedule referred to above is applicable to the lessee of an absolute occupancy tenant. In such a case the lessee is the person who holds land of the tenant and is, or but for a special contract, would be, liable to pay rent to him. In the case before me the rent has been paid in advance under the terms of the 32 years' lease which was given in 1906. As regards the definition of a holding, it will be seen that a holding is defined in the Act as a parcel of land held by a tenant of a landlord under one lease or under one set of conditions. The lease mentioned above includes, in my opinion, a lease for a fixed period, and in this view the lessor would be the landlord of the lessee, as a landlord under the Act is a person of whom a tenant holds land and to whom the tenant is, or but for a special contract wonld be, liable to pay rent for such land. The relationship of landlord and tenant having thus been established, it has to be seen next whether the fact that the claim is for joint possession by a co-owner makes any difference. The case before me differs from the one reported in *Ramdayal* v. *Gulabia Bai* (2) in that here the right of the co-owner is denied by the defendant while in the other it was not so denied. It appears to me that a right to joint possession being a lesser right than that of exclusive possession is included in the special provision of limitation relating to the exclusive right and therefore the limitation prescribed by Art. 1, Sch, 2, Tenancy Act, would apply alike to claims for exclusive joint possession.

I am unable to accept the contention that S. 14, Lim. Act, would bring the suit within time. The aid of that section cannot be invoked as the cause of action in Suit No. 57 of 1922 brought by Mt. Dulaya was different and the requirements of that section are not satisfied so as to attract the provisions thereof.

As regards the appointment of a receiver in that suit it will be seen that possession was delivered to respondent 2 on 18th June 1924. The receiver's possession therefore enures for the benefit of respondent 2, and not for that of the appellant.

It will thus be seen that there is no plea which could be legally urged by the defendant to save limitation and the dismissal of the claim for joint possession must stand.

The appeal therefore fails and is dismissed with costs on the appellant. He will pay the costs of respondent 2.

N.K. *Appeal dismissed.*

(2) [1908] 4 N. L. R. 120.

A. I. R. 1928 Nagpur 179

MACNAIR, A. J. C.

Domaji—Plaintiff—Appellant.

v.

Tulshiram—Defendant—Respondent.

Second Appeal No. 353 of 1926, Decided on 1st September 1927, from decree of Dist. Judge, Wardha, D/- 17th March 1926, in Civil Appeal No. 106 of 1925.

(a) *Civil P. C., O. 14, Rr. 6 and 7—Finding must be confined to matters raised in issue.*

Where there are definite pleadings and a definite issue on those pleadings is framed, the finding must be confined to matters raised in the issue. [P 180 C 1]

(b) *Wajib-ul-urz—Provision for collecting manure from waste land—Provision cannot be applied to a Gowthan.*

The clause in the wajib-ul-arz that anyone may collect manure from waste land cannot be applied to a Gowthan. For the purpose of making rules regarding the right to the manure the Gowthan is very different from the waste lands. [P 180 C 1]

D. T. Mangalmurti—for Appellant.

T. J. Kedar—for Respondent.

Judgment.—This appeal arises out of a suit for mesne profits. The plaintiff-appellant in this Court urges that three items of consent money and the value of certain manure should have been included in the profits. The learned Judge of first appeal states that he does not discuss the arguments relating to consent money as the plaintiff should have been aware of transfers and should have made a plea about the consent money from the outset. Now, this is a suit for accounts. The plaintiff in his plaint had merely to ask the defendant to render an account, and this is what he did. The defendant put in an account. Then the plaintiff, on 2nd March 1925, made objections. He stated:

The amount of Sewai income given by the defendant is denied. Plaintiff files a schedule for the years in suit.

The issue framed on this point was:

What was the Sewai income during the years in suit.

Although I should prefer Judges to mention the items to which an issue

referred, there could have been no doubt regarding the scope of this issue. Both parties have put in an account: presumably the plaintiff included all items admitted by the defendant: the issue referred to those sums which the plaintiff claimed and the defendant denied. In the course of evidence witnesses deposed to receipt of the entirely new items which from the subject of this appeal, and certain of these items were held to be proved by the first Court.

I agree with the lower appellate Court that suits cannot be tried in this way. Where there are definite pleadings and a definite issue on those pleadings is framed, the finding must be confined to matters raised in the issue. It is of course open to the parties to ask that fresh pleadings should be allowed and additional issues struck. But if they, although represented by counsel, produce evidence on matters which do not form part of the issues, this evidence should be disregarded. There was not even, in the lower appellate Court, a prayer to allow to amend the pleadings. Such a prayer is made to me, but I refuse to allow these items to be put in issue at this stage. The appeal, so far as regards the consent money, therefore, fails.

The other item refers to the value of manure collected from the Gowthan. I do not think the clause in the wajib-ul-arz, that anyone may collect manure from waste land, can be applied to a Gowthan. Gowthan is the place where cattle are collected in the morning before they are taken to graze on the waste land or elsewhere. Naturally much cowdung is deposited on the limited space, and for the purpose of making rules regarding the right to the manure the Gowthan is very different from the waste lands on which the cattle pasture. It would clearly be absurd to direct that the manure in the Gowthan could be taken by anyone who pleased; for it is admitted that this manure, which can be removed with ease, has considerable value.

But, apart from the question whether the plaintiff had a legal right to collect the manure, it is clear that he was allowed to collect it because of his position as managing shareholder. He cannot refuse to account for the profits he received on the ground that, though he took the manure in his capacity of managing cosharer, he had no legal right to do so.

The trial Judge held that the income from this source was Rs. 400 a year. This finding was challenged in appeal, but there is no finding by the lower appellate Court. It appears proper that I should determine the issue of fact under S. 103, Civil P. C. I do not lay great stress on the fact that the defendant has not given a complete account of the value of the manure received and the expenses incurred in collecting it. Such an account would be extremely troublesome to keep, and no inference can be drawn from the fact that it has not been kept. Similarly, it is difficult to place much reliance on the estimates given by the plaintiff's witnesses of the amount of manure which the defendant removes from the Gowthan in a year. There is evidence which has been believed that the defendant keeps a servant or servants to collect manure. Tukaram (D. W. 3) admits that there are 10 or 15 dalis of manure which the defendant has taken from the Gowthan. Later he says that there are two Gowthans in the village. It appears to me that about 400 cattle should leave, in the place where they stand in the morning, much more than 15 or 20 carts per year. It is necessary to estimate the amount taken to the best of the Judge's ability. I think it may be held that the plaintiff has proved facts which lead to the inference that the defendant received at least 50 loads per year. The rate, Rs. 3 per load, is not disputed and as defendant has claimed no expenses, I, do not allow the wages of a servant. I therefore, consider that an addition of Rs. 150 should be made to the income of the village for each year. The calculations necessary will be shown to the parties before judgment is finally delivered.

(The decree was amended accordingly after the approval of the calculations by the counsel and the Court.)

N.K. *Decree modified.*

A. I. R. 1928 Nagpur 181

FINDLAY, J. C.

Sheocharanlal—Plaintiff—Appellant.

v.

Ramratan—Defendant—Respondent.

Second Appeal No. 277 of 1926, Decided on 19th January 1928, against decree of Dist. Judge, Chhindwara, D/- 2nd February 1926, in Civil Appeal No. 70 of 1925.

(a) *Limitation Act, Art. 52—Date of delivery of a railway receipt is the date of delivery of goods for the purpose of Art. 52.*

Unlike a bill-of-lading a railway receipt when formally made over to a person, is a mercantile document of title to goods and gives the holder thereof the right to lawful possession of the goods and the date of delivery of receipt is the date of the delivery of the goods for the purpose of Col. 3 in Art. 52: 38 *Mad.* 664, *Foll.*

[P 181 C 2, P 182 C 1]

(b) *Civil P. C., O. 41, R. 22—Appeal from dismissal—Defendant can support decree on any ground without filing cross-objection.*

Where an appeal is filed from decree dismissing a suit, the defendant is entitled to support the decree even on grounds decided against him, and the decree being one of dismissal of whole suit he need not file any formal cross-objection: 13 *Bom.* 75 and *A. I. R.* 1922 *All.* 280, *Rel.* [P 182 C 1]

S. Y. Deshmukh—for Appellant.

M. B. Niyogi—for Respondent.

Judgment.—The plaintiff-appellant's suit has been dismissed in both the lower Courts. His case was that he booked, before 2nd March 1921, 54 brass gunds to Raipur from Uhilmili (Chhindwara) and that, on the said date, the defendant-respondent and he entered into a contract under which the former agreed to purchase from the latter gunds worth Rs. 325 odd. The plaintiff also paid Rs. 90 towards the price and it was further agreed between the parties that the gunds booked by the plaintiff to Raipur were to be taken over by the defendant who was to allow credit for their value. In pursuance of this contract, the railway receipt was also made over to the defendant and he is alleged to have taken delivery of the 54 gunds in question on 7th March 1921.

The parties were at variance as regards various details of the bargain, but the Judge of the first Court found that the agreement had been that the plaintiff was to pay in advance the price of the gunds purchased from the defendant. In pursuance of this alleged agreement the defendant sent a postcard to the plaintiff asking for the balance of the price and it is highly significant that no reply was sent by the plaintiff thereto. On the contrary, he remained quiescent for some three years and then filed the present suit in which he alleges that the defendant was responsible for the breach of contract and that he is accordingly entitled to recover the Rs. 90, earnest-money, or first instalment of price, as well as the price of the old gunds taken delivery of from the plaintiff. The Judge of the first Court held that, as the plaintiff had broken the contract, he could, at the most, only claim the actual money paid by him, but he further found that money was due to the defendant on the contrary from the plaintiff. Further, he held that the suit was time barred and accordingly rejected the plaintiff's claim. The appeal to the District Judge, Chhindwara, proved equally unsuccessful. The District Judge, confirmed the first Court's finding as to the terms of the contract and held that, in the circumstances, the defendant had committed no breach and that the plaintiff could not sue for damages. He further held that the claim for refund of the Rs. 90 was time barred under Art. 62, Sch. 2, Lim. Act. He further pointed out that the first Court had failed to determine the question of jurisdiction and that in this connexion also the suit should not have been filed in Chhindwara but in Raipur. Against these findings, the plaintiff has now come up to this Court.

It has been urged before me that Art. 62 referred to above was inapplicable to the case and that, under Art. 52, the three years' limitation ran from the date when defendant took delivery of old brass gunds in Raipur; this date was 7th March 1921 and the suit was filed on 6th March 1924. Therefore, if the plaintiff's contention were correct, the suit was within time. I may at once say that, even if we assume that Art. 52 applied, the suit was, in my opinion, clearly barred. In the present case, the plaintiff had done all he could to put the defendant in possession of the gunds by making over the railway receipt to him on 2nd March 1921. In this connexion, therefore, I think it must be held that 2nd March was the date of the delivery of the goods for the purpose of Col. 3 in Art. 52. I am aware that a bill-of-lading for goods conveyed by sea stands on a different footing from a railway receipt, but it seems to me that, according to the ordinary custom of trade in this country, a railway receipt like the present one, when formally made over to

the present defendant, was a mercantile document of title to goods and gave the holder thereof the right to lawful possession of the goods: cf. *Fakeerappa* v. *Thippanna* (1). Having regard to the terms of S. 90, Contract Act, the plaintiff, by delivering the railway receipt, had done all within his power which would have the effect of putting the goods in the possession of the defendant. It seems, therefore, to me that, from this point of view, the suit was clearly time barred.

Some argument has been addressed to me that the circumstances of the present case bring it under S. 70, Contract Act. The section in question, I need hardly say, has no application whatever to a case like the present where we are concerned with the question of a specific contract entered into by the parties, in which the real bone of contention was as to which side had broken it. On that point, there is a concurrent finding of both the lower Courts that the plaintiff was responsible for the breach and, even if it were open to me to vary that finding, I can see no reason for doing so.

Objection has also been taken by the appellant to the District Judge having gone into the question of jurisdiction. It has been urged that the present respondent, had he objected to the fact that the first Court had failed to consider this matter, should have filed a formal cross-objection. I am wholly unable to accept this proposition. The defendant, at the hearing of the appeal in the lower Court, was clearly entitled to support the first Court's decree, not only on any ground decided in his favour, but also on any other ground decided against him, and it was, moreover, unnecessary for him to file any formal cross-objection in view of the fact that the decree in the defendant's favour was wholly so; in other words, the suit had been wholly dismissed: cf. *Bhogji* v. *Bapuji* (2) and *Ram Prasad Kalwar* v. *Mt. Ajanasia* (3).

I desire only to add that the appellant's attempt to contend that the suit was triable in the Chhindwara Court, had obviously no basis whatever. The only ground apparently to urge in support thereof was that the old gunds had been dispatched from Chhindwara; this, however, occurred before the contract was entered into and is quite immaterial. Similarly, the argument that the defendant had to send the goods to be dispatched by him from Raipur to the Chhindwara District seems to me quite immaterial. Had he dispatched them by rail from Raipur to Chhindwara, he would have fulfilled his part of the contract when he made them over to the railway for delivery at Chhindwara. Obviously, had the defendant failed to perform his part of the contract, the action for breach would have lain in Raipur. The plaintiff's suit, therefore, was bad in respect of jurisdiction also.

The appeal accordingly fails and is dismissed. The appellant must bear the respondent's costs. Costs in the lower Court as already ordered.

N.K. *Appeal dismissed.*

(1) [1915] 38 Mad. 664=30 I. C. 950.
(2) [1889] 13 Bom. 75.
(3) A. I. R. 1922 All. 280=44 All. 577.

A. I. R. 1928 Nagpur 182

PRIDEAUX, A. J. C.

Kaluram and *others*—Defendants—Appellants.

v.

Gajasa—Plaintiff—Respondent.

Second Appeal No. 558 of 1925, Decided on 30th September 1927, from decree of Dist. Judge, Nimar, D/- 21st September 1925, in Civil Appeal No. 60 of 1925.

(a) *Evidence Act, S. 92—Negotiations of contract cannot be proved.*

The true construction of a document cannot be varied by extraneous evidence as to the negotiations which led up to the contract: 41 *Cal.* 493 (*P. C.*), *Foll.* [P 184 C 1]

(b) *Evidence Act, S. 92, Pro. 6—Evidence of circumstances can be led only to throw light on the meaning and not to change the nature of the document.*

Under prov. 6 to S. 92, evidence of circumstances surrounding a document is admissible only for the purpose of throwing light on its meaning and it would not be permissible to consider the surrounding circumstances with a view to holding that a document, which on the face of it was a sale-deed, was intended to operate as a mortgage: *A. I. R.* 1925 *Bom.* 501, *Foll.* [P 184 C 1]

(c) *Evidence Act, S. 92—Intention.*

Oral evidence for the purpose of ascertaining the intention of the parties is not admissible: 22 *All.* 149 (*P.C.*), *Foll.* [P 184 C 1]

A. V. Khare and *W. B. Pendharkar*—for Appellants.

S. B. Gokhale—for Respondent.

Judgment.—The plaintiff sues to recover certain fields sold to him by the defendants by a sale-deed dated 27th July 1923. Execution was not denied, but it was pleaded that on the same day it was agreed between the parties that on defendant's repaying the amount advanced with interest to the plaintiff, the plaintiff would execute a reconveyance of the property mentioned in the sale-deed. A chitthi dated 27th July 1923 has been filed by the defendants. It was further contended that the value of the property sold by the sale-deed is more than the price paid for it, and that the sale-deed was executed under undue influence, the defendants being allowed to remain in possession of the property. The plaintiff on his side alleged that possession of the property was delivered to him and that the defendants took the land back afterwards.

The case was tried on the following issues:

1. Whether the plaintiff had agreed to reconvey the property in suit to the defendant as alleged in para. 4 of the latter's written statement.

(a) Whether oral evidence to prove the alleged agreement is admissible?

(b) Did plaintiff execute the chitthi dated 27th July 1923?

(c) What was the market value of the property at the time of the sale in favour of the plaintiff?

2. Whether defendants delivered possession of the property to the plaintiff and the latter was subsequently dispossessed as alleged?

3. Whether the defendants executed the sale-deed under undue influence of the plaintiff.

4. Whether the sale in favour of the plaintiff is invalid and he is not entitled to possession of the property.

A separate finding was come to on issues 1 and 1 (a). The Judge found that neither the chitthi was admissible nor could oral evidence be given in support of the allegation that there was an agreement to reconvey. The Judge held that the defendants' case does not come under any of the provisos to S. 92, Evidence Act. Though the Judge gave the parties an opportunity to call evidence on the remaining issues no evidence was called. The suit was decreed, and on appeal that decree was confirmed.

The chitthi is rather an extraordinary document. It is not in favour of the defendants. It is said to be written by the plaintiff, but the plaintiff himself states that it is a forgery. The translation of it runs:

Salutations to Amirsa son of Jamnsa Fakir Mussalman of Mundi from Gajasa son of Bhikasa Mahajan Khadata of Mundi. Further: as regards the writing that I have got executed by Bhai Kaluram, Deolal (and) Dashrath, sons of Onkar Mahajan Khadata of Mundi, and got registered, you are the madhyasta (mediator) in the matter. And the land that was put to auction by Kunjilalsa, Motilalsa, Motisa of Mundi and Chunilal, son of Kesosa, was purchased by me. The amount in that connexion was deposited by them; and the dealings between themselves and myself take place, adjuring by Unkarnath. The amount of the bond of Rs. 200 is, however, due to me and I shall recover it duly. I shall return all the papers on the very day on which you will ask for them. You will not be affected in any way by your being a mediator. These papers are all worth having used for packets. I have no concern with them: they may leave bread for their children. Mitti Shrawan Badi 2 Sambat 1980, corresponding to 27th July 1923. Signature, Gajasa (self), by the pen of self. The mortgage-deed is dated 27th July 1923 by the pen of self, Gajasa, Mundi.

Reliance is placed for the appellants on prov. 2 to S. 92, Evidence Act. which runs:

The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Now, assuming that the defendants' story is a true one and that the real contract between the parties was that on payment of the money advanced, the land was to be reconveyed, it cannot be denied that the deed of sale is silent on this point, and such an agreement is clearly inconsistent with its terms. That seems to me to put the defendants out of Court. There is no doubt that the chitthi and the deed of sale were both part of the same transaction. I am referred to the Privy Council case of *Baijnath Singh* v. *Hajee Vally Mahomed Hajee Abba* (1). But in that case it seems that there was no document to which the provisions of prov. 2 could be applied. The other cases quoted are *Narasingerji* v. *Parthasaradhi Rayanam Garu* (2), *Umrao Singh* v. *Lachman Singh* (3), *Jhanda Singh* v. *Wahid-ud-din* (4), *Gujarmal Ramlal* v. *Sitaram*

(1) A. I. R. 1925 P. C. 75=3 Rang. 106 (P. C.).
(2) A. I. R. 1924 P. C. 226=47 Mad. 729=51 I. A. 305 (P. C.).
(3) [1911] 33 All. 344=10 I. C. 285=38 I. A. 104 (P. C.).
(4) A. I. R. 1916 P. C. 49=38 All. 570=43 I A. 284 (P. C.).

Arjun (5) and *Harkisondas Bhagwandas* v. *Bai Dhanu* (6). It is contended that under prov. 2 to S. 92, Evidence Act, existence of a separate document can be proved and that in the present case the chitthi does not contradict the document, but shows that there was a condition of repurchase. The appellant asks that the case be sent back to find out the surrounding circumstances and to discover whether there was a separate agreement for a resale.

It has to be noted that except as regards the first half of the issue 1, for which evidence was shut up, the defendants were given an opportunity of calling evidence on the other issues framed, and it is entirely their own fault if no evidence was adduced; and the only question before me is now as regards the decision on issues 1 .and 1 (a). It was held in *Durga Prasad Singh* v. *Rajendra Narayan Bagchi* (7) that the true construction of a document could not be varied by extraneous evidence as to the negotiations which led up to the contract, and in *Martand Trimbak* v. *Amritrao Raghojirao* (8), it was decided that under prov. 6 to S. 92, Evidence Act, evidence of circumstances surrounding a document was admissible only for the purpose of throwing light on its meaning and that it would not be permissible to consider the surrounding circumstances with a view of holding that a document, which on the face of it was a sale-deed, was intended to operate as a mortgage.

It seems to me that the principle enunciated in the Privy Council case of *Balkishen Das* v. *W. F. Legge* (9) governs the present case. In that case oral evidence for the purpose of ascertaining the intention of the parties was held not admissible, being excluded by the enactment in S. 92, Evidence Act. The chitthi was produced to prove an oral agreement of the parties, and it seems to me under the authority of *Gujarmal Ramlal* v. *Sitaram Arjun* (5), that direct oral evidence of the agreement is not admissible. As to how far evidence of conduct of the parties may be permitted in contradiction or variation of its terms, issues 1 (b), (c) 2, 3 and 4 relate to these matters; the appellants deliberately refrained from calling evidence thereon. I do not see why they should now be allowed to call such evidence.

The result is that this appeal fails and is dismissed with costs. The appellants will pay the respondent's costs.

N.K. *Appeal dismissed.*

(5) [1907] 3 N. L. R. 19.
(6) A. I. R. 1926 Bom. 497=50 Bom. 566 (F.B.)
(7) [1914] 41 Cal. 493=21 I. C. 750=40 I. A. 223 (P. C.).
(8) A. I. R. 1925 Bom. 501=49 Bom. 662.
(9) 1900] 22 All. 149=27 I. A. 58=7 Sar. 601 (P. C.).

A. I. R. 1928 Nagpur 184

KINKHEDE, A. J. C.

Ramchandra Nagoba—Plaintiff—Appellant.

v.

Retiram and *others* — Defendants—Respondents.

Second Appeal No. 590 of 1926, Decided on 28th October 1927, from decree of Dist. Judge, Bhandara, D/- 12th August 1926, in Civil Appeal No. 47 of 1925.

Easements Act, S. 7, Ill (j)—Natural right of drainage—Scope of.

The natural right of drainage covers only the right to allow rain-water falling on land of a naturally higher level to drain off by surface flow along whatever lines the water may find its way to the neighbouring land ; but it does not include a right to pass the water which has come artificially thereon : *Arkwright* v. *Gell*, (1839) 5 *M. & W.* 203 *and Young* v. *Bankier Distillery Co.* (1893) *A. C.* 691, *Foll.* [P 186 C 1]

A. V. Khare—for Appellant.

M. R. Indurkar—for Respondents.

Judgment.—The appellant is a malguzar owning some *sir* and khudkast land in the village known as Katurli and the defendants, at least some of them, are the malguzars of the same mauza. That mauza is divided into three mahals. The dispute relates to the plaintiff's right to drain off the bed of a tank bearing old No. 221-2, new No. 293-1kh situate in shamlat mahal No. 3 through its sluice A so as to discharge superfluous water remaining after the irrigation of the dhan crops is over, over the defendants' lands lying at the base of the tank, in order that the bed once submerged under water may be utilized by him for sowing kathan crop thereon. The malguzars defendants, who deny the plaintiff's right, are said to have caused obstruction to him in the year 1923, in the exercise of his right to so drain off and discharge the said water, and thus

prevented him from using portions of the bed, namely, 2·25 acres out of *sir* plot No. 292 of mahal No. 2 and 2·20 acres of khudkast No. 293-1kh of mahal No. 3 for the said purpose of sowing kathan crop, and thereby caused him loss to the extent of Rs. 100. Hence this suit for injunction and damages against the malguzars defendants, and others who acted in concert with them.

The defence need not be detailed here, but it is sufficient to state that the case of the malguzars defendants 1 and 2, is that plaintiff cultivates the bed of the tank as it dries up, i. e., such portions only as get dried in the ordinary course by the water being used up in irrigating the dhan crops, and that he has no right to drain off and discharge the water on their land for drying up the bed.

The first Court held that plaintiff failed to prove any right entitling him to break open the sluice at *A* for draining off and discharging the superfluous contents of the tank through it, on the defendants' land, in order that the dried bed may be available to him for showing the kathan crop. The plaintiff's suit was accordingly dismissed and his appeal to the District Judge's Court has also met with the same fate. The District Judge has in a careful judgment dealt with the nature of the right set up by the plaintiff from the point of view of its being either a natural right or a prescriptive right. As to the third position taken up before him, namely, of the right being a customary right he held that plaintiff did not base his right on custom, and that the plea could not, therefore, be entertained for the first time in appeal.

The plaintiff has come up in second appeal to this Court. At the very outset, I must remark that the District Judge was perfectly right in overruling the plaintiff's contentions based on an alleged custom, as he did not plead it specifically in the trial Court. This disposes of grounds 3 and 8 of this appeal.

As to the right being either a natural one or one acquired by prescription which forms the subject of the rest of the grounds of appeal, I think, the concurrent findings of fact of both the Courts to the effect that plaintiff failed to prove it, is fatal to the success of this appeal.

The lower appellate Court has very carefully discussed the evidence both oral and documentary, and arrived at the conclusion that the evidence on record does not go the length of proving that plaintiff was entitled to open the sluice *A* in order to free the surface of the bed of the tank represented by Nos. 292 and 293-1kh or even No. 293/2 from the volume or expanse or sheet of superfluous water with a view to dry it up and utilize the same for sowing the kathan or winter crop therein. From the fact that plaintiff used to cultivate varying areas in different years, that Court was perfectly justified in drawing the inference of fact which supported the defence, that plaintiff sowed kathan crop only on so much of the bed as got dry and was not under water, about the time of the sowing and, that he did not use to drain off the water of the tank, for that purpose. The stray instances of the exercise of that right in recent years were rightly characterized as insufficient to prove a prescriptive easement to discharge the water of the tank over the defendants' adjoining land. In my opinion the lower appellate Court's decision on this point of the right not being a prescriptive right is unassailable in second appeal

Now it remains to be seen whether the alleged right which plaintiff claims to exercise is a natural right. This question has been discussed in para 6 of the lower appellate Court's judgment. The species of natural right with which we are concerned here is not the riparian right to the flow of water, but the right of drainage. The former relates to the uninterrupted supply, while the latter to the interrupted clearance, of water. The latter right is based on the principle that water, if allowed to stand, has its own evils. It may damage buildings, stunt the growth of plots and cause decay of things submerged : cf. Katiar's law of Easements, p 503, Hence the utility of the right of drainage, both for the protection of one's own property from the evil effects of water accumulating there, and for freeing that property, from the expanse or sheet of water coming on it either by a natural stream, or stored there by artificial means, in order to restore it to its former condition in which it may be again available for its usual and legitimate use. As illustration (j) appended to S. 7, Easements Act, would show, this right is confined to water naturally rising in, or, falling on

such land, and not passing in defined channels. The natural right of drainage thus covers only the right to allow rain-water falling on land of naturally higher level to drain off by surface flow along whatever lines the water may find its way to the neighbouring land ; but it does not include a right to pass the water, which has come artificially thereon.

It may be useful here to point out that the natural rights in water do not come into existence so long as the water does not flow in known and defined channels, whether on the surface or underground : Peocock's Law of Easements, 3rd edn., p. 291. There are natural rights in natural streams but no natural rights in artificial streams, i. e., streams which flow at the source by the operation of man, as opposed to natural streams which flow by operation of nature and in a defined natural channel. Not only has every landowner a natural right to collect and retain within the limits of his own land, surface water not flowing in a defined channel, but he has also the right to draw it off on his neighbour's lower lands or put it to whatever use he pleases, agricultural or otherwise. But though there is a natural right of drainage, from higher lands to lower lands, of water flowing in the usual course of nature and in undefined channels, there is no obligation upon an adjoining landowner to submit to an artificial discharge of water from his neighbour's land, unless he is bound by an easement to do so : *Arkwright* v. *Gell* (1), *Young* v. *Bankier Distillery Co.* (2), quoted in Peacock's Law of Easements, p. 294, 3rd edn.

The lower appellate Court has held that in the present case plaintiff has not acquired a prescriptive easement and is not, therefore, entitled to drain the water of the tank by discharging it through sluice *A* over the land of defendant 2 for the specific purpose pleaded by him. Since he wants to put the submerged bed of the tank to a new use, namely, to grow kathan crop and this use appears to be of only recent growth, the conclusion of the lower appellate Court appears to be sound and legal. Plaintiff cannot by using artificial means of draining off the surplus water left after irrigation of dhan crops, convert and use the land, which forms the bed of the tank and ought to remain submerged under water, under ordinary conditions, i. e., until it gets dry by the natural process of atmospheric evaporation by the action of solar rays for the different purpose of growing the winter crop thereon. There is nothing to prevent him from using the land if and when it may get dry in the natural course but if he were to use artificial means in draining off the water and the Courts were to help him to do so, he would be practically imposing a new burden on the defendants' land. I am clearly of opinion that plaintiff as a malguzar or as co-owner of the bodi has no such right under law. The right he is trying to enforce in this suit could not be called a natural right of drainage, although the same could have been acquired by him as the result of a prescriptive right of easement, which, however, as shown above, he has failed to establish.

For these reasons I uphold the dismissal of the plaintiff's suit for injunction and damages. The appeal fails and is dismissed with costs.

N.K. *Appeal dismissed.*

(1) (1839) 5 M. & W. 203=9 L. J. Ex. 201=2 H. & H 17.

(2) [1893] A. C. 691=58 J. P. 100=69 L.T.838

A. I. R. 1928 Nagpur 186

FINDLAY, J. C.

R. B. D. Laxmi Narayan—Accused—Applicant.

v.

D. H. Mahajan—Complainant—Non-Applicant.

Criminal Revn. No. 340 of 1927, Decided on 19th January 1928, from order of Sess-Judge., Nagpur, D/- 8th October 1927 in Criminal Revn. No. 25 of 1927.

Companies Act, S. 248—Rule 15 made under S. 248 does not bar a competent person from filing a complaint.

Rrule 15 made under S. 248, Companies Act, by the Local Government is not intended to exclude any other competent party from filing a complaint. If the Local Government had in its mind the intention that, after the framing of the rules nobody else but the Registrar should file a complaint such a rule would be undoubtedly ultra vires because there is no provision in the Companies Act which detracts from the ordinary power of the aggrieved person to file a complaint with reference to a criminal complaint, or even with reference to the anomalous materials such as are dealt with in Ss. 76 and 131. A shareholder is such an aggrieved person: *A. I. R.* 1924 *Bom*, 303, *Dist.*

[P 187 C 1,2]

W. R. Puranik—for Applicant.
G. P. Dick—for Non-applicant.

Order.—The facts of the case which has led to the present application for revision are somewhat interesting. The non-applicant, Mr. D. H. Mahajan, filed a complaint against the present applicant and 12 other co-applicants who are Directors of the Nagpur Pioneer Insurance Company. His allegation was that the applicants in question had failed to comply with the provisions contained in Ss. 76 and 131, Companies Act, with reference to the holding of the annual general meeting and with reference to the preparation of the annual balance sheet and that, therefore, they were liable to the penalties laid down in the section in question. The complaint was filed in the Court of the 1st Class Magistrate, Nagpur, and, on behalf of the applicants, it was urged that the prosecution or complaint did not lie at the hands of the present non-applicant. It was urged that, under R. 15 of those made by the Local Government under S. 248 of the Act only the Registrar could take action for the recovery of any of the penalties prescribed in the Act. The rule in question reads as follows :

> Whenever any case of noncompliance with the provisions of the Act comes to the knowledge of the Registrar, he may apply to the Magistrate of the district, in which the registered office of the company is situated, to take the necessary steps for the recovery of the prescribed penalties.

Turning to S. 248 of the Act : it is obvious that these rules were only made under the power therein conferred of making rules and regulations with respect to the duties of Registrars and Assistant Registrars.

I am unable to see that the rule in question was ever intended to exclude any other competent party from filing a complaint like the one we are concerned with. I feel impelled, however, to go further and to say that, if the Local Government had in its mind the intention that, after the framing of the rules, nobody else but the Registrar should file a complaint of the kind in question, such a rule would be undoubtedly ultra vires because there is no provision in the Companies Act which detracts from the ordinary power of an aggrieved person to file a complaint with reference to a criminal complaint, or even with reference to the anomalous materials such as are dealt with in Ss. 76 and 131, of the Act in question : cf. also S. 113, Railways Act.

I have been referred to an unreported case decided by the Punjab Chief Court, in which a Judge of that Court held that a complaint filed by a clerk in the office of the Registrar under S. 74, old Indian Companies Act of 1882 was held bad in view of the fact that the Local Government had made an express rule that the Registrar was the proper person for filing such a complaint. I may point out, however, that the corresponding rule in the Punjab was very differently framed from the rule in these Provinces. The Punjab rule, as regards the relevant portion thereof, is as follows :

> The Registrar shall be deemed the proper officer for instituting and conducting all prosecutions.

Whether that rule was intra vires or ultra vires, is a matter I am not concerned with at present, but the Punjab case is obviously quite different in its facts from those of the present case. There seems to me, in short, no room in the present instance for the application of the maxim *expressi unius est exclusio alterius*.

Moreover, in the present case, there is the clear and obvious fact that, assuming the non-applicant to be a shareholder, he is given an express statutory right under S. 131, sub-S. (2), Companies Act, to inspect the audited copy of the balance-sheet of the company, and, if sub-S. (3) is read with sub-S. (4). it would seem that any shareholder would have a direct or implied authority to file a complaint under the section in question. Moreover, if reference is made to S. 279, Companies Act, that provision lays down that when a fine is imposed, the Court may direct that the whole or any part of it may be devoted towards rewarding the person on whose information the fine has been recovered. If the intention of the legislature had been that only the Registrar or some such officer should have the power of lodging the information in question before the Court, the wording of this provision would undoubtedly have been very different. I am of opinion, therefore, that the Magistrate and the Sessions Judge were correct in the view they took and that, under the law as it at present stands, any

aggrieved, if not any person at all, has a right to lodge the information in question before the Magistrate. Assuming that the non-applicant is a shareholder, it is, moreover, clear in his case that he must be regarded as a party aggrieved. On the merits, therefore, the present application must fail.

It has been suggested, however, before me that if there were a failure on the merits, the company has taken steps since to hold a general meeting as soon as possible and has, in other respects, shown its bona fides. I have been asked, on this ground, to exercise my discretion in favour of the applicants and to quash the proceedings in the Magistrate's Court. Reference has been made in this connexion to the order of Shah, Ag. C. J. and Crump, J., recorded in *In re P. D. Shamdasani* (1). In that case, however, the Crown did not press for further proceedings to be allowed to go on. In the present case the Crown has taken up a different attitude and the learned Government Advocate urged that it would be more proper and convenient that the question of bona fides and the like should be considered by the trying Court. I coincide in this opinion and I cannot find sufficient reason for quashing the proceedings at the present stage ; so far only the formal objection to the entertainability of the complaint has been considered. The application accordingly fails and is dismissed.

N.K. *Application dismissed.*

(1) A. I. R. 1924 Bom. 308=48 Bom. 305.

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* A. I. R. 1928 Nagpur 188

HALLIFAX, A. J. C.

Sitaram Kunbi—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 371 of 1927, Decided on 25th January 1928, against finding of Sub-divisional Magistrate, Multai, D/- 8th September 1927, in Criminal Case No. 41 of 1927.

(a) Criminal Trial—Penalty may not follow conviction.

There is no law that says a penalty must always follow a conviction. The maximum penalty for each breach of the law is fixed by it, but there is no minimum, except in a few special cases. [P 189 C 1]

(b) Maxims—Ignorance of law is no excuse.

Ignorance of the law is ordinarily very much of an excuse as leads to a reduction of the sentence though it cannot lead to an acquittal.

M. R. Pathak—for Applicant.

Order.—The applicant for revision is Sitaram Kunbi, a malguzar of the Betul District. On 3rd September 1927 he purchased one tola of opium at the licensed shop at Multai. A Sub-Inspector of Excise was informed of this and accosted him immediately afterwards and he admitted what he had done without any attempt at concealment or evasion. The reduction of the amount of opium which a person may have in his possession at one time from one tola to half a tola was made on 2nd November 1926, just ten months before. Sitaram Patel was found guilty on his own confession of an offence punishable under Cl. (c), S. 9, Opium Act, and ordered to pay a fine of Rs. 50, and he has applied for revision of this order.

The conviction is undoubtedly correct. The Magistrate has held that the accused was unaware of the change made in the law ten months earlier, and was inveigled by the man in the shop to buy more than half a tola, but his own statement in the case shows that it was not so. Anyhow ignorance of the law is not a ground for acquittal for a breach of it, according to the principle usually wrongly stated by saying that ignorance of the law is no excuse or that everybody must be presumed to know the law. Ignorance of the law is ordinarily very much of an excuse, as it leads to a reduction of the sentence though it cannot lead to an acquittal.

As to the other statement of this maxim, to presume a fact is to accept it as proved and act upon it as if it were a fact, so that to presume that everybody knows the law is to accept as true what is known to be untrue. That is going beyond all reason, and naturally a great deal beyond anything in the Evidence Act. The principle of which those two versions of the maxim are, like most maxims, much too wide a statement is that it is every man's business to know the law and to keep inside it, and if he breaks it because he has not taken the trouble to do so, he is as much liable to punishment, though usually not liable to as much punishment, as if he had.

As to the sentence : a fine of Rs. 50 s obviously too heavy a punishment under the circumstances. In the Magistrate's view that the patel sinned in ignorance it is monstrous, but anyhow it is four or five times as heavy as the punishment

ordinarily inflicted in such a case. It does not appear, however, that the amount of the fine was based on the consideration that to pay Rs. 50 would be no harder for Sitaram Patel than paying Rs. 10 would be for a poorer man. On the contrary, it is more than probable that the Magistrate refrained from inflicting a smaller fine because he was aware that a person in that position would regard it as a much heavier penalty, on account of the obloquy and ridicule to which it would expose him.

That idea is an entirely perverted idea, but it does exist and indeed is very general. In the petition presented to this Court there is a second prayer that, if the applicant is not acquitted, the amount of the fine should be reduced to five rupees. The learned pleader who presented it admitted, however, that he had no definite instructions to ask for anything, but an acquittal, and that he believed his client would object strongly to any reduction of the sentence, holding that a fine of anything less than Rs. 50 would lower him in the eyes of his fellows.

The Magistrate was then faced with the alternatives of passing a sentence much too heavy for the offence, or of passing what is called a "nominal" sentence which would be heavier still in the case of this offender. But there is a third possibility which is to pass a sentence of nothing at all. That is really the same as a "nominal" sentence; the only difference is that it is a great deal more honest and avoids the totally unnecessary and untrue pretence that it is a sentence or something. That pretence itself is so thin, that it is no more than a pretence at pretending.

The idea that some penalty must be inflicted is probably based on Ss. 245 and 258, Criminal P. C., which say that in summons cases and warrant cases the Magistrate

shall, if he finds the accused guilty, pass sentence on him according to law.

But if the infliction of no penalty is not "according to law" when it is done openly, it is surely even less so when it pretends to be what it is not. There is no law that says a penalty must always follow a conviction. The maximum penalty for each breach of the law is fixed by it, but there is no minimum, except in a few special cases.

The conviction of Sitaram Patel of being in possession of more than half a tola of opium is maintained and the sentence passed on him is altered to one of nothing at all. It may be remarked that he has practically been fined fairly heavily, and perhaps more than Rs. 50, in the costs he has incurred.

N.K. *Sentence reduced.*

A. I. R. 1928 Nagpur 189

FINDLAY, J. C.

Raje Bahadur Raghojirao and *others*—Defendants—Appellants.

v.

Sitaram Dajiba Pande—Plaintiff—Respondents.

Misc. Appeal No. 35 of 1926, Decided on 31st October 1927, from decree of Addl. Dist. Judge, Nagpur, D/- 12th July 1926, in Civil Appeal No. 15 of 1926.

(a) *Pensions Act* (23 *of* 1871), *S.* 6—*Suit by wahiwatdar of a temple receiving a grant from the trust fund set apart by the British Government—Certificate from the Collector is necessary.*

The plaintiff brought a suit as wahiwatdar of the Shri Jagriteshwar Deosthan at Nagpur which claims the amount from trust fund which has been set apart by the Government and placed under the indenture dated 24th October 1863 for three instalments due to him in respect of his services as wahiwatdar of the temple against trustees who formed a committee of the temple.

Held: that the suit was not maintainable without a certificate from the Collector: 22 *Bom.* 496, *Foll.*; 31 *Mad.* 12, *Dist.* [P 191 C 2]

(b) *Pensions Act* (1871)—*Act is to be strictly construed.*

The Pensions Act which is one which tends to restrict the ordinary legal rights of the subject to have recourse to the Court for remedy of grievances is one to be strictly construed. [P 191 C 1]

(c) *Pensions Act* (1871), *S.* 4—*Scope.*

A suit relating to an endowment for religious or pious purposes does not fall within the purview of S 4, Pensions Act: 22 *Bom.* 496, *Foll.*; *A. I. R.* 1922 *All.* 22 and 16 *Bom.* 537, *Rel. on.*; and 31 *Mad.* 12, *not Foll.* [P 191 C 2]

B. K. Bose and *A. D. Mande*—for Appellants.

M. R. Bobde and *W. R. Puranik*—for Respondents.

Judgment.—The plaintiff-respondent Sitaram Dajiba Pande brought the present suit in the Court of the Second Subordinate Judge, Second Class, Nagpur, as wahiwatdar of the Shri Jagritesh-

war Deosthan at Nagpur. His claim was for three instalments of the years 1922, 1923 and 1924 of Rs. 23-4-0 each, which he claimed were due him in respect of his services as wahiwatdar of the temple. The present defendants-appellants are admittedly the trustees who formed a committee of the temple. The preliminary objections were raised in the first Court, which need be mentioned here. One of these was that the consent of the Advocate-General under S. 92, Civil P. C., was necessary to the institution of the suit. The Subordinate Judge held that the suit was barred, such consent having not been obtained, and the lower appellate Court held, on the contrary, that S. 92, Civil P. C., did not apply. This point was not pressed for the defendants-appellants on the present appeal coming on for hearing.

I am, therefore, solely concerned in the present appeal with the question of whether or not the present suit is maintainable without a certificate from the Collector, having regard to the provisions contained in Ss. 5 and 6, Pensions Act, 1871. The Judge of the first Court held that the real plaintiff was, in reality, the deity itself and that, as the deity claims the amount from the trust fund, which has been set apart by the British Government, and placed under the control of the defendant-trustees, vide the indenture, dated 24th October 1866 (D. 1), the payment in essence remained one of the nature which would fall under the Pensions Act quoted above. In those circumstances, he held that the suit was barred for want of a certificate from the Collector.

The Additional District Judge, on the plaintiff appealing to his Court, took the view that the plaintiff has described himself as the wahiwatdar of the temple, but that, in reality, the gist of his claim is on the basis of his being a hereditary servant of the temple and that, on this basis, the provisions of the Pensions Act do not apply to the case. As a result of the remand of the case for further trial by the Additional District Judge, the defendants have now come up to this Court on appeal.

The present case raises the somewhat interesting point of law with regard to the construction to be placed upon the provisions of Act 23 (Pensions Act), 1871. It is perfectly clear that what the plaintiff claims is a part of a sum of Rs. 1,200 which, under the indenture already referred to (D. 1), is annually payable for the supprrt of the said temple. In this connexion, it is apposite to refer to the history of the relations of Government with such religious institutions. Up to 1863, it may be said that Government was in direct charge of such institutions. The preamble of Act 20, 1863, shows the reasons why Government then decided to have itself relieved of this duty. This Act did not apply to the Central Provinces and apparently here another device was adopted for the purpose, arriving at the same end. Government had recourse to the expedient of executive orders in the matter, and apparently it was as a result of such executive orders that the indenture (D. 1) was executed in the year 1866. Under the said indenture, Government promissory-notes of a value of Rs. 29,3,000 two hundred and ninety three thousands were made over to the Bhonsla Raja, and the income to be derived from these promissory-notes was to be devoted to the upkeep of the institutions shown in the schedule to the indenture institutions, of which the present temple admittedly forms one.

Under the indenture, the Bhonsla Raja, after receiving the Government promissory-notes, was to endorse the same for the payment of the interest thereof to three of his officials who may be taken as equivalent to the present defendants, These officials were, in turn, to be responsible for allocating the income to the institutions covered by the indenture, and it was expressly provided in the deed that, if the institutions should cease to exist, the securities and the interest thereof should revert and belong to the Government of India. The case for the defendants-appellants, therefore, is that, in these circumstances as the money formed part of a grant made by the former Government as well as by the British Government, the provisions of the Pensions Act, having regard to S. 4 thereof, apply proprio vigore and the suit was not cognizable without the sanction of the Collector. It is admitted that, under the arrangement made in the indenture, the interest for the upkeep of the institutions is not directly paid by the British Government, but is distributed through a non-official agency.

It has, however, been urged that the mere circumstance that this is so does not take the case out of the purview of the Act: cf. *Miya Wali Ulla* v. *Bava Santi Miya* (1) and *Satraji Donerchand Firm* v. *Madho Singh* (2). In the latter case, a pension payable to a political prisoner by the Government of India by a statutory obligation to maintain that person does not cease to be a political pension because the Government of India, under a special arrangement, has the money remitted by a foreign State to the Government Treasury for payment.

On behalf of the respondent it has been urged—so far quite correctly—that the Pensions Act, which is one which tends to restrict the ordinary legal rights of the subject to have recourse to the Court for remedy of grievances, is one to be strictly construed: cf. *Ravji Narayan* v. *Dadji Bapuji* (3) as well as *Gurushidgavda* v. *Rudragavdati* (4). I have also been referred to the decision of Banerji and Tudball, JJ., in *Amna Bibi* v. *Najmun-Nissa* (5), but the facts of that case do not seem to me to be peculiarly helpful for the decision of the questions of principle I am concerned with. Therein, certain immovable property had been granted in lieu of a pension and the sanad provided that, upon the death of the original grantee, the estate would be continued in perpetuity as an hereditary holding. Moreover, at the desire of the grantee, revenue was assessed thereon and the members of the family had treated it as ordinary zamindari property subject only to the payment of Government revenue. In those very special circumstances, the learned Justices held that the zamindari in question was not a pension within the meaning of S. 11, Pensions Act. It has been urged, in short, on behalf of the plaintiff-respondent that what was meant to be covered by the Pensions Act were payments by Government which are at its disposal and which it can discontinue at any time.

After full consideration, however, of the question, which is by no means free of difficulty, I am of opinion that this ex gratia grant by Government without consideration cannot be looked on or regarded as one of which Government has divested itself of all responsibility. The indenture provides for the money being properly applied and it further provides that the money will revert to Government if the institutions cease to exist. What it has, in reality, done is to hand over the management of the disbursements to the defendants-appellants whether they be regarded as agents or as trustees. It is perhaps a moot point, but, as present advised, I am of opinion that Government could at any moment, by an act of State. recall the indenture and discontinue the payment. In essence, the payment in question is, in reality, one made by Government and it seems to me to be immaterial whether that payment is made direct or through the instrumentality of the present defendants and whether they be designated trustees or agents. The grant is, in reality, a purely voluntary and charitable one and not contractual. Whatever contract exists in the matter, only exists between the Bhonsla Raja and the three persons appointed under the indenture to carry out the arrangement and make the disbursements. The object of the Pensions Act, as stated in the Legislative Council when the Bill was introduced, was to reserve to the Government the determination of all questions affecting grants of money, the bestowal of which was an act of grace of State policy on the part of the ruling powers. In those circumstances, I am of opinion that the present suit required the certificate of the Collector before it could be instituted.

It has also been suggested, on the strength of the decision in *Venkateswara Aiyar* v. *Secretary of State* (6), that a suit like the present one relating to an endowment for religious or pious purposes does not fall within the purview of S. 4, Pensions Act. For my own part, with all deference, I am unable to accept the various decisions of the Madras High Court on this matter, and I prefer to follow the view taken in *Miya Waliulla* v. *Santi Miya* (1), quoted above, as well as many other decisions of that Court. I can see no reason why S. 3, Pensions Act, should be arbitrarily limited in the manner suggested. Under the said provision,

(1) [1898] 22 Bom. 493 (494).
(2) A. I. R. 1927 Mad. 601=50 Mad. 711 (717).
(3) [1876] 1 Bom. 523 (529).
(4) [1876] 1 Bom. 531.
(5) [1909] 31 All. 382=2 I.C. 100=6 A.L.J. 519.
(6) [1908] 31 Mad. 12=17 M.L.J. 549.

grant of money or land-revenue includes anything payable on the part of Government in respect of any right, privilege, perquisite or office.

The phraseology is perfectly general and I am unable to see any reason for excluding therefrom a grant for pious or religious purposes : cf. *Harnam Das* v. *Faiyazi Begam* (7) and *Vyankaji* v. *Sarjarao Apajirao* (8). I am, therefore, of opinion that the present suit was not maintainable without a certificate from the Collector.

I do not think, however, that the Judge of the first Court was correct in summarily dismissing the suit as he did on this ground. The suit as such was not bad ab initio owing to the plaintiff's failure to produce the Collector's certificate. What the Subordinate Judge should have done was to give a reasonable adjournment to the plaintiff to enable him to obtain the required certificate. If the certificate was then obtained, the suit could proceed, but if it was refused, the suit was bound to fail. The judgments and decrees passed by both Courts are, therefore, set aside and the case will go back to the first Court for disposal of Civil Suit No 131 of 1925 according to law and in conformity with the above remarks. Costs hitherto incurred in all Courts will follow the event.

A cross-objection has also been filed by the plaintiff-respondent to the effect that the lower appellate Court was wrong in holding that Mt. Parbati was a necessary party to the suit. I agree, however, with the Judge of the lower appellate Court that, if the position be that Mt. Parbati claims or may claim against the present plaintiff a right to perform all or some of the services which formed the basis of his claim, it is desirable in the interests of all parties that Mt. Parbati be joined either as a plaintiff or as a defendant as the case may be. If she does put forward any claim of the kind alleged and if she were not joined and subsequent litigation ensued between her and the plaintiff-respondent, needless trouble and confusion would arise. The cross-objection, therefore, fails and is dismissed. I allow no separate costs as regards the cross-objection. The parties will bear their own costs therein.

N.K. *Case remanded.*

(7) A.I.R. 1922 All. 22=44 All. 354.
(8) [1892] 16 Bom. 537.

** A. I. R. 1928 Nagpur 192

FINDLAY, J. C.

Jhanaklal—Defendant—Applicant.

v.

Gulabchand and *another*—Plaintiff—Non-applicants.

Civil Revn. No. 471 of 1927, Decided on 28th February 1928, from decree of Small Cause Court Judge, Seoni, D/- 26th November 1927, in Small Cause Court, Suit No. 57 of 1927.

** *Limitation Act, S. 19—Period expiring in Court vacation — Acknowledgment made after expiry of actual period, but before expiry of vacation saves limitation.*

The dealings between the parties ceased on 3rd June 1921. On 13th June 1924, that is over three years later, the defendant executed a sarkat admitting liability. The civil Court vacation extended until 16th June 1927.

Held : that the acknowledgment must be held to have been made within the period prescribed by limitation for the suit, for that period, in reality amounted to not merely the actual period but three years plus the unexpired portion of the vacation : 26 *Bom.* 782, *Diss.*

[P 193 C 1]

S. C. Dutt Chaudhri—for Applicant.

Judgment.—In this case the dealings between the parties, had admittedly ceased on 3rd June 1921. On 13th June 1924, that is, over three years later, the defendant-applicant executed a sarkat admitting liability. The civil Court vacation extended until 16th June 1927, and it is urged on behalf of the present applicant, on the strength of the decision in *Bai Hemkore* v. *Masamalli* (1), that the acknowledgment having been executed after the three years had expired the suit was barred.

The only question for decision, therefore, is whether this acknowledgment can be said to have been executed before the expiration of the period prescribed for the suit. Admittedly, if the acknowledgment had been signed before 3rd June 1924, the suit could have been filed on 16th June 1924. Now S. 3, Lim. Act, specifically makes Sch. 1 thereof applicable subject to the provisions contained in Ss. 4 to 25. S. 4 similarly makes allowance for the intervention of the vacation of a Court. In my opinion, therefore, the effect of Ss. 3 and 4 is to extend the period prescribed for any suit in Sch. 1 in the special circumstances contemplated by S. 4. In those circumstances, I am of opinion, with all defer-

(1) [1902] 26 Bom. 782=4 Bom. L. R. 608.

ence to the learned Chief Justice, who decided *Bai Hemkore* v. *Masamalli* (1), quoted above, that the present acknowledgment must be held to have been made within the period prescribed by limitation for the suit we are considering, for that period, in reality, amounted to not merely three years, but three years plus the unexpired portion of the vacation. In those circumstances, I am of opinion that the suit was not barred, the acknowledgment having been given within the prescribed time for limitation as laid down in S. 19, Lim. Act, read with Ss. 3 and 4 idem. The contrary view, in my opinion, introduces a grave anomaly because, in an ordinary case, an acknowledgment of the kind contemplated by S. 19, Lim. Act, sets up a fresh period of limitation, if it is given before the period prescribed for the suit expires. If, under another provision of the Limitation Act, as is the case here, the period of limitation can be extended, it would seem both proper and reasonable, that neither debtor nor creditor should be deprived of the benefit granted by S. 19, Lim. Act. The benefit granted to the creditor is, of course, obvious, but, even in the case of a debtor, it is often advantageous to be able to grant a fresh acknowledgment and so stave off the early institution of the suit impending against him.

These findings govern the application which is dismissed. The applicant must bear the non-applicants' costs. Costs in the lower Court as already ordered.

D.D. *Application dismissed.*

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MOHIUDDIN, A. J. C.

Dharopsing —Plaintiff—Appellant.

v.

Rajaram and *others* — Defendants — Respondents.

First Appeal No. 93 of 1926, Decided on 11th January 1928, from decree of 1st Sub-Judge, 1st Cl., Saugor, D/- 14th August 1926, in Civil Suit No. 85 of 1925.

(*a*) *Hindu Law—Partition—Suit filed—An unmarried member cannot claim his marriage expenses.*

The institution of a suit for partition by a member of a joint Hindu family effects a severance of the joint status of the family, and a member of the family who is then unmarried is not entitled to have a provision made in the partition for his marrage expenses, although he marries before the decree in the suit is made : *A. I. R.* 1922 *P. C.* 201 : *A. I. R.* 1927 *Bom.* 651, *Foll.* and 31 *M.L.J.* 147, *Dist.* [P 194 C 1]

(*b*) *Hindu Law—Unmarried daughter is not entitled to share.*

The unmarried daughter is not entitled to a share in the joint family property. [P 194 C 1]

A. V. Khare—for Appellant.

G. L. Subhedar, *S. B. Gokhale* and *H. S. Gour*—for Respondents.

Judgment.—Dharop Singh filed this suit on 15th August 1925 for a partition of the joint family property, against Rajaram, Thansingh and Amar Singh, his sons by his first wife who is dead, against Ratan Singh, Ude Singh. Maharaj Singh and Jagat Singh, his sons by his second wife Mt. Indrani. An application was made on 11th January 1926 on behalf of Mt. Kaushalya Bai, the unmarried daughter to be made a defendant, and she was brought on record as defendant 9. Randhir Singh was born on 24th May 1926, and was brought on record as a defendant on 27th July 1926.

The lower Court has passed a preliminary decree for partition, and against that decree two appeals have been filed in this Court: one, first Appeal No. 93 of 1926 by Dharop Singh and the other by Ratan Singh, Ude Singh, Maharaj Singh, Jagat Singh and Randhir Singh, First Appeal No. 110 of 1926. All the points urged in the memorandum of appeal filed in appeal No. 110 of 1926 have been urged in appeal No. 93 of 1926 and, therefore, the judgment in appeal No. 93 of 1926 will decide both the appeals.

The first question to be decided is as to whether a sum should be set apart for the marriage expenses of unmarried sons because the married sons were married from family funds. It was argued that as the marriage of the sons must be performed by the father, therefore, it was his duty to make a provision for their marriage expenses, when a partition is effected between the father and the sons, and because the father was bound to make an equitable partition between himself and his sons. *Marugayya* v. *Palaniyandi* (1) was cited in support of the latter view but it only decide that a Hindu father can effect an equal partition of ancestral property between himself and his sons and does not say any-

(1) [1916] 31 M. L. J. 147=36 I. C. 507=(1916) 2 M. W. N. 284.

thing about an equitable partition. It has been decided by their Lordships of the Privy Council in *Ramalingam Annavi* v. *Narayana Annavi* (2) that

> the institution of a suit for partition by a member of a joint Hindu family effects a severance of the joint status of the family and a member of the family who is then unmarried is not entitled to have provision made in the partition for his marriage expenses, although he marries before the decree in the suit is made.

As a severance of the joint status of the family has been effected by an unequivocal declaration of intention to separate, provision cannot be made for the marriage of the unmarried sons of Dharop Singh. In *Pranjivan* v. *Motiram* (3) it has been held that

> under Hindu law, in a suit for partition, marriage expenses incurred by a party after the date of the suit and before the trial, or any prospective marriage expenses cannot be allowed.

The amount which has been spent on the marriage of Ratan Singh shall be accounted for by the appellant when he submits an account of the joint family property in his possession.

Next point which requires cosideration is as to whether the married daughter is entitled to a share in the joint family property. The learned counsel for the appellant has quoted the following passage from Viramitrodaya in support of his contention :

> Hence in partition after the death of the father, the (maiden) sisters are entitled to get shares out of the paternal property, and not that they are only to be disposed of in marriage. But if (partition takes place) previously (to the father's desmise) they get only whatever the father gives, for there is no particular text on the point.

This passage cannot be an authority for the proposition that a daughter is entitled to a share. Dharop Singh could give his daughter whatever he liked before the partition and may give anything he chooses to do from his share now, but the daughter cannot as of right claim a share as she has done. The girl will live with her parents and no special amount is likely to be spent on her education. The cost of maintenance and education can be easily met from the interest of the amount which is being provided for her marriage.

A perusal of Ex. P.. 3 makes it clear that it contains lists of properties which were divided on Asadh Badi 10 Sambat 1981 and were allotted to the shares of Amar Singh, Than Singh Rajaram, Ratan Singh, Ude Singh, Maharaj Singh and Jagat Singh and Dharop Singh. First three lists contain the signatures of Amar Singh, Than Singh, and Rajaram respectively on the list of properties which fell to their share and the other five lists bear the signature of Amar Singh only. It is thus clear that the properties contained in those lists were divided on or before Asadh Badi 10 Sambat 1981 and a severance of the joint family property took place in Sambat 1981.

Randhir Singh, who was born on 24th May 1926, long after the filing of this suit, and after a severance of the interests of the coparceners had taken place, is not entitled to a share in the joint family property.

The appeal is therefore, dismissed with costs. The pleader's fee in each apppeal will be Rs. 200. Respondents 4 to 10 are not entitled to any costs.

N.K. *Appeal dismissed.*

(2) A. I. R. 1922 P. C. 201=45 Mad. 489=49 I. A. 168 (P. C.).
(3) A. I. R. 1927 Bom. 651.

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* A. I. R. 1928 Nagpur 194

HALLIFAX AND KINKHEDE, A. J. Cs.

Shekh Kaudu—Appellant.

v.

Berar Ginning Co., Ltd.—Respondent.

First Appeal No. 17-B of 1927, Decided on 17th January 1928, from decision of Dist. Judge, Akola, D/- 18th December 1926, in Misc. Judicial Case No. 146 of 1925.

(a) *Companies Act, S. 247 (5)—Company can be wound up even after it has been dissolved —Person who was a shareholder of the company can apply for dissolution.*

The proviso to S. 247 (5) of the Companies Act shows clearly that a company can be wound up even after it has been dissolved. But in the case of a defunct company the person on whose application this can be done cannot be an existing shareholder because there is no such person; it must be any person who was a shareholder at the time of the dissolution.

[P 195 C 1]

* (b) *Limitation Act, Art. 181—Art. 181 applies to all applications to Court unless they are governed by some other provision.*

Article 181 governs the limitation of every application made to a Court under any Act except those for which different periods are prescribed in the Acts itself under which they are made. [P 196 C 1]

G. G. Hatwalne—for Appellant.

A. V. Khare—for Respondent.

Judgment—This appeal is against the dismissal of an application for winding up a company, made on 16th November 1925, under S. 166, Companies Act (7 of 1913). The company in question is the Berar Ginning Co. Ltd., Akot, which was formed in 1905 and worked only till 1910. On 15th September 1915 the Registrar of Joint Stock Companies struck its name off the register, so that it was dissolved on that day under S. 247 (3) of the Act. The only respondent mentioned in the petition of appeal is the company itself. How notice was served on this defunct company in the lower Court or was to be served on it in this Court does not appear, nor would that be more possible on the appellant having given the ten year old corpse an appearance of life, but no home, by getting its name restored to the register after filing the appeal. He was saved from having his appeal thrown out on this ground by the granting of the application, which he strenuously opposed, of one Narayan Udebhan to be made a respondent. Narayan Udebhan was at one time a director of the company and opposed the application in the lower Court, though in that Court's order he is wrongly stated to be one of the three co-applicants, the name of one of whom is omitted.

The application has been dismissed on the ground that the applicant has failed to prove that he was a shareholder. He proved that he was a shareholder during the whole of the life of the company and at the time of its dissolution, but the learned District Judge seems to have thought that his failure to prove that he had not transferred his shares after its death led to a presumption that he had. That is a finding that something that is impossible actually did happen. The proviso to S. 247 (5), Companies Act, shows clearly that a company can be wound up after it has been dissolved. But in the case of a defunct company the person on whose application this can be done cannot be an existing shareholder because there is no such person; it must be any person who was a shareholder at the time of the dissolution. The appellant is undoubtedly entitled to apply for an order under S. 166 of the Act.

But the application is time barred three times over. The reasons for the finding that it is not are stated as follows:

The Court can pass a winding up order after the company has been struck off the register and consequently no limitation begins to run from that date. The right to present a petition for winding up is unaffected and still subsists, and the application is not barred by any rule of limitation.

In each of these two statements of exactly the same thing the first sentence seems correct enough but there is no apparent logical connexion between it and the second. At first sight the natural answer to the question of limitation for such an application would be that it is governed by Art. 181, of the Schedule of the Limitation Act, the right to apply accrues afresh on each day of the life of the company, but not after its death, so that the application can be put in at any time during its life or within three years of its death. In that view the present application is time barred.

It is, however contended for the appellant that Art. 181 of the Schedule of the Limitation Act applies only to applications under the Civil Procedure Code and that for applications under any other Act there is no period of limitation whatever except where some period is fixed by the Act itself. This somewhat startling proposition, which was, in substance, accepted by the learned Judge of the lower Court, was not supported by any reasons but by mere citation of the decisions of the Bombay High Court in *Bai Manekbai* v. *Manekji Kavasji* (1), of the Allahabad High Court in *Ranbir Singh* v. *Drigpal* (2), and of the Calcutta High Court in *Tiluck Singh* v. *Parsotein Proshad* (3), *Rahmat Karim* v. *Abdul Karim* (4), and *Saroja Sundari Basak* v. *Abhoy Charan Basak* (5). In the last of these cases the question was mentioned but found not to arise and was not answered. Of the rest the first gives certain reasons for taking the view for which the appellant contends and the rest merely follow it without stating any further reasons.

The reason given for adopting this view in *Bai Manekbai* v. *Manekji Kavasji* (1), is that all the other articles of the third division of the Schedule of the Limitation Act refer to applications under the Civil Procedure Code; on this

(1) [1883] 7 Bom. 213.
(2) [1893] 16 All. 23=(1893) A. W. N. 198.
(3) [1895] 22 Cal. 924.
(4) [1907] 34 Cal. 672=11 C. W. N. 674=6 C. L. J. 119.
(5) [1914] 41 Cal. 819=24 I.C. 27.

it is considered probable that the concluding or "omnibus" article must refer to applications of the same kind, that is applications under the Civil Procedure Code. The premise would seem to lead more to the contrary conclusion, especially as it is hard, if not impossible, to find any application under the Civil Procedure Code requiring limitation at all that is not mentioned specifically in the schedule.

It is certainly true that the last article must refer to applications of the same kind as those already specified, but it cannot be said that an application under one statute is not of the same kind as an application under another, and still less can it be said that an application under one statute is of one kind and applications under all other statutes taken together of another. It is clear that the view taken in these cases is directly contrary to that generally accepted in practice without even a suggestion that anything else is possible. Nor indeed does anything else seem possible, as it would mean that every application under any Act other than the Civil Procedure Code for which no special period of limitation is provided by that Act, like the present one, could be made a hundred years after the right to make it had last accrued.

But S. 29, Limitation Act, puts the matter beyond all doubt. It provides that nothing in the Act shall affect or alter any period of limitation prescribed for any application by any special or local law in force in British India. If the Act did not apply in the first place to all applications, even under special and local laws, it would be mere waste of time to say that it was not to apply to those of them for which special periods were prescribed by those laws. It is clear that Art 181. of the Schedule of the Limitation Act governs the limitation of every application made to a Court under any Act except those for which different periods are prescribed in the Acts itself under which they are made.

The appeal will be dismissed and the appellant will be ordered to pay all the costs of the respondent Narayan Udebhan in both Courts. The pleader's fee in this Court will be fifty rupees.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 196

HALLIFAX, A. J. C.

Kshamadhar Prasad — Plaintiff—Appellant.

v.

Mt. Saraswati and *another*—Defendants—Respondents.

Second Appeal No. 209 of 1927, Decided on 4th January 1928, from decree of Dist-Judge., Hoshangabad, D/- 27th January 1927, in Civil Appeal No. 132 of 1926.

Hindu Law—Divorce at wife's request—She should return ornaments given by her husband.

With Hindus, among whom divorce and remarriage are permitted, it is a very common if not universal custom that when a woman is divorced for misconduct or at her own request, she returns to her husband all the ornaments he has given her, whether at the wedding or later. [P 197 C 2]

(*b*) *Hindu Law—Woman marrying second husband—Second husband should refund costs of first marriage (obiter).*

It is almost a recognized custom that if a woman marries for a second time her second husband refunds to her first husband the cost of the marriage. [P 197 C 2]

N. G. Bose and *M. R. Pathak*—for Appellant.

P. C. Dutt—for Respondents.

Judgment.—The plaintiff Kshamadhar Prasad Gujar married defendant 1, Saraswati, by *pat* on 21st February 1916 and she lived with him at Chaura Hat for six years. On a day between the middle of February and the middle of March 1922 she set off from Chaura Hat, with her husband's consent, on a visit to her mother at Sankla, as she had probably often done before, being escorted by her brother Dhanraj and Imrat Lal who is apparently some sort of a cousin. As is usual on such occasions, she took with her all the ornaments given to her at the wedding by the plaintiff, which were worth Rs. 823-8-0. Two months later, on a date between the 13th April and 11th May she was married to Parmeshwar Das Gujar of Sankla, and they both now live with her mother Radha Bai. The plaintiff thereafter demanded the return of the ornaments his wife had taken with her, and the demand was refused. Accordingly, on 9th March 1925, he filed the present suit for the payment of Rs. 823-8-0 against Saraswati and her mother (who died during the trial) and Parmeshwardas and also Dhanraj and Imratlal.

One of the many absurd results of the usual vague examination of questions of law that do not arise and the neglect of the actual details and facts of the case is the position of Dhanraj and Imratlal. It is obvious that on the allegations in the plaint neither of them has any concern with the case and they should both have been discharged as soon as they filed a written statement saying so. In the first Court, however, it was found that they were necessary parties to the suit because they were "proved to have removed defendant 1 with ornaments to her parents." There was no examination of their liability, and the decree for Rs. 823-8-0 was passed against all the four surviving defendants.

The appeal to the Court of the District Judge was filed by Saraswati and Parmeshwardas only, and the learned Judge ordered the dismissal of the suit, without mentioning the names of Dhanraj and Imratlal. The whole matter was left entirely out of sight till it was brought to the notice of the parties by this Court at the hearing of the appeal filed by the plaintiff against his wife and her second husband. But the District Judge could not and did not set aside the decree against the two defendants who were not parties to the appeal before him. The result is that the plaintiff still has a decree against Dhanraj and Imratlal for the value of the ornaments in the possession of Saraswati and Parmeshwardas which, according to the judgment of the District Court, belong to them or to her.

The judgment of the District Court is as follows:

> Though the ornaments were given to Saraswati on the morning after the wedding they form a part of the wedding gifts and are not gifts unconnected with the marriage as was held in the first Court. They are therefore, her stridhan. It is stated by the plaintiff's witnesses Babu and Raghuraj Singh (P.W. 2 and P. W. 3) that as she has deserted her former husband, she is liable to return the ornaments. This evidence was admitted in spite of (the absence of) any pleading as to custom regarding divorce or desertion prevailing among the caste to which the parties belong. A divorce can only take place by mutual consent and there is no such thing as desertion by the wife of the lawful husband, and to recognize such desertion as lawful requires specific pleadings which are absent in the case. Mt. Saraswati, therefore, continues to be the lawful wife of plaintiff and her second marriage with Parmeshwardas cannot be considered as legal.

There is no allegation that the gift was made subject to the condition that the ornaments should be returned if the woman deserted her husband.

> Moreover a custom whereby a wife married according to the rules of the caste is able to desert her husband at her own sweet will, with the only penalty of the return of the belongings given to her by the former husband, appears to be both immoral and against public policy.

It is not necessary to discuss the mistakes in this, as they are obvious. All that need be said is this: it is for the parties to state the facts only and for the Court to discover the law applicable to them. There could hardly be better evidence than the filing of this suit of the plaintiff having released his wife so as to make her second marriage valid. If it is required there is plenty, and both parties are now agreed that both marriages are perfectly valid. In the body of customs known as the Hindu law as expounded in the ancient texts there was no divorce and therefore no provision for what should happen in the case of divorce. But the Hindu law with which we are concerned is the body of customs existing to-day.

But it is only indirectly that we are concerned with the Hindu law at all. It is beyond doubt that with Hindus, among whom divorce and remarriage are permitted, it is a very common if not universal custom that when a woman is divorced for misconduct or at her own request she returns to her husband all the ornaments he has given her, whether at the wedding or later. It is almost as well recognized that if she marries again her second husband refunds to her first husband the cost of the first marriage, but with that we are not concerned. It is clear then that in this case when Kshmadhar Prasad gave his wife the ornaments she made a tacit promise that she would give them back if ever he divorced her for misconduct or at her own request. As he has divorced her at her own request she must give them back.

The decree of the lower appellate Court will be set aside and that of the first Court will be restored. The two respondents Saraswati and Parmeshwardas will pay the whole of the plaintiff's costs in all three Courts. The

defendants will pay their own costs. The pleader's fee in this Court will be fifty rupees.

N.K. *Appeal allowed.*

A. I. R. 1928 Nagpur 198

FINDLAY, J. C.

Ramchandra Narayan — Plaintiff — Appellant.

v.

Jaideo Ramji — Defendant—Respondent.

Second Appeal No. 221 of 1926, Decided on 19th January 1928, from decree of Dist. Judge, Nagpur, D/- 12th February 1926, in Civil Appeal No. 214 of 1924.

Transfer of Property Act, S. 52—Partition proceedings in revenue Court and a regular suit distinguished—Partition proceedings whether contentious depends on particular facts.

The partition proceedings may be a priori non-contentious is an admitted proposition. A partition proceeding is, in its essence, different from a suit. Every suit, prima facie, involves some contest between the parties, or a claim to be settled between them, and the latter proposition is true even of an uncontested suit, where what the plaintiff wishes is that he should obtain his relief. In partition proceedings, parties on either side may be agreeable thereto, the main object being that a formal record should be made by the revenue Court of the arrangement they desired effected. In other words, the parties in a partition suit need not necessarily start with any difference between them, whereas, even in an uncontested civil suit, the position is very different. Every case of this sort must be decided on the particular merits thereof: 11 *N. L. R.* 21; 1 *C.W.N.* 62 and 29 *All.* 330, *Foll.*; 6 *N.L.R.* 140, *Ref* and 27 *Cal.* 77, *Dist.* [P 193 C 2, P 199 C 1]

V. R. Dhoke—for Appellant.

R. N. Phadhay—for Respondent.

Judgment.—The facts of this case are sufficiently clear from the lower Court's judgments, and the only point in dispute in the present second appeal is whether or not the doctrine of lis pendens applies to the case. This, in turn, largely depends on whether the partition proceedings, as evidenced by Ex. P.-1, the order therein, were contentious or not. Before dealing with this matter, however, I desire to allude to the fact that the pleader for the appellant desired me to take into account certain documents which were filed with the petition of appeal in the lower Court, as, it has been suggested, these would throw light on the question of whether the partition proceedings were or were not contentious. As regards these documents, an objectionable and erroneous practice was exercised of filing them with the petition of appeal under a note that they were filed "for facility of reference." These were documents which, if the plaintiff-appellant thought were necessary or relevant to his case, could and should have been filed in the first Court. If there were any good reason for not having produced them there, his proper procedure was to have filed an application in the lower appellate Court for their due admission there. Neither course was taken and it was obviously attempted to have them brought on record, so to speak, by way of a side-door. The Judge of the lower appellate Court has very properly ignored these documents and not admitted them on record and I also am compelled to treat them accordingly.

The one question in the case, therefore, is whether the partition proceedings were contentious or not. The order of the partitioning officer shows that the non-applicant in the partition proceedings had no objection to the partition. He had, however, advanced a claim to a share in the field with which we are not concerned, but, as the revenue officer had apparently pointed out to him that the field in question had been in exclusive possession of the other party for nearly seven years, he could not claim a share in it, the non-applicant thereupon concurred in this view. Can it not, in those circumstances, be said that the partition proceedings in question were contentious or not. The partition proceedings may be a priori non-contentious is an admitted proposition: cf. *Chandan Singh* v. *Fakirgir* (1). The decision of Skinner, A. J. C., in *Dhirajsingh* v. *Dinanath* (2), does not seem to be peculiarly apposite in the circumstances of the present case. In the suit in question there has obviously been for some time a contest, and the mere fact that eventually a compromise decree was passed was held by the learned Acting Judicial Commissioner not to imply that this litis contestatio had ceased. In its very nature, however, as has frequently been pointed out, a partition proceeding is, in its essence, different from a suit. Every suit, prima facie, involves some contest between the parties, or a claim to be settled between

(1) [1915] 11 N. L. R. 21=27 I. C. 940.
(2) [1910] 6 N. L. R. 140=3 I. C. 288.

them, and the latter proposition is true even of an uncontested suit, where what the plaintiff wishes is that he should obtain a decree by which he can effectively obtain his relief. In partition proceedings, parties on either side may be agreeable thereto, the main object being that a formal record should be made by the revenue Court of the arrangement they desired effected. In other words, the parties in a partition suit need not necessarily start with any difference between them, whereas, even in an uncontested civil suit, the position is very different. Every case of the sort must be decided on the particular merits thereof.

I am aware that the decision in *Shaik Khan Ali* v. *Pestonji Eduljee* (3), was so far dissented from by Maclean, C. J., and Banerjee, J., in *Jogendra Chunder Ghose* v. *Fulkumari* (4) but, even in the latter case, Maclean, C. J., remarked as follows:

> A contentious suit is a suit involving contention, and it is perhaps difficult to predicate of any suit, at the moment of its inception, whether or not it is likely to be contentious; but if in point of fact, it turns out to be a suit which was contested, as is the case here, then, to my mind, the suit is a contentious one and the section applies. It seems to me that in order to appreciate whether the section applies, we must regard the event, and in this case the event showed a contested suit.

This principle, with all due deference, I fully coincide in and, if we apply it to the facts of the present case, there can, I think, be no question but that, on the terms of P.-1, the partition proceedings in question were utterly non-contentious. The decision of their Lordships of the Privy Council in *Faiyaz Husain Khan* v. *Prag Narain* (5) contains nothing which, in my opinion, would imply that, in the present case, the doctrine of lis pendens necessarily operated. Even if it can be held that the objection raised and withdrawn with reference to an entirely different field would have rendered the proceedings contentious, there has been no proof of when the objection was first raised, or even of when the non-applicant in the revenue proceedings was served with notice. I am of opinion, therefore, that the District Judge was correct in holding that there were no contentious proceedings regarding the land in suit.

Further, I am of opinion that, in any event, the terms of S. 52, T. P. Act, did not apply and could not apply proprio vigore in the facts of the present case. There was admittedly no contention whatever regarding the present field, but as regards an entirely different one, if as I have said, it could with any accuracy, be predicated of the partition proceedings that there was any contention at all. As Lord Macnaghten pointed out in the 29 *Allahabad* case quoted above at p. 345, the correct method of stating the doctrine of lie pendens is that pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent. If this principle be applied to the facts of the present case, it seems to me obvious that no question of lis pendens arises at all. I am, therefore, of opinion that the decision of the lower appellate Court is a correct one.

I desire to add that, in the course of argument, the pleader for the appellant made some effort to suggest that the terms of the lease were such as to imply that it was not one made in the ordinary course of management of the village and as possibly a bogus or fraudulent one. No such ground was taken in the petition of second appeal and, in any event, the finding on this point by the lower appellate Court is not one which I see the slightest reason for disturbing, even if it were open to me to do so.

The appeal accordingly fails and is dismissed. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

N.K. *Appeal dismissed.*

(3) [1897] 1 C. W. N. 62.
(4) [1900] 27 Cal. 77=4 C. W. N. 254.
(5) [1907] 29 All. 339=10 O. C. 314=34 I. A. 102=4 A. L. J. 344 (P. C.).

A. I. R. 1928 Nagpur 199

KINKHEDE, A. J. C.

Sirajuddin—Plaintiff—Appellant.

v.

Sonilal and *another* — Defendants — Respondents.

Second Appeal No. 383-B of 1926, Decided on 14th February 1928, from order of 1st Addl. Dist. Judge, Akola, D/- 19th August 1926, in Miscellaneous Case No. 20 of 1926.

Limitation Act, S. 5—Appeal to the District Judge—Presiding officer returning the memorandum for presentation to the Additional District Judge—Question of limitation does not arise as both Courts are part and parcel of the same Court.

An appeal was preferred to the Court of the District Judge, but the presiding officer re-

turned the memorandum of appeal for presentation to the proper Court as the value of the claim was below Rs. 1,000. Appeal was, therefore, re-presented the same day to the 1st Additional Judge of the District Court, who found that the appeal was presented one day late, but after inquiry held that there was sufficient cause for condoning the delay of one day. He thought that this was not, however, the only thing for him to decide. He considered that he could not condone the delay of eight days caused by the presentation of appeal in the District Court.

Held : that the question of limitation never arose as the District Court and Additional District Judge's Court were part and parcel of the same District Court. No question of the exercise of judicial discretion and condoning delay for sufficient cause within the meaning of S. 5, Lim. Act, ever really arose or could have arisen before him so as to necessitate the application of the principle laid down in 5 *N. L. R.* 25 to the facts and circumstances of the case : *A. I. R.* 1917 *P. C.*, 156 and *S. A.* 47-*B of* 1915, *Foll* ; 5 *N. L. R.* 25, *Dist.* [P 202 C 2]

S. A. Ghadgay—for Appellant.

A. V. Khare—for Respondent 1.

Judgment. — This is an appeal by plaintiff-appellant. It arises out of a suit instituted by plaintiff which after a long trial was dismissed by the Subordinate Judge, 2nd Class, Akot, on 12th December 1925. The plaintiff, therefore, preferred an appeal to the Court of the District Judge, Akola, on 18th February 1926 ; but the presiding officer, Mr. R. D. Pande, District Judge, returned the memorandum of appeal for presentation to the proper Court with the following endorsement :

> The jurisdictional value of the claim is below Rs. 1,000. Appeals over Rs. 1,000 come to this Court. The memorandum of appeal presented to this Court by Mr. S. M. Rahman, pleader for appellant, on 18th February 1926 is returned to him to-day the 25th day of February 1926 for presentation to the proper Court.

The memorandum of appeal was, therefore, re-presented the same day to the 1st Additional Judge of the District Court. The learned Additional District Judge, on 2nd March 1926, passed an order fixing the case for hearing the appellant on the point of limitation, as the Deputy Clerk of Court had reported at the time of initial presentation that it was barred by limitation by three days. Subsequently the report was modified so as to make the appeal barred by time by one day only. As a result of the enquiry held, the learned Additional District Judge found that there was sufficient cause for condoning the delay of one day. He thought that this was not, however, the only thing for him to decide. As the memorandum of appeal was re-presented on 25th February 1926, he considered himself called upon to decide the further question whether the delay of eight days between 18th February 1926, and 25th February 1926 could be condoned. He observed that the value of the appeal for purposes of jurisdiction being stated in the memorandum of appeal itself to be Rs. 895-3-9,

> the appeal should have been filed in this Court as, according to the distribution memo. this Court takes up appeals in cases up-to Rs. 1,000.

He accordingly held that there could be no oversight, as deposed to by the pleader, and, thinking that the principle laid down in the case of *Vithia* v. *Sakhya* (1) governed this case, and that he was bound by it, rejected the appeal as time barred on 19th August 1926.

No decree was, however, drawn up on the basis of this rejection of the appeal as barred by time. The appellant could consequently apply for a copy of the order only on 25th August 1926 ; he filed his memorandum of second appeal in this Court on 8th November 1926 with only a copy of order attached thereto. But this Court ordered him to obtain and file a copy of decree. Since no decree was drawn up, the appellant had to move the lower appellate Court as pointed out in *Mahu* v. *Kishan* (2) to draw up a formal decree in the appeal. A decree was thereafter drawn up in due course on 2nd April 1927, and on its copy being filed in this Court, on 25th April 1927, the second appeal was conditionally declared as duly presented that day. The respondent was served with a notice to show cause why the conditional order should not be made absolute, and after hearing both parties on the point that order was made absolute. It is, therefore, no longer open to the respondent to raise the question that since the memorandum of second appeal was unaccompanied by a copy of the decree it was incompetent, and that it could not be validly admitted on 25th April 1927 when the copy of decree was supplied.

If at all that question is material at this stage I may observe that the omission to draw up a decree in the appeal has been satisfactorily explained by the learned Additional District Judge as

(1) [1909] 5 N. L. R. 25=1 I. C. 904.
(2) [1912] 8 N. L. R. 92 (95-96)=15 I. C. 935.

being due to prevalence of practice in the Akola Courts not to draw up decrees when appeals are dismissed as time barred before they are registered. Without going into the question whether the practice is lawful or not, I may say that since the practice of a Court is the rule of the Court, I accept this explanation as satisfactory in the circumstances of the case. Moreover, the act of the Court ought to prejudice none is the maxim which ought to apply to this case. Until there was a decree in the civil appeal no right of second appeal could come into being, and, therefore, no limitation for filing a second appeal could be said to have at all begun to run against the appellant, until 2nd April 1927, when alone the decree was actually drawn up. For these reasons the memorandum of second appeal, though lodged in this Court on 8th November 1926, must be deemed to have been properly filed only when the copy of the decree was filed in this Court.

The only important point for determination, therefore, is whether the decision of the learned 1st Additional District Judge on the point of limitation is correct. Now, as regards this point : I must at once say that the orders of both the District Judge and the 1st Additional District Judge are based on misapprehension. If those Judges had turned their attention to the provisions of the Central Provinces Courts Act, 1917, and in particular to Ss. 14, 16, 20 and 26 (1) of the said Act they would have at once found that under the statute for each civil district there can be only one District Court and not several District Courts; that an appeal from the decree of a Subordinate Judge, 2nd Class, lies to the District Court; and that, whenever the Local Government thinks it necessary or expedient so to do, it appoints an Additional Judge to any District Court, such Additional Judge being entitled to exercise the jurisdiction of the Court to which he is appointed and the powers of a Judge thereof, subject to any general or special orders of the Local Government as to the class or value of suits and appeals which he may try, hear, or determine, and subject also, in respect of the distribution of the business of the Court, to the control of the Judge thereof. I am not aware of any such general or special orders of the Local Government. It is a matter of common knowledge that West Berar is a single civil district with headquarters at Akola. As, under the provisions of S. 16, only one District Court has been established, by the Local Government for West Berar, and, in exercise of the powers vested in it, under S 26 (1) of the Act, it has appointed several Additional Judges to that Court, it follows that the District Judge and the several Additional District Judges are Judges of one District Court.

The appointment of several Judges does not in law split the District Court into several Courts; as pointed out by Stanyon, A. J. C., in *Ganappa* v. *Balwant* (3)

> It remains one Court with several Judges, exactly in the same way as the Court of the Judicial Commissioner and every other Court to which Additional Judges may be appointed.

Much less would the distribution memo. of the District Judge entitle each presiding officer to look upon himself as constituting a different Court. As happily expressed by the learned Additional Judicial Commissioner in the aforesaid case,

> the appeal lay to the District Court of West Berar. It was filed in that Court within time and duly stamped. By an error it went by the wrong door and came before a wrong Judge; but that was a mere irregularity with reference to the distribution of the Court's business. It did not affect the validity of the presentation for the purposes of the law of limitation.

In this case, both the District Judge and also the 1st Additional District Judge have overlooked the fact that each of them forms part and parcel of the District Court, and that the appeal, as provided for by S. 20, Central Provinces Courts Act, unquestionably lay to the District Court. The District Judge ought, therefore, to have sent the case to the proper Judge of his Court; instead of doing so he erroneously made an order returning the appeal to the appellants' pleader "for presentation to the proper Court"; the 1st Additional District Judge, in his turn, conceiving himself to be a different Court from the District Judge's Court, passed the order that when the appeal was lodged before him it was barred by limitation by eight days Really speaking both the Judges were wrong. No question of delay by reason of the memorandum of appeal being detained before the District Judge from

(3) Second Appeal No. 47-B of 1915.

18th February 1926 to 25th February 1926 at all arose in the case. Since, the one day's delay in the initial presentation, the memorandum of appeal remained no more open to objection on the score of limitation. Since acceptance of a plaint or appeal by an officer of the Court appointed to receive them constitutes the institution thereof in the Court, it follows that the first endorsement dated 18th February 1926 about presentation to the District Court on the memorandum of appeal by the Deputy Clerk of Court, was itself sufficient acceptance even for the 1st Additional District Judge, as the same officer acted for both the aforesaid Judges. The second acceptance was, therefore, a surplusage. The first appeal must, therefore, be treated as validly instituted in time in the District Court on 18th February 1926.

It is thus clear that the 1st Additional District Judge approached the question of limitation in such a manner as to indicate that he misdirected himself as to the law to be applied to the case, and erroneously conceived himself and the District Judge as constituting different Courts, whereas, as a matter of fact, they were part and parcel of the same District Court. Such misdirection is valid ground for interference: cf. *Brij Indar Singh* v. *Kanshi Ram* (4). No question of the exercise of judicial discretion and condoning delay for sufficient cause within the meaning of S. 5, Lim. Act, ever really arose or could have arisen before him so as to necessitate the application of the principle laid down in *Vitha* v. *Sakhya* (1) to the facts and circumstances of this case.

The order as also the decree subsequently passed dismissing the appeal as barred by time are hereby set aside and the lower appellate Court is ordered to register the appeal presented on 18th February 1926 as regular civil appeal and decide it on its merits The appellant shall get refund of Court fee paid on the memorandum of second appeal. Other costs of this Court shall be paid by the respondents.

N.K. *Appeal allowed.*

A. I. R. 1917 P. C. 156 = 45 Cal. 91 = 44 I. A. 218.

A. I. R. 1928 Nagpur 202

FINDLAY, J.C., AND PRIDEAUX, A. J.C.

(*Maula*) *Mohammad Ibrahim Raza Malak*—Applicant.

v.

Commissioner of Income-tax, Nagpur—Non-Applicant.

Misc. Petn. No. 61 of 1927, Decided on 17th January 1928, for leave to appeal to the Privy Council from decision of Findlay, J. C., and Macnair, A. J. C., D/- 4th August 1927, reported in *A. I. R.* 1928 *Nag.* 10.

Civil P. C., S. 109, *Cl.* (c) — *Community assessed for its income — Reference answered against the community—Leave to appeal to the Privy Council sought—Question whether constitution of the community amounts to a trust or wakf—Leave was granted.*

A provision in S. 109, Cl. (c), Civil P. C., is clearly intended to meet special cases, such, for example, as those in which the point in dispute is not measurable by money, although it may be of great public or private importance. [P 203 C 1]

The representative and head of the Atba-e-Malak Badar community residing at Mehdibagh Nagpur, was assessed with a sum of of Rs. 2,000 as the income-tax payable on assessed income of the community for a certain year, and the reference, which was made under S. 66, Income-tax Act (11 of 1922), by the Commissioner of Income-tax, Central Provinces, was answered against the community and leave to appeal to their Lordships of the Privy Council was sought.

Held : that leave should be granted as an all-important legal question was involved as to the nature of the constitution of the community and as to whether its constitution amounted to a trust or a wakf : 23 *All.* 227(*P. C.*); 33 *All.* 188; 15 *B. L. R.* 1021 and *A. I. R.* 1924 *Mad.* 231, *Foll.* [P 203 C 2]

A. V. Wazalwar—for Applicant.

D. N. Chaudhari—for Non-Applicant.

Order.—This is an application for leave to appeal to their Lordships of the Privy Council against a decision of a Bench of this Court consisting of Macnair, A. J. C., and Findlay, J. C., in *Commissioner, Income-tax* v. *V. M. E. R. Malak* (1). The applicant is the representative and head of the Atba-e-Malak Badar community residing at Mehdibagh, Nagpur, and the reference in question which was made under S. 66, Income-tax Act (11 of 1922) by the Commissioner of Income-tax Central Provinces, concerns the question of whether the income of the community is question liable or not liable to income-tax, the contention of the applicant being that the property of the community

(1) A. I. R. 1928 Nag. 10.

in question is held under a trust or other legal obligation wholly for religious or charitable purposes. This Court decided that the last proposition could not be predicated of the community in question and leave to appeal is now sought.

It has been admitted before us that in the present case, only a sum of Rs. 2,000, is involved as the income-tax payable on the assessed income of the community for the year 1924-25. No question, therefore, of the subject-matter involved being above Rs. 10,000 arises and, on both sides, the position has been accepted that, if leave to appeal is granted, this must be done under S. 109, Cl. (c), Civil P. C.

It has been urged on behalf of the applicant that the question involved is one both of public and private importance. It is undoubtedly of great importance to the community involved which consists of some 200 to 300 individuals, a community, moreover, which is a fluctuating one. Likewise, from the point of Government as regards its revenue from income-tax, the matter is undoubtedly of importance. Still further, although the Bench of this Court was only concerned with the assessment for a single year, the question is one which is bound to recur from to year and it is of the highest importance to all concerned that a final and binding conclusion should be arrived at as regards the nature of the constitution of the community concerned.

As was pointed out by their Lordships of the Privy Council in *Banarsi Prasad* v. *Kashi Krishna Narain* (2), a provision like that contained in S. 109, Cl. (c), Civil P. C., is clearly intended to meet special cases, such, for example, as those in which the point in dispute is not measurable by money, although it may be of great public or private importance. In a sense, this can be predicated of the present case, because the amount of income-tax involved is entirely indefinite and will depend, in reality, on the number of years in which the community is assessed to income-tax. In *Najm-un-Nissa Bibi* v. *Amina Bibi* (3), Richards, C J., and Muhammad Rafiq, J., were of opinion that the nature of the legal position of a person who has collected the debts of a deceased individual by virtue of his being the holder of a succession certificate granted under the provisions of the Succession Certificate Act, 1888, is a substantial question of law such as would support the granting of a special leave to His Majesty in Council. In the present case, the position is, from another point of view, somewhat similar ; an all-important legal question is involved as to the nature of the constitution of the community in question and as to whether its constitution amounts to a trust or a wakf. Moreover, as we have pointed out, the question involved in this case is an important one, which will have the effect of governing similar other cases which are almost bound to arise from year to year, if this or any other similar or analogous community is assessed to income-tax: cf. *Hirjibhai* v. *Jamshedji* (4), and *Kesava Mudaliar* v. *Govindachariar* (5). That a question of law is involved in the proposed appeal is obvious on the face of it. We, therefore, are of opinion that the question involved is one of both public and private importance and that it is highly desirable in the interests alike of Government and of a community like that of which the applicant is the head, that the matter at issue be finally settled once for all.

We are accordingly of opinion that the case is a fit one in which to grant a certificate under S. 109 (c), Civil P. C., and a certificate will accordingly issue as craved for. We make no order as regards the costs in this application.

N.K. *Leave granted.*

(2) [1901] 23 All. 227 (231)=28 I. A. 11=7 Sar. 825 (P. C.).
(3) [1916] 38 All. 188=33 I. C. 345=14 A. L. J. 143.
(4) 15 B. L. R. 1021 (1033).
(5) A. I. R. 1924 Mad. 231.

A. I. R. 1928 Nagpur 203

MOHIUDDIN, A. J. C.

Gulabrao—Defendant—Appellant.

v.

Mt. Manjoolabai—Plaintiff — Respondent.

Second Appeal No. 344 of 1926, Decided on 31st January 1928, from decree of Dist. Judge, Raipur, D/ 29th January 1926, in Civil Appeal No. 50 of 1925.

(a) *Limitation Act, S. 3—Plea of prescriptive right, i. e., positive limitation, cannot be taken at any stage—Plea of prescription belongs to the branch of substantive law of limitation which primarily strengthens the title of a party and, therefore, cannot be taken at any stage.*

The plea of limitation which can be taken at any stage of the suit and even in second appeal

relates to that part of the law of limitation which is negative in its operation. [P 205 C 1]

(*b*) *Civil P. C., O.* 6, *R.* 17—*Amendment of pleadings should be allowed in order to overcome the effects of bona fide mistakes whether of law or fact.*

Amendment of pleadings should be allowed in suitable cases in order to overcome the effects of bona fide mistakes of law or of fact, and it does not matter whether the assertions or omissions caused by such mistakes were deliberately made or not : *A. I. R.* 1924 *Rang.* 249, *foll.* [P 205 C 2]

M R. Bobde—for Appellant.

Yadorao Bhagdikar—for Respondent.

Judgment.—The appellant before me seeks permission to amend his pleadings. His grounds are twofold. In the first place, it is urged that a plea of limitation can be urged at any stage of the *lis*. Secondly, it is prayed that the statement regarding the time of alleged adoption into another family was too general and without specification of the exact date. The result was that it went unnoticed by all concerned.

In order to appreciate these contention, a general outline of the facts leading up to the filing of the above applications may usefully be given. The appellant's relation with the respondent would appear from the following table :

Bandaji Sindhe (died 1911)
Mt. Tani Bai (died)

Tatya Rao (died 2-2-18)	Gulab Rao (Defendant)
Mt. Manjoola Bai (Plaintiff)	

The parties are Marathas and have made the district of Raipur their place of permanent residence. It is not disputed that they are governed by the Mitakshara school of Hindu law. The history of the family is brief and simple. Bandaji was the proprietor of the village Kirna in Raipur tahsil. On his death which occurred in 1911 his property devolved on his sons Tatya Rao and Gulab Rao in equal shares. Subsequently, Gulab Rao was given in adoption in the Mahadik family of Rajim in 1917. The plaint alleges that after this adoption Tatya Rao became the sole owner of Kirna village and remained in sole possession thereof. In the mutation register, however, his recorded share was 8-annas only, the remaining 8-annas continuing in the name of Gulab Rao, even after the latter's adoption. Tatya Rao died on 2nd February 1918. His widow Mt. Manjoo Bai then became the sole proprietor of Kirna. The defendant managed the village for her. Two years before the initiation of this litigation the parties fell out and the defendant began to assert his title to a moiety of the village and declined to give up its possession. Aid of the Court was, therefore, invoked to recover its possession.

The defence made a general admission of the allegations contained in paras. 1 to 8 of the plaint which include the statement about the time of his adoption. Allegations regarding the defendant being divested of his 8-annas share of Kirna and of its possession were denied. It was pleaded that both Tatya Rao and after him the plaintiff acquiesced in defendant's possession of his 8-annas share. In mutation proceedings the plaintiff admitted the defendant's share. The legal plea of estoppel by acquiescence was taken against the plaintiff. It was further pleaded that the adoption did not and could not result in the loss of defendant's defined share in his natural family and his possession thereof as its recorded proprietor was under a family arrangement which was consistently acted upon for a series of years. Defendant's possession was stated to be in his own right. The litigation was characterized as ill advised.

Both the Courts below have held that by adoption into another family the defendant lost his right to the subject-matter of this litigation and that plaintiff is entitled to its possession. The plea of estoppel has been held to be inapplicable to the facts of the case.

The plea which is sought to be added to the defence is as under :

The defendant was adopted on 3rd May 1912, and he being in possession of the eight annas share in question ever since, in spite of the adoption, the plaintiff's claim is barred by time and her title is extinguished by defendant's possession which is adverse.

As regards the contention that the plea of limitation can be taken up at any stage of the suit, I am clearly of opinion that it is unsound The plea taken is that the plaintiff's right has been extinguished and the defendant's established by the law of prescription. This plea relates to the branch of substantive law of limitation which primarily strengthens the title of the defendant. It does not prescribe a period of limitation for a suit to be brought

which forms that part of the law of limitation which is adjective. It has been aptly remarked at p. 5 of Rustomj's Law of Limitation, 4th edn, that limitation properly so called is negative in its operation depriving a person of a power which he before possessed. Prescription, on the other hand, is affirmative, conferring on a person the right to that which he has hitherto enjoyed in fact only. The plea of limitation which can be taken at any stage of the suit and even in second appeal relates to that part of the law of limitation which is, as remarked above, negative in its operation. This being so, it is clear that the appellant cannot as of right take up the plea now.

The second ground however, rests on a different footing. The plaint contained a general averment in para. 5, that in 1917 the defendant Gulab Rao was transferred to the Mahadik family of Rajim by means of adoption to Ganpat Rao Mahadik. This allegation is admitted in equally or rather more general terms by the defendant in para. 1 of his written statement which says that the statements contained in paras. 1 to 8 of the plaint are admitted. One looks in vain to the record for specific pleadings as to the date or more exact time of the adoption. In fact, there are no pleadings on record beyond the defendant's written statement except the plaintiff's general denial of all the allegations in paras 9 and 10 of the written statement and the defendant's intimation that he does not wish to adduce any evidence to substantiate the allegations in para. 10 of his written statement. It will be seen that the defence mainly rests on assertion of its title and continuance of its possession of the subject-matter of the suit even after the time of adoption. The exact time when this adoption took place was, therefore, a material point and essential for proper adjudication. All concerned seem to have lost sight of this. Now under R. 17, O. 6, Civil P. C., the Court may at any stage of the proceedings allow either party to amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. The discretion given to Court by the first part of the rule is very wide, while the second part makes it incumbent upon Courts to allow certain amendments. As observed by my learned brother Hallifax, in *Sheo Narayan* v. *Ram Prashad* (1),

> Rule 17, O. 6 of the present Code makes no express restriction on the discretion of the Court.

In allowing an amendment in *Anwar Khan* v. *Yakub Khan* (2), my learned brother Prideaux observed that :

> Order 6, R. 17 gives a Court great powers to permit either party to alter or amend his pleadings and, therefore, the matter of amendment is one within the discretion of the presiding Judge.

As a general rule this discretion has to be exercised in favour of the amendment unless there be objections to its exercise and make it injudicious. The legal objection to the grant of the amendment is that it cannot be allowed if it is barred by limitation. The other main objection would be that the amendment sought is not made in good faith or it is mischievous or deliberately vexatious or unnecessary or frivolous or introduces an entirely different, new and inconsistent case or prejudices the other party in such manner as cannot be compensated by costs. No such objection obtains in the present case. Mere delay would not be an adequate ground for refusing an amendment. The defendant pleads inadvertence. In this connexion it will be observed that the Rangoon High Court has gone so far as to hold that

> amendment of pleadings should equally be allowed in suitable cases in order to overcome the effects of bona fide mistakes whether of law or fact, and that it does not matter whether the assertions or omissions caused by such mistakes were deliberately made or not : *Sahib & Co.* v. *K. M. Admsa* (3).

In the case before me the inadvertence or mistake, though negligent, is a bona fide one. The element of negligence can be adequately compensated in costs which have been held by Bowen, L. J., to be a panacea which heals every sore in litigation.

For these reasons I allow the defendant to amend his pleadings as prayed for and send back the case to the Court below to have the amendment placed on record, examine the parties touching all material points relating thereto, recast or amend the issues, admit fresh evidence on the question of the date of adoption

(1) A. I. R. 1923 Nag. 241.
(2) A. I. R 1925 Nag. 62.
(3) A. I. R. 1924 Rang. 249=2 Rang. 66.

and the length of defendant's alleged adverse possession to the knowledge of the other party and then decide the case on its merits. As regards costs, : it is decided that the appellant will bear his costs of this appeal and pay those of the respondent for the same irrespective of the ultimate result, and he shall in addition pay Rs. 100 to the respondent.

N.K. *Case remanded.*

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* A. I. R. 1928 Nagpur 206

HALLIFAX, A. J. C.

Damodardas— Defendant 2 — Appellant.

v.

Rodba and *others* —Plaintiffs and Defendant 1—Respondents.

Second Appeal No. 71 of 1926, Decided on 16th June 1927, from decree of Dist. Judge, Wardha, D/- 10th November 1925, in Civil Appeal No 57 of 1925.

* *Civil P. C., O. 6, R. 1 — Court must itself find and examine all pleas of law that apply to facts of the case—Practice.*

Court must find and examine all pleas of law that may possibly apply to the facts for itself. It must not wait for the parties even to suggest them, still less for the parties to plead them, which they are expressly forbidden to do by the Civil Procedure Code. Refusal by a Judge to examine a question of law applicable to the facts because it was not "pleaded" earlier is his own condemnation ; he ought to see it for himself earlier but anyhow he should hasten to repair the results of his own inadvertence when a party reminds him of it.

[P 207 C 1]

T. J. Kedar—for Appellant.

D. T. Mangalmurti and *G. S. Lule*—for Respondents.

Judgment.—The mortgage which the plaintiffs claimed to redeem was executed on 8th January 1872 by Narayan Patel who died in December 1880. The mortgage was with possession and comprised a two-anna share in the village of Saoda and a field of 32·30 acres bearing the number 54 and then described as malik wahit. In 1882 there was an agreement between the mortgagee and some, if not all, of the surviving members of the joint family of which the mortgagor had been the head, whereby the mortgagee was to retain the two-annas share in the village and return the field to the other party and the mortgage was to be regarded as extinguished. This agreement was duly carried out.

The members of the family at that time were Ramji, aged 24 or 25, Govinda aged 16, Rodba aged 14, Ananda Bai the mother of Ramji and Govinda and Jhipri Bai the mother of Rodba, and they continued to live together as a joint Hindu family till 1890. The main evidence of the agreement extinguishing the mortgage is contained in a copy of an application for mutation of names in respect of the share in the village made by Ramji on the 9th February 1882 (Ex. D-3) and a copy of the statements made by him and his mother Ananda Bai before the Tahsildar in the enquiry started by that application (Ex. D-1). In both Ramji's application and deposition the full details of the agreement are stated. In the course of the former he stated that he was his father's heir (waris), and in the latter that his father's heirs were himself and his mother Ananda Bai, who was present with him and affirmed this statement.

This has been accepted in the lower appellate Court as an assertion that Ramji and Ananda Bai were the only heirs of Narayan, to the exclusion of his other two sons. That is, even at first sight, very improbable, and the inclusion of the widow Ananda Bai along with Ramji would alone be sufficient to show that it is impossible, and that they were both speaking as the representative of the joint family, though Ramji alone had the legal right to do so. The suggestion that Ramji's statement was even meant to be a denial of his brothers' rights in the inheritance, or rather in the joint family property, is preposterous, but even if it were possible it would be disproved by his allowing them to enjoy their shares in the property with him for the next eight years.

But even if Ramji's words can be taken as bearing the meaning put upon them, they are far from being the only evidence on the one question to be decided, which is whether his two younger brothers were or were not parties to the agreement of which he spoke. On this point the learned District Judge says that it was never the first defendant's case that Ramji was representing the joint family when he deposed before the Tahsildar, and that though he might have raised that plea he never did, and it was then too late to do so.

The Court must find and examine all pleas of law that may possibly apply to the facts for itself. It must not wait for the parties even to suggest them, still less for the parties to plead them, which they are expressly forbidden to do by the Civil Procedure Code. Refusal by a Judge to examine a question of law applicable to the facts because it was not "pleaded" earlier is his own condemnation ; he ought to have seen it for himself earlier, but anyhow he should hasten to repair the results of his own inadvertence when a party reminds him of it.

But the matter in issue is not whether Ramji meant to deny his brothers' rights in the joint family property (and admit a right in his mother which she had not got) when he deposed before the Tahsildar. The question is whether the agreement of which he then spoke, which had already been made, was an agreement made on his own account only or on behalf of the whole joint family by him as the manager. The words of the application for mutation and of the deposition seem to me quite sufficient proof that the agreement mentioned was made by Ramji on behalf of the whole family.

But there is still more proof of this. Ramji and his two minor brothers remained joint for eight years after the agreement and all of them acted on it from the beginning. They took possession of the malik wahit field and became occupancy tenants of it and neither of the two brothers even thought of questioning the arrangement till Rodba was induced to execute the champertous sale on which the other plaintiffs sue in 1919. They both attained majority within six years after 1882, and Govinda lived till 1918 while Rodba is still alive and one of the plaintiffs.

On the question which has not been decided in the lower appellate Court I find that when Ramji entered into the agreement of which he spoke in his deposition to the Tahsildar in 1882, he did so as the manager of the joint Hindu family of which he was a member and on behalf of the other two members of it. In accordance then with the judgment of the Privy Council in *Khiarajmal* v. *Daim* (1) cited in the judgment of the lower Court, it must be held that the right of redemption is dead, having been extinguished at the latest in 1894, nearly 30 years before this suit was filed.

The decree of the lower appellate Court will accordingly be set aside and in its place a decree will issue dismissing the suit and ordering the plaintiffs to pay the whole of the costs of the opposite party throughout the litigation. The pleader's fee in this appeal will be two hundred rupees.

N.K. *Appeal allowed.*

(1) [1905] 32 Cal 296=32 I. A. 23=8 Sar. 734 (P. C.).

A. I. R. 1928 Nagpur 207

PRIDEAUX, A. J. C.

Kashiram—Plaintiff—Appellant.

v.

Balwant and *others*—Defendants—Respondents.

Second Appeal No. 326-B of 1925, Decided on 21st November 1927, against decree of Additional District Judge, Akola, D/- 25th June 1925, in Civil Appeal No. 18 of 1925.

Minor — Decree against — Carelessness of guardian ad litem is not sufficient to set aside decree—Gross negligence on his part must be proved.

The fact that the guardian is either negligent or careless is not sufficient reason to warrant the decree being set aside. It is necessary to establish gross negligence on the part of the guardian of a minor before a decree can be set aside, though it is not every kind of negligence nor every degree of negligence which will render proceedings otherwise regular and proper, liable to be reopened: *A. I. R.* 1926 *All.* 36, *Rel. on.* [P 208 C 2]

M. B. Niyogi—for Appellant.

B. K. Bose and *V. D. Shindekar*—for Respondents.

Judgment.—In this case the plaintiff's late father Amrita and two others executed a mortgage-deed for Rs. 750 in favour of defendant 1 who sued on that document, obtaining on 31st August 1917, a preliminary decree against the plaintiff Kashiram, he then being a minor. This decree was made final on 31st August 1918. The plaintiff brought the present suit, contending that no notice of the final decree was issued or served on his mother, his uncle Ganpat or his maternal uncle Sheoram with whom he then lived. The Court reader who had been appointed guardian ad litem for him during the suit did not let the family know of the final decree proceedings. He contended, there-

fore, that the final decree did not bind him and asked it to be set aside and that he be given possession of the mortgaged property. Defendants 2 and 3 had purchased the property from defendant 1.

Defendant 1 contended inter alia that the plaintiff's father had only a two-thirds share in the field. But this contention has been rightly rejected by both the lower Courts. The defendant also denied fraud or gross carelessness on the part of the guardian ad litem and stated that notice of the final decree had been duly served on that guardian who was present in Court when the decree was made final.

The trial Court held that there was negligence on the part of the guardian ad litem. The decree was set aside, the plaintiff was given the land in suit on his depositing Rs. 1,161-4-0 for payment to defendant, and this payment was made within a month of the passing of the decree.

On appeal by defendant 1, the Judge of the lower appellate Court writes :

> . . . . respondent 1's (plaintiff's) mother having refused to act as guardian ad litem the Court reader was appointed in due course as guardian ad litem and the appellant was asked to pay Rs. 50 for engaging a pleader on behalf of the minor. A defence was put in on behalf of the minor by his pleader and the preliminary decree was passed after some protracted trial on 1st September 1917. It may not be out of place to mention here that the suit was instituted so far back as on 4th January 1915 and respondent 1 and his mother could not be served in spite of the repeated summonses and notices till 20th September 1916. Respondent 1 was then admittedly 15 years old and thus he and his mother cannot deny knowledge of the suit when they were served after repeated summonses. The said suit did not end with the preliminary decree. It continued right up to the date of the final decree, vide explanation to the definition of the term decree in S. 2, sub-S. 2, Civil P. C. Plaintiff-respondent 1 cannot, therefore, complain of the ignorance of the preliminary decree and the proceedings subsequent thereto (which are admittedly the proceedings in the suit). At any rate his mother cannot claim the said ignorance. In this view of the case no notice is necessary to be given to a defendant when a decree is to be made absolute. Absence of notice cannot be a ground for setting aside a final decree: vide *Babooji* v. *Ramgopal* (1). In the present case a notice was served on the guardian ad litem (who was the reader of the Court) and he was present when the case was taken up. It is urged that he should have informed respondent 1's mother or his other relations of the proceedings taken for making the decree absolute. No doubt it would have been well and good had he done so. However, since he did not do anything of the kind I do not think the proceedings are in any way vitiated. The law does not require any notice being given and thus respondent 1 cannot claim any.

The Judge held that the guardian ad litem was not careless; but assuming that he was either negligent or careless, that itself was not sufficient reason to warrant the final decree being set aside. Culpable or deliberate negligence is required and in the present case there is neither any pleading nor evidence to show that the guardian ad litem was deliberately negligent.

Now, it has been established by a series of cases that in a case like the present it is necessary to establish gross negligence on the part of the guardian of a minor before a decree can be set aside, though it has been held that it is not every kind of negligence nor every degree of negligence which will render proceedings otherwise regular and proper, liable to be re-opened: see *Brij Raj* v. *Ram Sarup* (2). Now, in the present case the issue dealing with the negligence of the guardian ad litem is in this form:

> Whether the final decree in Civil Suit No. 4 of 1915 was obtained without issue of necessary notices and by fraud of defendant 1 and negligence and want of enquiry on the part of the guardian ad litem?

It seems to me obvious that the form which this issue should take is:

> Was the final decree obtained owing to the gross negligence on the part of the guardian ad litem ?

and I must remand the case to the trial Court for a fresh decision on this point. A minor and his property were concerned: although the suit itself was properly fought, yet it has to be considered whether the guardian ad litem made any attempt to inform the minor or his relations that a preliminary decree had been passed: he should have told them what the result of not paying the money would be. There is some doubt whether the Court reader who appeared in the final decree proceedings is the same Court reader who was appointed guardian ad litem. This point must be cleared up. I note that the field was foreclosed for some Rs. 1,000 below its proper value.

With the above remarks I remand the case. Costs here will abide the result.

N.K. *Case remanded.*

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(1) A. I. R. 1923 Nag. 320=19 N. L. R. 124.

(2) A. I. R. 1926 All. 36=48 All. 44.

A. I. R. 1928 Nagpur 209

HALLIFAX AND KINKHEDE, A. J. Cs.

Mt. Shantabai—Appellant.

v.

Gunwant Rao—Respondent.

Misc. Appeal No. 28-B of 1927, Decided on 9th March 1928, from order of Dist. Judge, Akola, D/- 16th July 1927, in Misc. Judicial Case No. 36 of 1925.

Guardians and Wards Act, S. 17—Rival claimants for being appointed guardian of minor's property—Court should consider whether appointment is necessary and whether appointment would be for minor's welfare—Wishes of persons most near to the minor are evidence of probability of minor's welfare.

In appointing a guardian for the property of a minor, the Court has to decide first whether the appointment of a guardian is necessary and, having decided that it is, it has to select from among those who are willing to act, the person who is most likely to manage the property best, and the decision of both points depends solely, as is laid down in Ss. 7 and 17, on what is for the minor's welfare. Nearness of kin comes into consideration only because a person nearly related to the minor is likely to look after his interests better and more keenly than a more distant relative. The wishes of the persons connected most nearly with the minor that a certain person should be appointed to look after his property can only be taken into consideration as evidence that that person will probably be the best manager of it. [P 209 C 1 & 2]

W. R. Puranik—for Appellant.

M. R. Bobde—for Respondent.

Judgment.—As in most cases of the appointment of a guardian for the property of a minor, the matter for decision has been regarded all through as the conflict between the "claims" of various persons to that appointment. In such a case the Court has to decide first whether the appointment of a guardian is necessary and, having decided that it is, it has to select from among those who are willing to act the person who is most likely to manage the property best, and the decision of both points depends solely as is laid down in Ss. 7 and 17 of the Guardians and Wards Act, on what is for the minor's welfare.

Section 17 mentions certain matters to be considered in deciding what is for the minor's welfare. They certainly are the chief matters for consideration in that connexion, as they would be even if they were not mentioned in the Act, though there are often others. But they are all subsidiary matters on which the decision of the main matter, the welfare of the minor, depends. Nearness of kin, for instance, comes into consideration only because a person nearly related to the minor is likely to look after his interests better and more keenly than a more distant relative.

Now certain people may have a claim, or a right, in ordinary circumstances, to manage a minor's property, such as his father or his mother, but nobody can possibly have any claim or semblance of a claim to be deemed by a Court to be the best manager of it or to be appointed to that position. The putting forward of such a claim is ordinarily in itself fairly good evidence of the unfitness of the person who puts it forward, as it indicates a desire to benefit himself out of the property. Even the wishes of the persons connected most nearly with the minor that a certain person should be appointed to look after his property can only be taken into consideration as evidence that that person will probably be the best manager of it.

In appointing Gunwant Rao the guardian in the present case the learned District Judge does give some reasons of his own for considering him the best person to appoint, which he undoubtedly is. He was, however, considerably influenced by the agreement to his appointment between all the minor's relatives except one, who included some of the "claimants," and he certainly did not regard their joint application as merely an indication of Gunwant Rao being the best person to appoint, but as some sort of an agreement between rival parties which to a certain extent he was bound to accept. That is clear from his acceptance of the scheme they put before him in that petition. That scheme includes details as to the amount of allowances to be paid and the limit of the cash to be kept in the hands of the guardian, which are solely for the Court to settle and may be altered by the Court on the following day. The arrangements made, however, which are expressly stated to be temporary, seem unobjectionable. If they are found to be unsound in working they can be altered at any time; this of course could be done if they had been stated to be permanent.

It is in accordance with this perverted idea of the matter that Shanta Bai has come to this Court in appeal. She is the minor's stepmother, aged about 20, and is living at Poona with her parents, though in her petition of appeal she describes herself as of Kamargaon, doubtless with the idea of supporting her "claim" by the untruth. She was the first to apply for the guardianship, but eventually withdrew her application and contented herself thereafter by opposing the appointment of anybody else. In her petition of appeal she prays that she may be appointed in place of Gunwant Rao, and the amount of Rs. 50 provisionally fixed as her monthly allowance shall be raised to Rs 100.

Shanta Bai's age, sex and residence alone indicate that it would be hard to find a person more unfit than she is for the appointment. In her petition of appeal no reason for considering her fit at all has been given, nor any for considering Gunwant Rao unfit or less fit than she is, unless we are to regard her complaint about the amount of her allowance as a statement of a reason; that, however, seems a reason for the contrary.

In the argument of the appeal, however, when it was realized that the appointment depended solely on the interests of the minor and Shanta Bai could not possibly be appointed herself, a new position was taken for her. It was stated that in her anxiety for the welfare of her stepson she desired the removal of Gunwant Rao and the appointment of the Official Receiver in his place. The pretence is ludicrously hollow, but anyhow the only reason stated for her fear that Gunwant Rao will not manage the property efficiently is that he is an old man : we do not share her fear. The amount to be paid to her for her maintenance is of course not a matter in which this Court should or could interfere, the more so as it is fixed temporarily "until the annual income of the estate can be more clearly ascertained."

The appeal is entirely futile and will be dismissed. The appellant will be ordered to pay all the costs of the respondent. The pleader's fee will be Rs. 50.

R.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 210

PRIDEAUX, A. J. C.

Nazarali—Applicant.

v.

Bala and *another*—Non-Applicants.

Civil Revn. No. 132 of 1926, Decided on 21st September 1927, from an order of Small Court Judge, Khandwa, D/- 6th March 1926.

(a) Civil P. C., O. 21, R. 46—Court having jurisdiction to execute can only issue prohibitary order.

A prohibitory order for attachment of money under O. 21, R. 46, should come from a Judge having jurisdiction in the place where it is to be executed. [P 210 C 2]

(b) Civil P. C., O. 21, R. 48—Money due to Railway contractor for work done cannot be attached under R. 48.

Property belonging to a Railway contractor and consisting of payments to be made to him for work done, is neither the salary nor the allowance of a servant of the Railway Company and is therefore, not attachable under R. 48. [P 210 C 2]

W. R. Puranik—for Applicant.

A. V. Khare—for Non-Applicants.

Order.—The applicant in this case obtained a decree against one Bala for Rs. 218-6-6 including costs. Bala was a contractor for the G. I. P. Ry. Co. The applicant applied for execution to the Small Cause Court, Khandwa, and asked for a prohibitory order for attachment of certain money due to Bala by the G. I. P. Ry. Co. The applicant obtained the order and it was sent to the Chief Auditor, Bombay, and to the Loco Traffic Manager, Nagpur. The Bombay Office returned it on 27th March 1925, pointing out, and rightly so, that the attachment obviously fell under O. 21, R. 46, Civil P. C., and should come from a Judge having jurisdiction in Bombay. Then the prohibitory order was served on the Station Master, Khandwa, obviously a wrong person to address such a document to. The execution proceedings have been struck off as wholly infructuous.

It is fairly obvious that unless the applicant can bring the prohibitory order under O. 21, R 48, Civil P. C., he has no case. I am certain that the property, in this case, which belonged to a Railway contractor and consisted of payments to be made to him for work done, is neither the salary nor the allowance of a servant of the Railway Company. It is also clear that the Station Master, Khandwa, was not the proper person to address to

in the matter. On the facts I have no hesitation in finding that the execution proceedings have been properly disposed of. I accordingly dismiss this application with costs. The applicant will pay the non-applicants' costs. I fix pleader's fees at Rs. 15.

R.K. *Application dismissed.*

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* A. I. R. 1928 Nagpur 211 (1)

PRIDEAUX, A. J. C.

Sukhrani—Plaintiff—Appellant.

v.

Wasudeo and *others*—Defendants—Respondents.

Second Appeal No. 49 of 1926, Decided on 14th March 1928, against decree of Dist. Judge, Saugor, D/- 20th October 1925, in Civil Appeal No. 73 of 1925.

* *C. P. Tenancy Act* (1920), *S.* 21—*Sub-tenant is not liable for arrears under S.* 21.

A sub-tenant of an occupancy holding who has grown and reaped crops in such holding is not liable to the landlord of the village for arrears of rent under S. 21. [P 211 C 2]

K. V. Deoskar—for Appellant.

A. Razak—for Respondents.

Facts.—During St. 1980 and 1981 respondent 1 Wasudeorao was the tenant and the respondent 2 Madari sub-tenant of certain occupancy fields and that the kists of rent were in arrear when the suit was filed by the plaintiff-appellant.

Plaintiff claimed these arrears with interest and a decree was given against the tenant Wasudeorao, respondent 1.

Relief was asked against defendant 2 Madari on the ground that he had appropriated the rabi crop of St. 1981 i.e. the crop reaped about March 1925 and was liable to the extent of that crop under S. 21, Tenancy Act, to pay the claim for the arrears. The lower Court dismissed the claim against respondent 2 Madari holding that he had not appropriated the produce in the sense of S. 21, Tenancy Act.

Order of Reference.

Prideaux, A. J. C.—The question raised in this suit is one of considerable importance to landlords in the Province. It is

whether a sub-tenant of an occupancy holding who has grown and reaped crops in such holding is liable to the landlord of the village for arrears of rent under S. 21, Tenancy Act ?

Opinion of the Bench

We have no hesitation in deciding the question put to us in the negative. The word "appropriating" in S. 21, Tenancy Act 1920 means, in our opinion, to take to one's self in exclusion of others, or to claim or use as by an exclusive right, and would not apply to crops raised and taken by a sub-tenant legally in possession. Let the record be returned.

(The appeal was dismissed in accordance with the above opinion).

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 211 (2)

PRIDEAUX, A. J. C.

Sheikh Ahmad—Defendant—Appellant.

v.

Amirkhan and *another*—Plaintiffs—Respondents.

Second Appeal No. 347-B of 1925, Decided on 5th December 1927, against decree of 2nd Addl. Dist. Judge, Akola, D/- 25th August 1925, in Civil Appeal No. 15 of 1923.

Mahomedan Law—Minor—Father entering into a valid contract with A for sale of a certain property—Widow completing the sale after his death—Sons are bound by the contract—Specific Relief Act, S. 27—*Transfer of Property Act, S.* 54.

When a person is in possession of a certain property under a valid contract made by the father in his favour inheritance will be subject to that contract. [P 212 C 1]

Where mother gave possession of a field, under a contract entered into by her husband, to *A* and though the deed of sale did not mention that she executed that document also on behalf of her minor sons but it was clear that she completed the sale in pursuance of her husband's agreement.

Held : that *A's* possession could not be disturbed as the alienation was made not on the woman's own account but in discharge of an obligation made by her husband and as regards the sons in pursuance of a contract made by their ancestor : 12 *C. P. L. R.* 154; 41 *Bom.* 438 ; *A. I. R.* 1922 *Bom.* 9; 1 *All.* 533, *Foll.* [P 212 C 2]

M. R. Bobde—for Appellant.

M. Y. Sharif and *K. V. Deoskar*—for Respondents.

Judgment.—This case was last before me as Second Appeal No. 18-B of 1924 when I remanded it to the lower appellate Court. That Court has again decreed the plaintiffs' claim. The plaintiffs sued for joint possession of their 7/8ths share

in survey No. 5/1 of Dawalpur in the Balapur Taluq. This field has been sold by their mother to defendant after their father's death in 1911 when they were minors. The First Court had dismissed the plaintiffs' suit but in appeal it was successful. The defence was that Umraokhan the father entered into an agreement to the sale and was paid Rs. 200, and after his death his widow took another Rs. 300 and executed the sale-deed. There was a further plea that by an oral will Umraokhan had directed his widow to dispose of the field to the defendant. The findings as they now stand are that the contract for sale was made by the plaintiffs' father and part of the consideration was received and the property was sold by the plaintiffs' mother in pursuance of the contract of the father. The lower appellate Court finds that even so, the sale is not binding on the plaintiffs, and quotes cases to show that a de facto guardian of a Mahomedan minor cannot convey to another any interest in the minor's property. The Court finds that the mother was not appointed an executrix and that the mother is an heir and cannot validly sell the property in discharge of the debts of her deceased husband. The Judge finds that the plaintiffs' claim cannot therefore be resisted. On the finding that Umraokhan himself entered into a contract for sale, it seems to me, that the conclusion come to by the lower appellate Court is wrong. The defendant is in possession under a valid contract made by the father in his favour and inheritance would be subject to the contract. Illustration to S. 27 (b), Specific Relief Act says :

> *A* contracts to convey certain land to *B* by a particular date, *A* dies intestate before that date, without having conveyed the land, *B* may compel *A*'s heir or other representative in interest to perform the contract specifically.

Bansi Seth v. *Pandoba* (1), is a similar case, in which it was held

> the sale was complete by the transfer of possession and payment of consideration.

In *Bapu Apaji* v. *Kashinath Sadoba* (2) it was held that

> where the plaintiff being the owner of certain immovable property seeks to recover possession of that property and there are no facts operating to his prejudice it is a valid defence to the suit that the plaintiff has agreed to sell the property to the defendant, the agreement being at the date of suit still capable of specific enforcement, but there being no registered conveyance passing the property to the defendant, who has taken possession under the agreement for sale,

and in *Venkatesh Damodar* v. *Mallappa Bhimappa* (3), a similar case, it was held that even if defendant's right to obtain specific performance had become time barred, the defendant was entitled to remain in possession against the plaintiffs.

Under Art. 113, Lim. Act, the date for commencement of limitation against the defendant would be when he learnt that performance of the contract was refused and therefore there is no question here of defendant's right of specific performance being barred by time. The doctrine of part-performance also seems to me applicable to the present case : see *Mahomed Musa* v *Aghore Kumar Ganguli* (4), *Venkayyamma Rao* v. *Appa Rao* (5) and *Kunti* v. *Gajraj Tiwari* (6) and to these cases may be added *Sandu Walji* v. *Bhikchand Surajmal* (7).

In the present case, the mother gave the defendant possession under the contract entered into by her husband and though the deed of sale does not mention that she executed that document also on behalf of her minor sons, the present plaintiffs, it is clear, that she did so in pursuance of her husband's agreement. The alienation is made not on the woman's own account but in discharge of an obligation made by her husband and as regards the present plaintiffs in pursuance of a contract made by their ancestor. Under these conditions, it seems to me, the defendant's possession cannot be disturbed; *Hasan Ali* v. *Mehdi Husain* (8).

It seems to me clear if the mother had not put the defendant in possession and conveyed the field to him, a suit by the defendant for specific performance of his contract with Umraokhan against the widow and her minor sons would have been bound to be decreed. It is here argued for the respondents that one co-heir cannot dispose of the whole property i.e., the property of herself and her co-

(1) [1899] 12 C. P. L. R. 154.
(2) [1917] 41 Bom. 438=39 I. C. 103=19 Bom L. R. 100.
(3) A. I. R. 1922 Bom. 9=46 Bom. 722.
(4) A. I. R. 1924 P. C. 27=42 Cal. 801=42 I. A. 1 (P. C.).
(5) A. I. R. 1916 P. C. 9=39 Mad. 509=43 I. A. 138 (P. C.).
(6) A. I. R. 1924 All. 826=46 All. 847.
(7) A. I. R. 1923 Bom. 473=47 Bom. 621.
(8) [1876] 1 All. 533.

heirs. That contention I will not deny. But in the present case the conveyance was made in fulfilment of an agreement entered into by the husband and father. It is true that a guardian cannot increase the liabilites of minors but in this case the mother only did what she and her minor sons could have been forced to do.

In my view of the case the lower appellate Court's decision is erroneous. I therefore set it aside and restore the decision of the trial Court, dismissing the plaintiffs' claim with costs. The respondents here will pay the appellants' costs in all three Courts.

N.K. *Appeal allowed.*

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* A. I. R. 1928 Nagpur 213

KINKHEDE, A. J. C.

Necha—Accused—Applicant.

v.

Emperor.

Criminal Revn. No. 3 of 1928, Decided on 20th February 1928, against decision of Sess. Judge, Nimar, D/- 10th December 1927, in Criminal Appeal No. 74 of 1927.

(a) *Evidence Act, S.* 114—*Possession of stolen goods — What amounts to recent possession depends on facts of each case.*

The question as to what amounts to recent possession sufficient to justify the presumption of guilt in any particular case, varies according as the stolen article is, or is not, calculated to readily pass from hand to hand. [*A. I. R.* 1926 *Lah.* 528; 11 *M. L. W.* 43; *A. I. R.* 1921 *Lah.* 89 and 22 *C. W. N.* 597, *Rel. on.*] But the strength and nature of such presumption must vary according to the seriousness of the offence and the nature of the property involved.

[P 214 C 1]

* (b) *Evidence Act, Ss.* 30 *and* 133—*Difference explained—Accused cannot be convicted solely on a confession of a co-accused.*

A confession of an accused person implicating a co-accused under S. 30 cannot be considered as the same thing as 'the testimony of an accomplice' which is referred to in S. 133 of the Act. S. 133 contemplates that the accomplice shall be examined as a witness. This being so, the provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, has no application to the case of an uncorroborated confession taken into consideration as against a co-accused jointly tried with the confessing accused under S. 30. Therefore an accused person cannot be convicted solely on such a confession made by a co-accused; 9 *C. P. L. R.* 35 *Cr.* and 37 *Cr.*; 24 *W. R.* (*Cr.*) 42; 38 *Cal.* 559, *Rel. on.* [P 215 C 2]

(c) *Evidence Act, S.* 30 — "*May take into consideration.*"

The expression 'may take into consideration' points to the necessity of there being other evidence on record to which this statement can lend assurance. [P 215 C 2]

Order.—This order will dispose of Criminal Revision No. 4 of 1928 also. The applicants, Necha and Gurdayal and one Fulsing were tried jointly with Hiralal who not only admitted his own guilt but implicated the rest in the commission of an offence under S. 457, I. P. C. All the four accused were convicted and sentenced to rigorous imprisonment. Out of them Hiralal who was a previous convict did not appeal against the conviction and sentence passed against him. So he dropped out at the appellate stage. The rest appealed to the Sessions Judge, who upheld the convictions and sentences and dismissed the appeals. Fulsingh has not cared to come up in revision. The applicants have sent up their petitions for revision through the Superintendent of Jail, Hoshangabad. No one appeared either for the applicants, or for the Crown, although notices were issued; the latter through the District Magistrate was called upon to show cause why the conviction and sentences should not be set aside.

The learned Sessions Judge in dismissing the appeals observes that out of 14 prosecution witnesses none is an eye-witness to the house-breaking itself; not even Dallu the owner of the house says anything about it. But the fact is that the house was broken in at night. The said Judge was, however, satisfied that the property recovered from the several accused was the property stolen from the house of Dallu and belonged to him, and that whatever property was seized from the possession of the applicants, Necha and Gurdayal, formed part of such property. Although the theft took place on the night of 7th July 1927, the property was not traced for about 40 days after the occurrence.

Two questions, therefore, arise (1) whether the possession of the applicants was such recent possession as could give rise to any presumption under S. 114, Evidence Act, and (2) whether the applicants have been rightly convicted on the statement of Hiralal, the co-accused.

As to the question whether the presumption which attaches to recent pos-

session has been rightly applied in this case by the Sessions Judge, I may say that the question as to what amounts to recent possession sufficient to justify the presumption, in any particular case, varies according as the stolen article is, or is not, calculated to readily pass from hand to hand. In the following cases the period of 19, 13, 5 and even 3 months was treated by the Courts as too long to raise such a presumption under S 114, Evidence Act: *Naqli* v. *Emperor* (1), *In re Jaimullabdin* (2), *Hari Ram* v. *Emperor* (3), and *Joeenullah Bepari* v. *Emperor* (4). This clearly shows that the importance to be attached to possession as giving rise to the presumption of guilt must vary with the circumstances of each individual case. We cannot also forget that there is the normal presumption of innocence in favour of every accused person whose guilt has to be proved beyond the possibility of any doubt. But it seems well established that where in a criminal case there is a conflict between presumption of innocence and any other presumption, the presumption of innocence prevails. The strength of the presumption varies according to the seriousness of the charge. It has been said that the greater the crime the stronger is the proof required for conviction : *Atihraf Ali* v. *Eempror* (5).

In this case the property was not actually traced in the possession of the applicants until 17th August 1927. The applicants alleged that they got possession of the goods from the co-accused Hiralal some time in the middle of Shrawan last, i. e., towards the end of July 1927, by purchase. Under these circumstances the prosecution had still to prove that the applicants had the custody of the goods between the date of the theft and the admitted receipt thereof by them, though not for the longer period extending right upto the date of their discovery, in spite of the fact that their possession of the stolen goods which commenced towards the end of July could be treated as sufficiently recent under the circumstances of the case.

From such recent possession a presumption was available to be made against the applicants. But the strength and nature of such presumption must vary according to the seriousness of the offence and the nature of the property involved. They were, therefore, rightly called upon to explain their possession and to account for the manner in which they came to have it. The explanation offered by them was one of title by purchase from Hiralal, but the same has been disbelieved by both the trying Magistrate and the Sessions Judge. The Sessions Judge thought that Hiralal, their so-called vendor, was not a cloth merchant, so that in purchasing goods from him they could not be said to have acted quite innocently. Having chosen to reject the explanation offered, the further position which the Sessions Judge formulated for consideration was whether the applicants were thieves or receivers of stolen goods from Hiralal, a person who confessed his own guilt. But had he sufficient evidence to convict them as thieves? Their possession might make them receivers of stolen goods if they had the knowledge that the goods were stolen. But they were not necessarily thieves unless proved to be so.

He had still to determine whether their possession of the goods said to be derived from Hiralal had really originated in their so-called association with him in the commission of the offence, i. e., in their getting possession simultaneously with Hiralal by means of house-breaking, or, whether it commenced only 20 days after, as alleged by them without such association. It was the duty of the Crown to prove by positive evidence that they were so associated. The evidence given for the prosecution standing by itself falls short of proving that the applicants were associated with Hiralal in the offence. Their admission of the receipt of goods takes us back only to the end of July 1927 so as not to make them his associates on the 7th July. How then are they connected with that particular crime? Ordinarily, they cannot be, unless it is held that the Courts below were right in acting on what co-accused Hiralal who was being tried jointly with them had chosen to say, regarding their being his associates, in his examination

(1) A. I. R. 1926 Lah. 528.
(2) [1919] 11 M. L. W. 43=53 I. C. 819=26 M. L. T. 389.
(3) A. I. R. 1921 Lah. 89.
(4) [1918] 22 C. W. N. 597=46 I. C. 158=19 Cr. L. J. 702.
(5) [1917] 21 C. W. N. 1152=43 I. C. 241=19 Cr. L. J. 81.

as an accused person. This brings in the question of the admissibility of such statement under section 30, Evidence Act.

The Sessions Judge in paragraph 4 of his judgment has noted that an objection was taken to the legality of the conviction of the appellants before him on the ground that the same was based on Hiralal's statement as an accused person, and that they should not have been convicted on his uncorroborated 'evidence', especially as they had no opportunity to cross-examine Hiralal and that the proper procedure for the Magistrate, if he intended to use Hiralal's 'evidence' against them, was to have held a separate trial of Hiralal and convicted him on his plea of guilty and then put him in the witness-box as a witness so as to enable them to test his veracity. The Sessions Judge, however, disposed of these objections by his following observations:

I do not, however, consider that this argument is of much use. In the present case, there is ample evidence to prove that the property was stolen from Dallu, and that it was found with the accused. The accused also having failed satisfactorily to account for their possession, it only remained to determine whether they were the thieves or whether they were guilty receivers of stolen property, and *it is only to decide which of these the accused were that the evidence of Hiralal, the accomplice, is of use.*

(I underline (here italicized) the words which are important for the purpose of Ss. 30 and 133, Evidence Act).

Section 30, Evidence Act, permits such a statement by an accused person who implicates himself to be used against other persons, whom he implicates along with himself. The Magistrate is perfectly correct in convicting them under S. 457, I. P. C., on the statement of Hiralal.

As the words underlined (italicized) by me in his observations quoted above show, the Sessions Judge treated Hiralal as an "accomplice" and his statement as "evidence". Apparently the learned pleader, who argued the appeals before him, failed to draw his attention to the distinction made by Stevens, J. C., in *Empress* v. *Govinda* (6) and *Empress* v. *Karimbax* (7) between the confession of a co-accused and the testimony of an accomplice. The following observations in the latter case are very instructive on the point:

Section 27, Evidence Act, has no application to the case; but as I have said, S. 30 does apply. At the same time the confession of a co-accused used under the provisions of the latter section stands on a perfectly different footing from the testimony of an accomplice. The latter is substantive evidence in the strict sense of the term; a conviction may legally proceed upon it without corroboration, though the general practice of the Courts is to require corroboration, because a presumption naturally arises against such evidence from its tainted character. Whether corroborated or uncorroborated it may form the basis of a conviction. It is entirely otherwise with the confession of a co-accused. It is not in itself substantive evidence and we may not start with it as a basis, proceeding to inquire how far it is corroborated. It can be used only in a subsidiary manner in connexion with the substantive evidence adduced in the case. We have thus to have recourse in the first instance to the evidence of the witnesses.

In the words of Stevens, J. C., in *Empress* v. *Govinda* (6). I may say that the conviction of the applicants

is bad in law. The Magistrate is not correct in regarding a confession of an accused person implicating a co-accused under S. 30, Evidence Act, as the same thing as 'the testimony of an accomplice' which is referred to in S. 133 of the Act. It is plain from the words of the latter section that it contemplates that the accomplice shall be examined as a witness. This being so, the provision that 'a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice' has no application to the case of an uncorroborated confession taken into consideration as against a co-accused jointly tried with the confessing accused under S. 30. All the chartered High Courts in India have held that an accused person cannot be convicted solely on such a confession made by a co-accused.

Really speaking the statement of Hiralal was evidence against himself but not having been examined as a witness his statement cannot be called 'evidence' strictly so-called within the meaning of the definition of that word as given in S. 3, Evidence Act. The Sessions Judge was, therefore, not right in treating it as 'evidence' against the applicants, but he has relied upon S. 30, Evidence Act as permitting such a statement to be used against the other co-accused. S. 30 does not say that the statement is 'evidence', but all that it says is that a confession, when made by one of several persons tried jointly for the same offence, is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such a confession. The expression 'may take into consideration' seems to be very guarded. It points to the necessity of there being other evidence on record to which this statement can lend assurance.

(6) [1896] 9 C. P. L. R. 35 Cr.
(7) [1896] 9 C. P. L. R. 37 Cr.

The obvious intention of the Legislature in so saying was that when as against such person there is evidence tending to his conviction the truth or completeness of this evidence being the matter in question the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him should be taken into consideration as bearing upon the truth of sufficiency of such evidence. Per Jackson., in *Queen* v. *Chunder Bhuttacharji* (8).

This shows that the statement cannot alone form the basis of a conviction but that it could only be taken into consideration along with other evidence in the case: cf. *Emperor* v. *Lalit Mohan Chuckerbutty* (9).

If 'substantive evidence' is wanting as is the case here, it necessarily follows that the convictions of the applicants become based solely on the confession of a co-accused and as such on no evidence and, therefore, bad in law. I do not agree with the District Magistrate in thinking that the convictions are not based solely on the statement of Hiralal. The applicants were prosecuted for an offence under S. 457, I. P. C., and not as receivers of stolen property. Consequently on the point of their participation in the crime the prosecution was bound to adduce substantive evidence and ask the Magistrate to take the confession of the co-accused into consideration only in a subsidiary manner in connexion with such evidence as pointed out in *Empress* v. *Karimbax* (7). As such substantive evidence is wanting in the case the conviction based on the confession of Hiralal is bad in law and must be set aside. The applications for revision are allowed; the applicants are ordered to be set at liberty at once.

N.K. *Conviction set aside.*

(8) 24 W. R. Cr. 42.
(9) [1911] 38 Cal. 559 (583)=10 I. C. 582=15 C. W. N. 593.

A. I. R. 1928 Nagpur 216

GULAM MOHIUDDIN, A. J. C.

Punjaji—Plaintiff—Appellant.

v.

Kadoo—Defendant—Respondent.

Second Appeal No 399-B of 1926, Decided on 20th February 1928, from decision of the Addl. District Judge, Buldana, D/- 30th September 1926, in Civil Appeal No. 32 of 1926.

Registration Act, S. 17 (2), Expl. (as amended by Act 2 of 1927)—It has retrospective effect.

The words of the Explanation "Or ever to have required registration" makes it quite clear that Act 2 of 1927 does apply even to a document dated prior to 8th February 1927.

[P 216 C 2]

W. B. Pendharkar—for Appellant.
G. C. Hatwalne—for Respondent.

Judgment.—The lower appellate Court decided this suit on a point of law, in accordance with the principle laid down by their Lordships of the Privy Council in *Dayal Singh* v. *Indar Singh*, appeal No. 49 of 1924, (53 *I. A.* 214), in which it was held that the effect of sub-S. (6) (b), S. 55, T. P. Act 1882 is that a purchaser of land who has paid earnest money cannot sue for specific performance of the contract, unless the contract has been registered. As this ruling was inconsistent with the practice prevailing in India, the Indian Registration (Amendment) Act, 1927 (Act 2 of 1927), was passed, which came into force from 18th February 1927. By this Act, there has been added to S. 17, sub-S. (2). Registration Act 1908, the following explanation.

Explanation.—A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest-money or of the whole or any part of the purchase money.

It was argued by the learned pleader for the respondent that Act 2 of 1927 is a substantial amendment of the Registration Act, and cannot have a retrospective effect, and cannot apply to suits decided before 18th February 1927. The words of the Explanation "or ever to have required registration" makes this point quite clear, and Act 2 of 1927 does apply to the document dated 8th May 1922, which is a document of the description given in the Explanation, and did not require to be registered.

As the appeal was disposed of on a preliminary point, and as the decree passed by the lower appellate Court is now set aside, the case is remanded to the Additional District Judge, Buldana, who will re-admit the appeal in its original number and decide it according to law. The appellant will be granted a certificate for the refund of Court-fees

filed in this Court, and the respondent will pay the appellant's costs incurred in this appeal. Other costs incurred in the suit will depend on the result of the appeal in the lower appellate Court, and on the order which will be passed about it.

R.K. *Case remanded.*

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* A. I. R. 1928 Nagpur 217 (1)

FINDLAY, J. C.

Dayaram and *others*—Accused—Applicants.

v.

Emperor—Non-Applicant.

Misc. Petn. No 98 of 1927, Decided on 23rd January 1928, for transfer of Criminal Case from the file of 2nd Class Mag., Saoner, to some other Court.

* *Criminal P. C., S. 526—Merely Magistrate expressing, in previous case, opinion adverse to accused does not justify transfer.*

The mere fact that the Magistrate has in a cross case expressed an opinion adverse to the accused is not necessarily a sufficient ground to transfer the case. [P 217 C 1]

G. R. Pradhan—for Applicants.

Order.—This is an application for transfer of Criminal Case No. 45 of 1927 from the file of the Second Class Magistrate, Saoner, to some other Court. The ground for the application is that, in a cross-case already decided by the same Magistrate, he has expressed an opinion that the present applicants were the aggressors in the alleged riot and that the applicant 1 was largely responsible therefor. I am asked, on the authority of *Rangasami Goundan* v. *Emperor* (1) to transfer the case to another Court.

For my own part, I do not think that the opinion expressed in the cross-case, on evidence judicially recorded, is ipso facto a sufficient ground for transfer. This view has been followed in many reported cases of *Asimaddi* v. *Govinda Baiday* (2), *Emperor* v. *Hargobind* (3) and *Rajani Kanta Dutt* v. *Emperor* (4). The question I am concerned with is, in reality, one of principle, viz., is the mere fact that the Magistrate has in a previous case expressed an opinion adverse to to the applicants or any of them sufficient to raise a reasonable apprehension in their minds that they will not have a fair trial. It is, no doubt, difficult to determine where the line should be drawn in a case like the present, but on the allegations in the application, I am not satisfied that sufficient and reasonable ground for the said apprehension has been made out. The Magistrate has still to try the present case and he must avoid being influenced by any impression he may have formed in the previous case. He must deal with the present case on its own merits and independently of the evidence produced in the previous case. or of his decision therein. I can see no reason to suppose that the Magistrate will not act accordingly and, in the circumstances, I see no reason to transfer the case. The application is dismissed without notice to the Crown.

D.D. *Application dimissed.*

(1) [1907] 30 Mad. 283=2 M. L. T. 89.
(2) [1897] 1 C. W. N. 426.
(3) [1911] 33 All. 583=12 I. C. 652=12 Cr. L. J. 564.
(4) [1909] 36 Cal. 904=3 I. C. 88=10 Cr. L. J. 244.

A. I. R. 1928 Nagpur 217 (2)

FINDLAY, J. C.

Mt. Vidiabai and *others* — Defendants—Appellants.

v.

Idol of Mandir Shri Sheoji of mouza Mohgaon (Seoni)—Plaintiff—Respondent.

First Appeal No. 106 of 1926, Decided on 11th November 1927, from decree of 1st Class Sub-Judge, Seoni, D/- 26th July 1926, in Civil Suit No. 15 of 1926.

Religious Endowment—Idol created owner—It can be represented in litigation by de facto manager.

One *A* gifted property to the idol but remained manager during his life. After his death, four Panchas named in the deed of gift were to manage, but the terms of the deed clearly implied that the deity was to be the owner and the Panchas were to be mere managers.

Held: that a defacto guardian of the idol had power to file a suit on behalf of the idol for declaration that it was entitled to have the property partitioned : *A. I. R.* 1923 *All.* 160, *Rel. on.* [P 218 C 1]

W. R. Puranik—for Appellants.

M. R. Bobde—for Respondent.

Judgment.—The plaintiff, idol of Mandir Shri Sheoji of mouza Mohgaon (Seoni), filed the present suit against the three defendant-appellants for a declaration that it was entitled to have the parti-

tion of the said village effected and to have separate possession of 4 annas share thereof together with all rights appurtenant thereto, and the defendants have now come up to this Court on appeal. The pleadings of the parties and the facts of the case are fully stated in the judgment of the lower Court and I proceed at once to dispose of the questions which have been agitated in this appeal.

On the appeal coming on for hearing, the counsel for the appellants did not press the objection with regard to limitation in view of the fact that the order, dated 26th May 1922, of the Deputy Commissioner (cf. copy P. 4) shows that the latter officer considered he was acting under S. 165, Land Revenue Act.

The first point pressed on behalf of the appellants was that Jairamgir, as the sarbharakar of the temple, could not alone file the present suit. In this connexion, reference has been made to the so-called trust-deed and it is suggested that there must be four Panchas duly appointed before the present suit could be filed by them. I am unable, however, to accede to this proposition. The deed in question is perhaps an irregular and faulty one. Mt. Sonabai gifted the property to the idol but remained manager during her life. Then the four Panchas named were to manage after her death, but the terms of the deed clearly imply that the deity was to be the owner and that the Panchas were to be mere managers. The mutation record of 1912 (P. 2) bears out this view and it is perfectly clear that Jairamgir has been de facto manager on behalf of the idol.

In those circumstances, I am in agreement with the view taken in *Sheo Ramji* v. *Ridhnath Mahadeoji* (1) and am of opinion that Jairamgir had power to file the present suit in the form it was filed. There was no distinct provision in the deed constituting the so-called trust that when any Panch died, another was to be appointed in his place. Even if the Panchas were to be given the position of trustees, which is extremely doubtful in view of the terms of the deed S. 76, Trusts Act, would be a sufficient answer to the appellants' allegation on appeal in this connexion. The trust-deed does not lay down that, if any of the trustees die, the others shall be incapable of acting until a fresh trustee is appointed. On the contrary, the only provision in this connexion laid down therein is that, if all the Panchas are absent (or presumably dead), the existing King should take over the management and make proper arrangements. The first contention urged on appeal, therefore, fails.

The next contention urged is that Sonabai had owned a 5 anna 4 pie share of the village and had gifted the 4 anna share without khudkasht to the temple and that the remaining 1-anna 4-pie share with khudkasht had been given to Parsadgir and has now fallen into the share of the present defendant-appellants. In other words, it is argued (cf. the jamabandis of D. 3, D 4 and D. 5) that whatever khudkasht Sonabai had at the time of the gift to the temple did not pass thereto, it being admitted at the same time that, if any khudkasht land was subsequently created in respect of the 4- anna share that would pass therewith.

As regards the *sir* land, similarly it is urged that the plaintiff-respondent was not entitled to claim partition with respect to any *sir* lands, as these exclusively belonged to the defendants. In the absence of any distinct pleading or proof that there has been a partition of *sir* and khudkasht lands and that these are in the exclusive possession of the defendant-appellants, I do not think this contention can succeed. Even the defendants' witnesses (cf. the evidence of D. W. 1, Madangopal) professed ignorance as to whether there had been any partition of *sir* and khudkasht lands, while Laxmichand (D. W. 2) definitely said that there had been none. This question, therefore, seems to me to be essentially one for the Revenue Officer to determine in the course of the partition: cf. Ss. 173, and 175, Land Revenue Act. It may conceivably be found that there is no *sir* and khudkasht land appurtenant to the share, but prima facie, on the record, as it stands, the partitioning officer must have power to determine whether this is so or not. The judgment of the lower Court is somewhat ambiguous in its para. 7 on this point because in one part thereof, it refers to the fact of there being no bar to the division of the proprietary rights in the *sir* land appurtenant to the 4-anna share, while, in a latter part, almost contradictory statements are made as to whether or not plaintiff is entitled to cultivating rights in *sir*-

(1) A. I. R. 1923 All. 160=45 All. 319.

The decree as given in the terms it is, viz.

Plaintiff is entitled to have the partition of the entire village effected and to have separate possession over its 4- annas share along with *sir* and khudkasht land appurtenant to that share,

is perhaps a faulty one in that it gives rise to the assumption that there is *sir* and khudkasht land appurtenant to the share in question. Personally, I think this question must be left an open one for the partitioning officer to determine and it would be premature for the civil Court to determine it at this stage. Any misunderstanding, which might arise in this connexion, will be obviated if the words " if any " are inserted between the words " land " and " appurtenant " in the passage from the decree just quoted. This modification is perhaps unnecessary, but anyhow it is a case of erring on the side of safety.

I accordingly order that the decree be amended accordingly by the addition of words given above. To all intents and purposes, the present appeal has, however, failed and the appellants must bear the respondent's costs therein. Costs will be borne in the lower Court as already ordered.

N.K. *Appeal dismissed.*

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* A. I. R. 1928 Nagpur 219

FINDLAY, J. C.

Seth Balkishan—Accused—Applicant.

v.

Emperor—Non-Applicant.

Criminal Revn. No. 383 of 1927, Decided on 2nd March 1928, from order of Sess. Judge, Nagpur, D/- 17th November 1927, in Criminal Revn. No. 41 of 1927.

* (*a*) *Arms Act, S. 19—Condition of license being not to carry arms in religious procession or public assemblage—Marriage procession is neither religious procession nor public assemblage within condition of the license—Words.*

A licensee was granted a license for gun on certain conditions one of which was " licensee shall not go armed otherwise than in good faith for the purpose of sport, protection, display and save where he is specially authorized in this behalf by the District Magistrate, he shall not take any such arms to a fair, religious processsion or other public assemblage." The licensee was convicted under S. 19, Arms Act, in respect of his having gone armed with his gun in a marriage procession.

Held: that a marriage procession neither comes necessarily under the category of a religious procession nor of a public assemblage within the condition and therefore no special permission of the District Magistrate was required for the carrying of arms in such a marriage procession. [P 220 C 1]

* (*b*) *Arms Act—Construction—Interpretation of statutes.*

A penal enactment like the Arms Act must be construed in favour of the individual person where any doubt exists. [P 220 C 1]

P. C. Dutt—for Applicant.

G. P. Dick—for the Crown.

Order.—The present applicant Seth Balkishan possessed a gun license in Form No. 16. He was prosecuted under S. 19, Arms Act, in respect of his having gone armed with his gun in a marriage procession, and was convicted by the 1st Class Magistrate, Nagpur, being sentenced to a fine of Rs. 10. It would appear that the District Magistrate, Nagpur, had decided in 1925, that permission to carry guns in marriage processions should not in future be ordinarily granted. The Sessions Judge, Nagpur, dismissed the present applicant's appeal, holding that the taking of the gun in the marriage procession was a contravention of condition (4) of the license.

I have heard the counsel for the applicant and the Government Advocate. The condition in question reads as follows:

Licensee . . . . . shall not go armed . . . . otherwise than in good faith for the purpose of sport, protection, display and save where he is specially authorized in this behalf . . . . by the District Magistrate, he shall not take any such arms to a fair, religious procession or other public assemblage.

The only question, therefore, with which I am concerned in this case is whether the marriage procession in which admittedly the applicant was taking part can be described as a religious procession or a public assemblage The learned Government Advocate has urged that a marriage procession will fall both under the term " religious procession " as well as under that of " public assemblage " and it is obvious also that the learned District Magistrate, Nagpur, has been under a similar impression.

As regards the marriage procession being a religious procession I feel considerable doubt as to whether this can properly be termed as such. Doubtless marriage in the case of a Hindu is equally a religious ceremony as that of a marriage in, say, the Church of England, but to hold that the customary procession to

the house of the bridegroom is therefore a religious procession seems to me to be fallacious. It would be almost equally correct were one to hold that a queue of boys or girls being taken from a school formally to service in Church forms a religious procession. I do not think that this is so. Moreover a penal enactment like the Arms Act must be construed in favour of the individual person where any doubt exists. Had the legislature intended to include "marriage procession" in condition (4) I should have expected to find a specific mention thereof in the license. A marriage procession from one point of view is very largely a matter of display and the first two lines of the license cover the use of a gun for the purpose of display. On the whole, therefore, I am inclined to the view that a marriage procession, as ordinarily understood in this country, cannot be held to be necessarily a religious procession.

I have equally no doubt that such a marriage procession cannot be described as a public assemblage. In the first place, only guests, friends, relations or caste fellows of the parties ordinarily join in such an assemblage. The word "public" therefore is a misnomer to apply thereto. Some effort has been made by the learned Government Advocate to argue that the word "assemblage" has been deliberately used in contra-distinction to "assembly" his contention being that assemblage means the coming together or the act of assembling, whereas the assembly means the completed act; in other words, the completed assemblage of individuals together. Webster's International dictionary does not bear out any such distinction. Assemblage may mean the act of assembling or the coming together of various people, but it equally denotes the completed act, i. e., the collection or assembly. Similarly, I think, on the other hand that the word "assembly" while most commonly used in the latter sense of what I have termed the completed act may also mean the act of collecting or coming together. I am, therefore, unable to hold that a marriage procession comes necessarily under the category of a religious procession or of a public assemblage and this being so, I am of opinion that no special permission of the District Magistrate is required for the carrying of arms in such a marriage procession as we are concerned with in the present case. There being thus in my opinion no breach of the license, the conviction and sentence passed on the applicant are set aside and he is acquitted. The fine if paid will be refunded to him.

D.D. *Accused acquitted*

A. I. R. 1928 Nagpur 220

PRIDEAUX, A. J. C.

Raja Shanker Pratap Singh—Plaintiff—Appellant.

v.

Motilal—Defendant—Respondent.

Second Appeal No. 110 of 1927, Decided on 9th March 1928, from decree of Addl. Dist. Judge, Narsinghpur, D/- 25th October 1926, in Civil Appeal No. 44 of 1926.

Civil P. C., O. 22, R. 9—Plaintiff dying pending suit—Suit dismissed as parties absent—Fresh suit by successors of plaintiff on the same cause of action is barred—Civil P. C., O. 9, R. 4.

B filed a suit for possession of two fields. *B* died on 28th March 1925, and the suit was dismissed on 23rd April 1925 by an order which stated: "parties absent. Dismissed in default at 3 p. m." Successors in title of *B* brought a fresh suit on the same cause of action. Both the lower Courts held that the former suit automatically abated after the 90 days allowed for *B*'s heirs to appear and that R. 9, O. 22 barred the present suit. Plaintiff appealed.

Held: that the suit was rightly dismissed.

[P 221 C 1]

G. L. Subhedar—for Appellant.

N. G. Bose—for Respondent.

Judgment.—One Raja Bijay Bahadur, the plaintiff's predecessor-in-title, filed Civil Suit No. 555, 1924, against the present defendant for possession of two fields. Raja Bijay Bahadur died on 28th March 1925, and the suit was dismissed on 23rd April 1926 by an order which stated:

> Parties absent. Dismissed in default at 3 p. m.

The plaintiff brought the present case on the same cause of action. The defence was that as the former suit had abated, the present suit was not maintainable under O. 22, R. 9, Civil P C. Both the lower Courts have held that the former suit automatically abated after the 90 days allowed for the Raja's heirs

to appear and that R. 9, O. 22, barred the present suit.

The argument advanced here is ingenious. It is that the former suit having been dismissed under O. 9, R. 3, the present plaintiff is entitled, under R. 4 of the same order, to bring a fresh suit. They could either bring a fresh suit or could apply for an order to set aside the dismissal, and they had chosen the former alternative. Now, O. 9 is headed "appearance of parties and consequence of non-appearance" and it therefore presumes that the parties were alive; while O. 22 deals with the abatement of suits on the death, marriage and insolvency of parties. It seems to me that the lower Courts have correctly applied the law relating to the present case, and I decline to interfere.

The result is that this appeal fails and is dismissed with costs. Appellant will pay the respondent's costs.

R.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 221

PRIDEAUX, A. J. C.

Jugalkishore—Plaintiff—Appellant.

v.

Nago and *another*—Defendants—Respondents.

Second Appeal No. 89 of 1926, Decided on 24th November 1927, from decree of Dist. Judge, Nimar, D/- 26th November 1925, in Civil Appeal No. 67 of 1925.

(a) *C. P. Tenancy Act, S. 12—Transfer from a tenant in another person's patti—Owner of the patti can prove his claim in a civil Court.*

If an owner of an independent patti chooses to accept a surrender or a transfer from a tenant in another person's patti and then gives the land out to another tenant, the owner of the patti is not debarred from presenting his claim in a civil Court. [P 222 C 1]

(b) *Civil P. C., S. 9—Jurisdiction.*

The venue in a particular case is determined by the nature of the claim as brought: 9 *N. L. R.* 54, *Foll.* [P 222 C 1]

W. R. Puranik—for Appellant.

M. R. Pathak—for Respondents.

Judgment.—In this case the plaintiff and defendant 2 were owners of Mouza Raysana jointly, and on the plaintiff's application his share was divided into a separate patti and he became the sole owner of patti No. 4 in the village, the partition coming in force on 1st June 1921. He now sues for possession of field No. 54, contending that defendant 1 Nago has no right to hold the field and that he had taken wrongful possession of the same from August 1923. It was said that Ragho the original tenant of the field was in possession till 30th January 1923.

Defendant 1 contended that he had taken a lease of the field from defendant 2 on 7th April 1923 and that he is entitled to possession on the ground that he was duly made a tenant and could not be evicted. Defendant 2 admitted that he had taken the field in surrender on 31st January 1923 and let it out to defendant 1 on 7th April 1923. It was further contended that the plaintiff was not appointed the lambardar of the patti and that the lease was given by defendant 2 in the ordinary course of management and with the consent of the plaintiff. It was further contended that the remedy was to get the transfer by Ragho set aside by the revenue Court and that the civil Courts had no jurisdiction.

The trial Court found that Ragho surrendered the field on 31st January 1923 and that the deed by which the land was surrendered was a transfer, and further that the plaintiff cannot sue in a civil Court without setting that transfer aside and the suit is not maintainable. The Judge writes:

> In this case the patti of the plaintiff was separated and the plaintiff became the sole owner thereof from 1st June 1921. Thus defendant 2 had no interest in that from 1st June 1921 onwards. Thus the surrender in favour of defendant 2 was a transfer in favour of a stranger and the remady of the landlord for such a transfer made in contravention of S. 12, Tenancy Act, is to go to the revenue Court to get the same set aside and get possession of the field.

The Judge further writes that no suit can lie unless and until the surrender is set aside and no suit for possession can lie in this Court.

On appeal the learned Judge of the lower appellate Court holds that the civil Courts have no jurisdiction in the case and that the suit was rightly dismissed. The consideration for Ragho's surrender or transfer to defendant 2 was said to be arrears of rent amounting to Rs. 40.

Now, it is absolutely clear that defendant 2 had no right to accept a surrender or transfer of the field for arrears of rent, and he is exactly in the same position as an absolute outsider would be. Can it be

seriously contended that, if an outsider resident of another village—chooses to accept a surrender or a transfer from a tenant in another person's patti and then gives the land out to another tenant, the owner of the patti is debarred from pressing his claim in a civil Court? I do not think so. The plaintiff here is the sole landlord, and as to what took place betweeen Ragho and defendant 2 is no concern of his and is void as against him. Further, had the document been executed as a transfer, registration would have been refused and so that registration was obtained by fraud, which vitiates the transaction. After all, the venue in a case is determined by the nature of the claim as brought ; see *Ganpat* v. *Trimbak* (1). In my opinion the civil Courts have a right to try the present suit. I therefore, set aside the decree of both the lower Courts and remand the case to the trial Court for a fresh decision. Costs will abide the result.

N.K. *Case remanded.*

(1) [1913] 9 N. L. R. 54=19 I. C. 759.

A. I. R. 1928 Nagpur 222

FINDLAY, J. C.

Narsinghdas—Applicant.

v.

Damdoolal and *another*—Non-Applicants.

Civil Revn. No. 88 of 1927, Decided on 15th November 1927, against order of Dist. Judge, Nagpur, D/- 21st February 1927, in Misc. Appeal No. 35 of 1926.

(a) *Civil P.C., S.* 115—*Revision does not ordinarily lie in an order refusing a temporary injunction.*

No revision lies against an order refusing a temporary injunction unless non-interference causes an irremedial injury or leads to failure of justice : 15 *N. L. R.* 21, *A. I. R.* 1924 *Nag.* 44 ; *A.I.R.* 1921 *All.* 1, *Foll.*; 33 *All.* 79 ; 41 *Cal.* 436, *Dist.* [P 222 C 2]

(b) *Civil P. C., O.* 39, *R.* 1—*Injunction cannot be granted where object is to avoid suit for possession and consequent Court fees.*

Where the real object underlying the wish of the applicant to obtain a temporary injunction is to avoid having to sue for possession and having to pay Court-fees accordingly injunction cannot be granted. [P 223 C 1]

M. R. Bobde—for Applicant.

R. N. Padhay—for Non-Applicants.

Order.—The facts of this case which has led to the present revision application are so far correctly stated in the application. The order of the first Court refusing to grant a temporary injunction was a summary one, merely rejecting the connected application. The learned District Judge, in the appeal against this order and in the connected order in which he also refused the application for a temporary injunction, has dealt with the case in detail on the merits.

In this Court, it has, first of all, been urged on behalf of the non-applicants that no revision lies against an interlocutory order of the kind in question. In this connexion, the decisions in *Amolaksao* v. *Govindrao* (1) and *Achalsingh* v. *Seth Jiwandas* (2) as well as the majority decision in the Full Bench case of *Buddhu Lal* v. *Mewa Ram* (3) have been relied on, on behalf of the non-applicants, while the applicant, in urging that revision lies, has quoted *Abdullah Khan* v. *Banke Lal* (4) and *Israil* v. *Shamser Rahman* (5) in favour of the opposite view, but, from the principles laid down in the latter Nagpur case quoted, it is perfectly obvious that there is no true analogy between an application for revision of an order rejecting an application to sue as a pauper and an order refusing a temporary injunction like the present one.

It is utterly impossible to postulate of the present case that the interlocutory order in question goes to the root of the case ; it relates merely to an incidental matter connected with the trial of the connected suit. It seems unnecessary, in the circumstances of the present case, to go into the vexed question of what is to be termed the decision of a case within S 115, Civil P. C. That question is the subject of a great diversity of decisions, particularly as between the Allahabad and the Lahore High Courts and the remaining High Courts of India. Even, in the case of the latter High Courts, however, it has again and again been laid down that the High Court will not interfere in revision with interlocutory orders unless its non-interference will cause an irremedial injury or lead

(1) [1919] 15 N. L. R. 21=49 I. C. 34.
(2) A. I. R. 1924 Nag 44=19 N. L. R. 165.
(3) A. I. R. 1921 All. 1=43 All. 564 (F. B.).
(4) [1911] 33 All. 79=7 I. C. 183=7 A. L. J. 932 (F. B).
(5) [1914] 41 Cal. 436=18 C. W. N. 176 = 21 I. C. 861=19 C. L. J. 47.

to a failure of justice. It is impossible to postulate any such premises of the present case. At the most, if the non-applicant 2 is allowed to remain in possession, the applicant may have to alter the nature of his relief and pay some additional Court-fees. Apart from this, however, even if I were of opinion that it was open to this Court to interfere in the case of an order like the present refusing a temporary injunction, I am satisfied on the merits that here there would be no cause for doing so. It is utterly impossible to postulate of the careful and reasoned order of the District Judge that either of the conditions A, B or C laid down in S. 115, Civil P. C., has been fulfilled. It would appear that the real object underlying the wish of the applicant to obtain a temporary injunction is to avoid having to sue for possession and having to pay Court-fees accordingly. As the case at present stands, the present applicant is, under the order passed under O. 21, R. 98, Civil P. C., under an obligation to deliver possession and, until that order is upset in the civil Court, the equities seem to me to be largely in favour of the non-applicants being allowed to hold possession.

Considering the time of the day at which the sale-deed was taken, the explanation offered for the delay, viz., applicant's absence from Nagpur, does not seem to me a satisfactory or an adequate one. The applicant's position is, in my opinion, both from the legal and equitable points of view, a peculiarly weak one in striving to obtain a temporary injunction. Even, therefore, if, on the merits, I had deemed it to be open to this Court to interfere, it would be quite impossible for me to hold that the learned District Judge has not exercised his discretion in a reasonable and equitable manner in refusing to grant a temporary injunction.

I decline, therefore, to interfere and dismiss the application. The applicant must bear the non-applicant's costs irrespective of the result of the connected litigation. I fix Rs. 20 as pleader's fees.

N K. *Application dismissed.*

A. I. R. 1928 Nagpur 223

FINDLAY, J. C. AND PRIDEAUX, A. J. C.

Chotesha and *others*—Defendants 1 to 3—Appellants.

v.

Mt. Maktum Bi and *others*—Plaintiffs and Defendant 4—Respondents.

Second Appeal No. 572 of 1925, Decided on 3rd January 1928, from decree of Dist. Judge, Nagpur D/- 4th September 1925, in Civil Appeal No. 45 of 1925.

(a) *Transfer of Property Act, S. 132—Transfer of mortgage carries with it all the rights and obligations attached to it—Mortgage.*

The transfer of a mortgage carries with it all the rights and obligations attached to it. The assignee of a mortgage is bound to give credit for all moneys received by his assignor, and if he takes a transfer without enquiring from the mortgagor, he does so at his own risk as regards the state of the account. In the cases of assignments or transfers, the transferees or assignees take subject to the state of account existing between the mortgagors and the mortgagees on the dates of the assignments or transfers and no differentiation in this connexion need be made in the case of a usufructuary mortgagee: 40 *Mad.* 683, 28 *W. R.* 128, *Foll.* [P 224 C 2]

(b) *Civil P. C., O. 13, R. 1—Evidence sought to be produced at an abnormally late stage which could have been produced at the proper time should be excluded—Evidence—Admissibility.*

Where an application made for admitting, at an abnormally late stage, evidence which could have been equally well produced at the proper time is vexatious and made with the object of delaying disposal of the suit, such evidence should be excluded: 20 *Cal* 740, *Dist.* [P225 C2]

(c) *Transfer of Property Act—Act is not exhaustive.*

Transfer of Property Act is not exhaustive and does not contain the whole law on the subject of transfer of property. [P 224 C 1]

Facts.—The first six plaintiff-respondents filed the present suit in the Court of the 2nd Subordinate Judge, first class, Nagpur, against the three defendant-appellants and the seventh defendant-respondent under the following circumstances. The suit was one for redemption of a mortgage, dated 1st September 1888, executed by Safdar Hasan Ali in favour of Beharilal Pande for an amount of Rs. 2,500. The plaintiffs claimed to be the successors-in-interest of the original mortgagor, while the defendants were transferees in possession of the mortgaged subjects from the heirs of the original mortgagee. The mortgage in question was a usufructuary one, but possession of the property was allowed to remain with the mortgagor. He fail-

ed to repay the mortgage debt according to the terms of the deed, and the mortgagee filed a suit in 1891 for recovery of the mortgage amount, or in default for possession of the mortgaged property until satisfaction of the debt. Possession was actually obtained in 1892 and the defendants have held the mortgaged subjects ever since. In 1917 an application was made by the plaintiffs to be put in possession of the mortgaged property on the allegation that the decretal amount had been wholly satisfied; this application was dismissed on the ground that their proper remedy was by way of a regular suit.

The District Judge decreed the plaintiffs' claim to possession without payment of any further amount in cash.

Judgment.—(The judgment after stating facts as above proceeded). It is unnecessary here to repeat the various transfers and assignments by which the three defendant-appellants are now in possession of the whole of the mortgaged property. It will suffice to say that defendant-appellant 1 holds 10-annas 6-pies of the property, defendant 2 holds 2-annas 8-pies, and defendant 3 2-annas-10 pies, and that the subjects have been in possession of the defendants from 1901, 1904 and 1905 onwards.

A novel contention has been raised on behalf of the appellants that they can only be held liable to account from the dates on which they entered into possession of the various portions of the mortgaged property, and that the mortgagee, although he now holds no interest whatever in the property, should be held liable to account for profits for the period before the present transferees or assignees entered into possession. It is true that, as was explained by Teunon and Richardson, JJ, in *Shafikul Huq* v. *Krishna* (1) the Transfer of Property Act is not exhaustive and does not contain the whole law on the subject of transfer of property. It has been argued on behalf of the appellants that no special provision exists in the Transfer of Property Act by which, in what has been termed by the pleader for the appellants, a suit for accounts, the parties liable to be impleaded have been specifically laid down. In support of this position we have been referred to certain passages in Fisher's Law of Mortgage, 6th Edn. Paras 1690 and 1707. In the former paragraph it is stated that where the mortgagee has assigned the whole benefit of his security, having previously been in possession, and the mortgagor seeks an account of an overplus alleged to have been received, the mortgagee, notwithstanding his assignment, must be joined with the assignee, in order that he may account for what he received in his time. In the latter paragraph quoted an observation is made that, if redemption is sought after a great length of time, or the dismissal of a former action to redeem, or several assignments, the account against an assignee in possession will be taken only from the time of his purchase prior to which the profits will be set against the interest.

These observations seem to be founded on certain English cases which we have not been able to make available, and in at least one of them the propriety of the decision seems to have been doubted in a later English case. For our own part we can see no reason whatever in the circumstances of the present case for departing from the ordinary principle that the transfer of a mortgage carries with it all the rights and obligations attached to it. In our opinion the assignee of a mortgage is bound to give credit for all moneys received by his assignor, and if he takes a transfer without enquiring from the mortgagor, he does so at his own risk as regards the state of the account. We are in full agreement with the decision of Ayling and Napier, JJ., in *Subramania Ayyar* v. *Subramania Pattar* (2), and are of opinion that, in the cases of assignments or transfers such as we are concerned with here, the transferees or assignees take subject to the state of account existing between the mortgagors and the mortgagees on the dates of the assignments or transfers. We see no reason to make any differentiation in this connexion in the case of a usufructuary mortgage. A party who satisfies such a mortgage obviously becomes a usufructuary mortgagee in place of his assignor and has the right to remain in possession of the property until the debt has been discharged by the usufruct. It follows pari passu that

(1) [1918] 28 C. L. J. 77=47 I. C. 428=23 C. W. N. 284.

(2) [1916] 40 Mad. 683=30 M. L. J. 615=34 I. C. 859=(1916) 1 M. W. N. 351.

such a party is also subject to all the liabilities attaching to the original mortgagee: cf. *Achumbit Singh* v. *Kesho Lall* (3). The first contention urged in appeal, therefore, seems to us to have no basis.

The next point urged on behalf of the appellants is that the lower Court wrongly exercised its discretion in refusing to allow the defendant-appellants to examine certain witnesses at a late stage of the case, as also to produce certain documents and accounts. The history of this bitterly contested suit is clear from the order-sheet of the first Court. The suit was filed on 19th July 1922 and was decided on 23rd December 1924. After the case had been fixed for argument on 9th December 1924, an application was filed on behalf of defendants 1 and 2 praying for the addition of one Kanhaiyalal and his heirs as a party as well as for permission to cite one Ramchandra as witness. A reference, however, to the order-sheet will show that, on 7th August 1924, Ramchandra who had been served with summons was absent, but the pleader for the defendants, although offered a warrant of arrest against him, refused to avail himself of it and preferred to take out a fresh summons against him. He was warned at the time that he would take up this course of action at his own risk, and accordingly, on 2nd December 1924, Ramchandra remained absent. In the circumstances of the case we think the Judge of the first Court was perfectly entitled to exercise the discretion he did, and indeed, in our opinion, he would have exercised a wrong discretion in practically allowing the case to be re-opened at the stage it had reached on 9th December 1924. Even had this not been so, this Court will not in second appeal interfere with a discretion which would appear to have been reasonable, and deliberately exercised by the lower Court. Moreover the learned District Judge has also considered this question and found it against the present defendant-appellants. We are also of opinion in the same connexion that the lower Court's order of 22nd November 1923, in refusing to admit a fresh set of documents which could have been equally produced long before, was a proper and just one in the circumstences of the case. The issues had been framed no less than four months before, and there is every reason to suppose that these repeated applications for admitting at an abnormally late stage evidence which could have been equally well produced at the proper time were little less than vexatious and made with the object of delaying disposal of the suit. The decision in *Moni Lal Bandopadhya* v. *Khiroda Dasi* (4) has no application whatever to the facts of the present case as a glance thereat will show. We see no reason, therefore, to interfere with the finding of the lower appellate Court as regards the evidence in question having been properly excluded.

It has next been urged on behalf of the appellants that, having regard to the terms of Ss. 60 and 62, T. P. Act, the present suit for redemption did not lie. We have been unable to understend how this contention arises in the present case. Had there been a specific provision in the present mortgage, that the amount thereof could only be satisfied out of the usufruct of the property, there might have been substance in the present contention. But the terms of the mortgage-deed, Ex. P. 13, speak for themselves. Under these terms the mortgage money was payable in a fixed period, viz., 12½ years But there was a further provision that the mortgagor was at liberty to pay off the entire mortgage debt at any time he chose within the said period. The contention, therefore, that, if anything is still due on the mortgage, no right of redemption arises, seems to us an utterly untenable one in the circumstances of the present case.

We pass now to the final question raised in this appeal. This concerns the finding of the learned District Judge that, in the peculiar circumstances of this case, the mortgagees in possession having failed to keep or render accounts a presumption arises that the mortgage money has been entirely satisfied both as regards principal and interest. It has correctly enough been pointed out that Stanyon, A. J. C., in First Appeal No. 12 of 1911, (*Seth Jugal Kishore Bania* v. *Mulchand*), laid down that the absence of accounts only raises a presumption that the interest has been satisfied, and this is so far true. We are fully in accord with the principle laid down by the learned A. J. C. in the judgment just quoted. The facts of the present case, however, go very much further. Here, at the time

(3) 28 W. R. 128.

(4) [1893] 20 Cal. 740.

when the mortgage was entered into, the belief of and understanding between the parties was that the mortgage would be satisfied by 12½ years' usufruct of the property. The position now is that the mortgagee or his transferees have been in possession for some 36 years. When this is taken into account with the village paper evidence as to the village paper estimate of profits, a strong probability arises, in the circumstances of the present case, not only that the mortgage money has been satisfied, but that it has been satisfied over and over again. As was pointed out by the Judge of the first Court in para. 10 of his judgment, there was probably in the present case something more than mere neglect and negligence in keeping accounts. There was apparently a studied avoidance of producing them at the proper stage of the case. The defendants' allegation that the village has all through been in practice every year a losing concern is one which is obviously baseless and, were it true, it is difficult to understand why they should have gone on progressively acquiring piece after after piece of the property. We are, therefore, of opinion that in the circumstances of the present case there is on record ample material to justify the presumption drawn by the learned District Judge that the entire mortgage-debt has been satisfied. The present case is not one in which, on the terms of the deed and the actual subsequent history of the transaction, the presumption should be that only the interest was satisfied.

It has been suggested that the mortgagors have lain by and for many years have remained quiescent. The fact, however, remains that they did make the application in 1917 already referred to, and the present suit was instituted within five years from that date It is easy to understand circumstances under which the mortgagors out of possession of their property found it difficult or impossible to bring the suit earlier than that date. It has been suggested on behalf of the defendants that the mortgagors could, at the worst, have filed a suit in forma pauperis, but that course is often neither a convenient nor an acceptable one from the point of view of the plaintiffs concerned. We do not think, therefore, that in the present instance any presumption arises against the present mortgagor-plaintiffs out of the delay in bringing the suit, and the circumstances explained in paras. 2 and 3 of the plaint are also significant in this connexion. We are, therefore, of opinion, for the reasons given above as well as for those stated by the learned District Judge in his judgment in Civil Appeal No. 45 of 1925, that the circumstances of this case are such as to justify the conclusion that the mortgage-debt, both principal and interest, has been fully satisfied.

There can in our opinion be no question but that the defendants or their predecessors-in-title have recovered from the usufruct of the estate much more than was in reality due from the mortgagors, and in no circumstances we think that the plaintiffs have rightly been awarded costs in both the lower Courts. The present appeal is dismissed. The appellants must bear the respondents' costs. Costs in the lower Courts as already ordered.

N.K. *Appeal dismissed.*

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* A. I. R. 1928 Nagpur 226

GULAM MOHIUDDIN, A. J. C.

Gopal Prasad—Appellant.

v.

Bhuneshwar and *others*—Respondents.

Second Appeal No. 17 of 1927, Decided on 3rd December 1927, from order of Dist. Judge, Raipur, D/- 30th September 1926, in Misc. Civil Appeal No. 12 of 1926.

* *Provincial Insolvency Act, S. 24 (1) (a)—Only prima facie proof of inability is sufficient—Present value of debtor's property is to be considered.*

Where a debtor applies for adjudication as insolvent the debtor is only required to furnish such proof of his inability to pay his debts as will satisfy the Court that there are prima facie grounds for believing the same. In dealing with an application for adjudication of insolvency the Court should enquire into the present value of the properties which are available for meeting the liabilities of the debtor and decide whether having regard to proviso (a) to S. 24, the debtor has proved his inability to pay his debts: *A. I. R.* 1923 *Mad.* 585, *Rel. on.* [P 227 C 1]

S. C. Dutt Chowdhry—for Appellant.

S. A. Ghadgay—for Respondents.

Judgment.—Gopal Prasad submitted an application in the Court of the Additional District Judge, Raipur, on 13th Feb. 1926, to be adjudged an insolvent. Bhuneshwar Prasad, one of the creditors to whom Gopal Prasad has to pay about Rs. 728-6-6 and who had got him arrested also, opposed the application alleging

that Gopal Prasad is in a position to pay his debts. The Additional District Judge found that the applicant has 33 acres of land which gives him a profit of about 200 rupees per year, and besides this the applicant has some occupancy land. He has cursorily observed that, "the non-applicant's witnesses prove that he has also some cattle and cash." He has not definitely ascertained as to how many they are and what is their value. The application was rejected and the appeal has also been dismissed.

It seems to me that both the lower Courts have wrongly refused to adjudicate Gopal Prasad an insolvent. At this stage the debtor is only required to furnish such proof as will satisfy the Court that there are prima facie grounds for believing the same and, in my opinion, such proof has been furnished.

The appellant is in possession of some tenancy land, from which an annual income can be derived; but it is not a marketable property, which can be sold at once and from which the debt of Bhuneshwar Prasad can be paid. In dealing with an application for adjudication of insolvency the Court should enquire into the present value of the properties which are available for meeting the liabilities of the debtor and decide whether, having regard to proviso (a) to S. 24, the debtor has proved his inability to pay his debts In *Lakshmi Narayan* v. *Subramania Aiyar* (1), where the admitted facts were that the debtor's debt amounted to over Rs. 40,000 and his assets to over Rs. 51,000 and the properties which constituted his assets were under attachment and presumably would be sold and it was accordingly not possible for the debtor to realize the price himself or to use them for the payment of his debts, it was held, that this was sufficient prima facie proof of inability to pay debts.

In this case Gopal Prasad cannot sell off the property he has got and satisfy his creditors, and, therefore, there are prima facie grounds for thinking that the debtor is unable to pay his debts and must be adjudged an insolvent.

The appeal is, therefore, allowed and the order passed by the lower appellate Court is set aside. I allow Rs. 15 as pleader's fees in this Court. The respondents shall bear their own costs and shall pay the costs of the appellants in all the Courts.

D.D. *Appeal allowed.*

(1) A. I. R. 1923 Mad. 595.

A. I. R. 1928 Nagpur 227

FINDLAY, J. C.

Sadashiv Rao Deshmuk—Defendant—Appellant.

v.

Laxman Sao Kalar—Plaintiff—Respondent.

Second Appeal No. 89 of 1927, Decided on 22nd November 1927.

(a) *Limitation Act, S. 14—Plaintiff's suit for land revenue for five years—Plea of limitation raised in respect of claim for the first three years—Plaintiff losing time in seeking apportionment of land revenue in a civil Court—Plaintiff was held to be entitled to the benefit of S. 14.*

Plaintiff who was already the owner of a 12 annas share bought a four anna share of a certain village except a *sir* field from the defendant. The plaintiff sued defendant claiming proportionate land revenue in respect of the *sir* field for five years from 1920 to 1926 as fixed by the Sub-divisional Officer in 1925. But before that he had sued the defendant in 1923 for contribution in the civil Court but there it was decided that a civil Court had no jurisdiction to make an apportionment. The defendant contended that plaintiff was not entitled to land revenue for the years 1920 to 1923 as the claim was time barred.

Held: that the claim was not time barred and the plaintiff was entitled to get the benefit under S. 14, Limitation Act, as before the new Land Revenue Act came into force, the civil Court had power to make apportionment and the time which the plaintiff spent in pursuing his remedy of apportionment of land revenue in a civil Court must be deducted: 6 *N. L. R.* 27, *A. I. R.* 1925 *Nag.* 419, *Ref.* [P 228 C 2]

(b) *Land Revenue Act, S. 159—Section gives weapon to recover revenue subject to limitation.*

The procedure laid down in S. 159 merely gives the proprietor the actual weapon or instrument by which to recover the land-revenue in question, and it ipso facto follows that, subject to the limitation applicable, such land revenue can be recovered for any of the years which do not fall under the ban of limitation. All that the provision in question does, in short, is to change an inchoate right into a choate one. Had the legislature intended to lay down that the right to recover land revenue was only to come into existence and to have effect as from the date of the Deputy Commissioner's order, or as from any other date, e. g., the beginning of the next agricultural year or the like, it is inconceivable that the legislature would not have framed their intention in language precisely indicating this.

[P 228 C 2, 229 C 1]

M. R. Pathak and *R. D. Mande*—for Appellant.

R. N. Padhay—for Respondent.

Facts.—The plaintiff-respondent formerly owned a 12 annas share of mouza Boregaon of Nagpur Tahsil. The defendant-appellant, who owned the remaining 4 annas share, sold that share except a *sir* field (Khasra No. 23) to the respondent on 3rd March 1919. The respondent is thus the proprietor of the whole of the village except Khasra No. 23 of which the appellant is the proprietor.

The respondent alleged that the appellant was liable to contribute a proportionate share of the land revenue. The claim was in respect of a period of five years.

It was on 2nd November 1925 that the Sub-divisional Officer, Nagpur, fixed a sum of Rs. 30-3-0 as the proportionate share payable by the appellant on account of land revenue in respect of Khasra No. 23 annually. But, before that, the respondent had sued the appellant in the year 1923 for contribution. That litigation came to an end on 27th February 1925 when the Court of the Judicial Commissioner decided that a civil Court had no jurisdiction to make an apportionment. The lower Court has found that, regard being had to the provisions of S. 14, Limitation Act, the period which commenced on 10th January 1923 and ended on 27th February 1926 should be excluded for computing the period of limitation, that having been the period during which the former litigation was going on. The lower Court also found that the claim which was inchoate became choate when the order dated 2nd November 1925 was passed by the Sub-divisional Officer. The whole of the claim, except that in respect of interest, was accordingly decreed.

Judgment.—The plaintiff's suit has succeeded in both the lower Courts, and the defendant has now come up here on second appeal against the decree of land-revenue for five years from 1920 to 1925 in respect of the *sir* plot No. 23 leased by the defendant to the plaintiff.

The facts of the case are fully stated in the judgment of the lower appellate Court and only three points have been raised on appeal. For the first time in this Court it has been urged that the present suit was barred by res judicata in view of the decisions in the previous suits, 32 of 1923 and 273 of 1920. It seems to me that this contention has been raised far too late and cannot properly be considered now. Questions of fact and of law are both involved, and I do not think it would be proper to allow the contention, even it had any merits to succeed now. On the materials before me I feel bound to add that, in my opinion, there is no force whatever in the present plea of res judicata. The parties were suing and being sued in a different capacity in the previous suits; the causes of action were different and the whole nature of the suits was different.

The second point is whether the plaintiff was entitled to the benefit of S. 14, Lim. Act, in respect of his claim for the years 1920 to 1923. For my own part I entertain not the slightest doubt but that the decision of the lower Courts on this point was correct. Before the new Land Revenue Act came into force, the civil Court had power to make apportionment in a case like the present: cf. *Chaturbhuj* v. *Chindirmool* (1). There is not the slightest reason to suppose that the plaintiff would have indulged in unnecessary litigation for the recovery of what was, if not a legal, undoubtedly an equitable claim. The point involved in the suit, which led to the decision of Baker, J. C., in *Laxmanrao* v. *Sadasheo* (2), was a moot one, and the case has been deemed of sufficient importance to be published in the official reports. The present case is one which most obviously falls both within the letter and spirit of S. 14, Lim. Act, and I am in full agreement with the finding of the two lower Courts on this point.

The third contention offered on behalf of the defendant-appellant is an equally futile one. It is urged that the word "thereupon" in S. 159, sub-S. (3), C. P. Land Revenue Act, 1917, means that revenue shall only be payable on the land concerned from the date of the Deputy Commissioner's order, or even from the beginning of the agricultural year next following thereon. I can see no substance whatever in his contention. The right to reimburse the land revenue concerned was already in existence. The procedure laid down in S. 159 merely gives the proprietor the actual weapon or instrument by which to recover the land-revenue in question, and it ipso facto follows that, subject to the limitation

(1) [1910] 6 N.L.R. 27=5 I. C. 705.
(2) A. I. R. 1925 Nag. 419=22 N. L. R. 121.

applicable, such land revenue can be recovered for any of the years which do not fall under the ban of limitation. All that the provision in question does, in short, is to change an inchoate right into a choate one. Had the legislature intended to lay down that the right to recover land revenue was only to come into existence and to have effect as from the date of the Deputy Commissioner's order, or as from any other date, e. g., the beginning of the next agricultural year or the like, it is inconceivable that the legislature would not have framed their intention in language precisely indicating this. Very obviously, once the liability of the defendant to contribute his quotum of land revenue has been affirmed by the revenue Court, the present plaintiff can claim such land revenue for any years which do not fall under the ban of limitation applicable. Holding, as I do, that the time spent by the plaintiff-respondent in pursuing his remedy in the wrong Court must be excluded, the whole of the present plaintiff's claim is within time.

These findings govern the present appeal which is dismissed. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 229

FINDLAY, J. C.

Bapu—Defendant—Appellant.

v.

Santosh Rao—Plaintiff—Respondent.

Second Appeal No. 108 of 1927, Decided on 30th November 1927, from decree of Dist. Judge, Nagpur, D/- 21st December 1926, in Civil Appeal No. 163 of 1926.

C. P. Tenancy Act (1920), *S.* 49 — *Ex-proprietor becoming an occupancy tenant of his sir land held in severalty is tenant of the purchaser of his village share—The latter and not the lambardar can claim rent from him—C. P. Land Revenue Act* (1917), *S.* 188 (2) (*a*).

Where a co-proprietor of a village sells his share to a third party and becomes an occupancy tenant of his *sir* held in severalty, such an ex-proprietor is the tenant of his vendee and the vendee is primarily entitled to claim the rent and not the lambardar. Having regard to the definition of "landlord" and "tenant" in S. 2 (7) and (11) respectively of the Tenancy Act, this conclusion is inevitable: *A. I. R.* 1928 *Nag.* 39 (1), *Foll.*

Section 188 (2) (a), Land Revenue Act, does not exclude the co-sharer concerned in a such case from demanding rent from his tenant.

[P 229 C 2]

A. N. Chorghade—for Appellant.

M. R. Bobde—for Respondent.

Judgment.— The plaintiff Santosh Rao, the lambardar malguzar of mouza Pangar Mahal 2, sued the defendant-appellant Babu for rent of his occupancy field. The defendant denied his liability to pay rent to the plaintiff on the ground that the village share in question, including the *sir* field, had been sold to one Vithoba through the civil Court and that the latter was, therefore, the proprietor of the field and he only had the right to demand rent. Apparently it was admitted in the first Court that the *sir* field in question had been previously held in severalty by the defendant who had a proprietary share in the village. The first Court accordingly dismissed the plaintiff's claim. The plaintiff appealed to the Court of the District Judge who decreed the plaintiff's claim on the ground that the present case differed from the facts of *Dhondba* v. *Vishwanath* (1), and was also contrary to the view taken by the Chief Commissioner in a revenue appeal. The District Judge was further of opinion that the matter was settled in any event by S. 188 (2) (a), Land Revenue Act, and he accordingly reversed the judgment of the first Court and decreed the plaintiff's claim. The defendants has now come up here on second appeal.

The decision of the District Judge was given before a Bench of this Court had considered precisely the point at issue in the present one. The Bench in question, *Baribahu* v. *Ganesh Singh* (2), have held that where a co-proprietor of a village sells his share to a third party and becomes an occupancy tenant of his *sir* held in severalty, such an ex-proprietor is the tenant of his vendee and that the vendee is primarily entitled to claim the rent and not the lambardar. Having regard to the definitions of "landlord" and "tenant" in S. 2 (7) and (11) respectively of the Tenancy Act, I think this conclusion is inevitable, S. 188 (2) (a), Land Revenue Act does not, in my opinion, exclude the cosharer concerned in a case like the present from demanding rent from his tenant. The advocate for the respondent has urged that there has been no proof that the *sir* land here was previously held in severalty. That seems

(1) [1902] 15 C. P. L. R. 143.

(2) A; I. R. 1928 Nag. 39.

to have been assumed and admitted by all concerned in the case, and, if the plaintiff's plea in the lower Courts had been otherwise, I should have expected to find a distinct mention thereof. The whole bone of contention in the lower Courts is precisely the point on which the Full Bench decision quoted above has been given, and that decision, in my opinion, applies proprio vigore to the facts of the present case. It follows, therefore, that the payment of rent by the present appellant to his landlord, the purchaser, was a valid one and that the plaintiff's present claim must fail.

The judgment and decree of the lower appellate Court are accordingly reversed and instead a decree will issue dismissing the plaintiff-respondent's suit. The latter must bear the defendant-appellant's costs in all three Courts.

N.K. *Decree reversed.*

A. I. R. 1928 Nagpur 230

KOLHATKAR, A. J. C.

Jagannath—Defendant 5—Applicant.

v.

Radhakisan—Plaintiff—Non-applicant.

Civil Revn. No. 290-B of 1927, Decided on 21st April 1928, from decree of 1st Class Sub-Judge, Morsi, D/- 22nd October 1927, in Civil Suit No. 119 of 1925.

Transfer of Property Act, S. 74 — Subrogation—Decretal debt due to the prior mortgagee paid by the puisne mortgagee under obligation to pay—The latter cannot acquire the rights of the prior mortgagee.

The doctrine of subrogation has no application when a person simply performs his own obligation, and pays off a charge which he has undertaken to satisfy.

Where the puisne mortgagee, at the time of his mortgage had undertaken to pay the amount of prior mortgage but did not actually then pay and the major portion of the amount paid by him under a foreclosure decree obtained by prior mortgagee against mortgagor and puisne mortgagee represented this money which he had undertaken to pay.

Held : that the question of subrogation and the puisne mortgagee stepping in the shoes of the prior one cannot arise: 2 *C.L.J.* 288, *Relied on*: 43 *Cal.* 69; 4 *A. L. J.* 349 ; 41 *All* 372 ; and 27 *All.* 400; *Ref. A. I. R.* 1925 *Nag.* 15, *Dist.*

[P 231 C 2, P 232 C 1]

W. R. Puranik—for Applicant.

A. V. Wazalwar—for Non-applicant.

Order.— The material facts connected with this revision application are briefly as follows: On 15th March 1926, the plaintiff Radhakisan Birbhan—a prior mortgagee—obtained on his mortgage a preliminary decree for foreclosure against the mortgagor, Gangaram Krishnaji, defendant 1, defendant 5, Jagannath Mangiram—a subsequent mortgagee—and one other person viz, defendant 6. These three defendants were required to pay the amount of Rs. 1,711-10-0 due on account of the mortgage-debt and costs of the suit within six months from the date of the decree. The said amount being not paid within the prescribed period, the plaintiff Radhakisan presented an application to the lower Court for making the decree final. It seems that some time after the presentation of this application, defendant 5, Jagannath, satisfied the decree, and then applied for a final decree being made in his favour in the proceedings initiated by the plaintiff's application. His application was refused by the lower Court. It is this order dismissing defendant 5's application for making a final decree in his favour which is now sought to be revised in this Court. It appears from defendant 5's written statement, dated 13th January 1926 filed in the case, prior to the passing of the preliminary decree for foreclosure, that out of Rs. 2,500, the principle amount of the mortgage-deed dated 26th May 1924, executed by defendant 1, in favour of defendant 5, the latter undertook to pay Rs. 1,000 to the plaintiff Radhakisan in satisfaction of his prior mortgage, but that the said amount was not paid by defendant 5 to the prior mortgagee, prior to the passing of the preliminary decree for foreclosure in the present case.

The only question raised in this case is whether defendant 5 —a puisne mortgagee is entitled to subrogation and to have a final decree for foreclosure passed in his favour in the suit instituted by the prior mortgagee, on payment of the latter's mortgage-debt by the former. It is urged on behalf of the applicant Jagannath, that as he has paid off the whole debt due under the prior mortgage of the plaintiff Radhakisan, he is entitled, under S. 74, T. P Act, to all the rights and powers of the prior mortgagee, including the latter's right to have a final decree made in his favour, and reliance is placed on the decision in *Shankar Rao* v. *Ganpat Rao* (1), while, on the other hand, it is maintained on

(1) A. I. R. 1925 Nag.15.

behalf of the non-applicants 2 and 6, that the doctrine of subrogation cannot be availed of by the applicant under the circumstances of the case, especially in view of the fact that the major part of the payment made by the applicant consisted of Rs. 1,000, which he had undertaken to pay to the prior mortgagee on account of the mortgagor, and the amount of interest thereon, from 26th May 1924, the date of the applicant's mortgage, to the date of payment. It seems to me that there is much force in the latter contention and that it must consequently prevail.

It is no doubt true that the applicant Jagannath has paid Rs. 1,711-10-0, the whole amount due under the prior mortgage of the plaintiff, inclusive of the costs of the suit. But a greater part of this amount was paid by him in discharge of an obligation imposed on him by the terms of his mortgage. It is quite manifest from his own admissions involved in his written statement, dated 13th January 1926, that out of Rs. 2,500, the principle amount of his mortgage, he undertook in express terms to pay, on account of the mortgagor, Rs. 1,000 to the prior mortgagee in satisfaction of the latter's mortgage. The rate of interest stipulated in the applicant's mortgage is not set out in his written statement, but if it be taken to be the fair rate of Re. 1 per cent per mensem, interest on Rs. 1,000 from 26th May 1924, the date of the applicant's mortgage, to 12th March 1927, by which date the whole decretal amount was deposited by him in the Court, will work out to nearly Rs. 300. Thus, out of Rs. 1,711-10-0 deposited by the applicant for payment to the prior mortgagee, nearly Rs. 1,300 will represent the amount paid by the former for, and on behalf of the mortgagor, in discharge of the obligation arising out of the applicant's mortgage. It follows, therefore, that the major part of the payment was made by the mortgagor through the applicant Jagannath. It is only the remaining amount of about Rs. 411, which was paid by the applicant Jagannath out of his own pocket. Can it be said in these circumstances that the prior mortgage-debt was fully satisfied by the applicant Jagannath alone? There is not the least doubt that this question will have to be answered in the negative. The primary liability to pay off the debt due under the prior mortgage attached to the mortgagor, and it was only in the event of his failure to satisfy the debt, that the mortgaged property subsequently mortgaged to a puisne mortgagee was made liable for payment of the said debt. It was for the discharge of this primary obligation that the mortgagor agreed with the applicant Jagannath that Rs. 1,000 out of Rs. 2,500, the principal amount of the latter's mortgage, should be paid by the latter on the former account to the prior mortgagee. In this view the payment of Rs. 1,711-10-0, made by the applicant Jagannath, must be deemed to have been made mostly by the mortgagor himself, in so far as the major part of the payment is concerned, and partially by the applicant Jagannath, the puisne mortgagee, in so far as the remaining part of the said payment is concerned.

The applicant Jagannath cannot, therefore, claim to have himself paid off the whole decretal debt due under the prior mortgage when he has paid only a smaller part of the said debt. It is not, therefore, open to him to avail himself of the principle of subrogation underlying S. 74, T. P. Act, and to insist upon a final decree for foreclosure, in default of payment of Rs. 1,711-10-0, being passed in his favour, when the major part of the said amount has been paid by the mortgagor: vide *Har Shyam Chowdhary* v. *Shyamlal Sahu* (2), *Baijanath* v. *Murlidhar* (3), *Gulzarilal* v. *Aziz Fatima* (4), and *Tufail Fatma* v. *Bitola* (5). It has been affirmed in *Surjiram Marwari* v. *Barhamdeo Prasad* (6), that the doctrine of subrogation has no application when a person simply performs his own obligation, and pays off a charge which he has undertaken to satisfy. The fact of the major part of the payment being made by the mortgagor differentiates the present case from the aforementioned unreported case of this Court, of *Shankar Rao* v. *Ganpat Rao* (1), in which the whole decretal amount due under the prior mortgage was paid off by the puisne mortgagee from his own pocket. I am, therefore,

(2) [1915] 43 Cal. 69=22 C. L. J. 227=31 I.C. 22=20 C. W. N. 601.
(3) [1907] 4 A. L. J. 349=(1907) A. W. N. 85.
(4) [1919] 41 All. 372=50 I. C. 375=17 A. L. J. 357.
(5) [1904] 27 All, 400=2 A. L. J. 13=(1904) A. W. N. 284.
(6) [1905] 2 C. L. J. 288.

clearly of opinion, in view of the foregoing reasons, that full payment of the decretal debt due to the prior mortgagee having not been made by the puisne mortgagee the question of subrogation and the latter's stepping in the shoes of the former cannot possibly arise. It is consequently unnecessary to enter into the question whether the lower Court should have exercised its discretion in the applicant's favour by the transposition of the applicant's name under O. 1, R. 10, Civil P. C. Nor would it be necessary to deal with the question whether the fact of the preliminary decree in question being drawn up in form No. 3, and not in form No. 6 prescribed in Appendix D to Sch. 1, Civil P. C., would present any difficulty in passing a final decree in favour of the pusine mortgagee paying off a prior mortgage.

The result is that, there being no valid ground for interference, the application for revision is liable to be dismissed. It is, therefore, dismissed with costs. The applicant will pay the costs of the non-applicant and bear his own. Counsel's fee will be Rs. 30.

N.K. *Application dismissed.*

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* A. I. R. 1928 Nagpur 232

HALLIFAX AND MOHIUDDIN, A. J. Cs.

Khushal—Defendant 1—Appellant.

v.

Labhan Rao and *others*—Plaintiffs and Defendant 2—Respondents.

First Appeal No. 41 of 1926, Decided on 29th February 1928, from decision of First Class Sub-Judge, Drug, D/- 30th April 1926, in Civil Suit No. 112 of 1925.

* (a) *Hindu Law — Alienation — Legal necessity has to be proved for a transfer and not for each rupee of the consideration.*

Legal necessity has to be proved for the transfer and not for each rupee of the consideration. The necessity for the transfer can in most cases be established only by proving necessity in respect of the consideration, but ordinarily proof in respect of the greater part of the consideration is quite sufficient : *A. I. R* 1925 *Nag.* 302 ; *A. I. R.* 1927 *P. C.* 37; and *A. I. R.* 1927 *P. C.* 246, *Ref.* [P 235 C 2]

(b) *Contract Act, S. 23 — Sale of a village without reservation of occupancy in the* sir *land which had not been sanctioned by a revenue Court constitutes a void agreement—C. P. Tenancy Act, S. 49.*

Sale of a village without reservation of occupancy rights in the sir land which had not been sanctioned by a revenue officer, constitutes a void agreement. The whole agreement has to be set aside and not one or other of the two parts to which the parties try to give the appearance of separate agreements. The reason for holding such an agreement void is that the subject of the agreement "is of such a nature that, if permitted, it would defeat the provisions" of S. 49, Tenancy Act, completely. [P 236 C 1]

(c) *Practice — It is not the duty of a civil Court to punish offences.*

Where a civil Court held that the defendant ought to be made to suffer for entering into an illegal agreement and breaking the law.

Held : it was not the duty of a civil Court to punish offences. [P 237 C 1]

B. K. Bose, V. Bose and *P. N. Rudra*—for Appellant.

N. G. Bose, D. N. Choudhri and *S. K. Ghosh*—for Respondents.

Judgment.—The failure to notice the obviously preposterous nature of many if not most of the claims made in the civil Courts is perhaps the cause and perhaps the effect of the success of many of them, or perhaps both. In 1923 the father of the two plaintiffs sold their two-thirds share in joint family property, along with his own one-third share, to the defendant Khushal Teli for Rs. 40,000. It was not pretended in the plaint that there was anything wrong with the transaction beyond certain technical flaws in the conveyance, and the plaintiffs' claim, which has partly succeeded, was that, because of those flaws only, the whole of the property, including the share belonging to their father whom they joined as defendant 2, should be returned to them and they should be allowed to keep the Rs. 40,000 Khushal paid them for it. If it were not of almost daily occurrence that similar and even more preposterous claims are allowed to succeed, as this has been in part, it would be amazing that a Court should even consider this claim seriously.

It has been found in the lower Court that plaintiff 1, Babhan Rao Maratha, was born on 18th January 1907 and, therefore, his 18th birthday was on 18th January 1925. The truth of this is doubtful, but the finding is no longer contested. Plaintiff 2 is Babhan Rao's younger brother Lal Saheb, who was born in the year 1920. On 27th February 1918, before Lal Saheb was born, Gulab Rao, for himself and for Labhan Rao, then just 11 years old, executed a mortgage of their ancestral village of Sangli in favour

of one Sudarshan Prasad, as security for the repayment of a sum of Rs. 12,999 with which it was proposed to purchase the village of Kamhli. The village was purchased with that money and is still in the possession of the joint family.

On 20th July 1923, a sale-deed was executed in favour of defendant 1, Khushal Teli of the whole of the village of Sangli, excepting the cultivating rights in the *sir* land, for Rs. 25,000. The deed was executed by Gulab Rao for himself and for his younger son Lal Saheb and by Labhan Rao for himself, though, according to his present statement, he was then only 16½ years of age. Of the Rs. 25,000 paid by Khushal for Sangli, Rs. 21,000 went to pay off Sudarshan Prasad's mortgage on the village.

Three days later the same persons, that is, Gulab Rao for himself and his younger son and Labhan Rao for himself, executed in consideration of Rs. 15,000 a deed of surrender of their occupancy rights in the whole of what had been their *sir* land in Sangli till three days before. This sum of Rs. 15,000 they owed to Khushal as the consideration for a sale-deed of the village of Dandesara executed by him on 20th July along with their sale-deed of Sangli. The real nature of this transaction is, of course, that, without the sanction of a revenue officer, the village of Sangli was sold without reservation of the right to occupy the *sir* land for Rs. 40,000, on which Rs. 36,000 went in paying off Sudarshan Prasad's mortgage and buying the village of Dandesara. It has not been stated that there was any *sir* land in Dandesara, presumably there was none, or else cultivating rights in it were reserved.

On 31st March 1925, less than two years after the sale of Sangli and less than three months after what has been found to be Labhan Rao's 18th birthday, he filed the suit out of which the present appeal arises, for himself and as next friend of his younger brother, against Khushal Teli and his father Gulab Rao. Their claim was that both the sale-deed and the deed of surrender should be set aside and the whole of the property returned to them, and (though this was not expressly stated at the beginning) that they should be allowed to retain the Rs. 40,000, Khushal had paid them for it. How they could claim their father's share in the property against him was also not stated.

In support of this claim a number of obviously false and irrelevant statements were made. It was said that Khushal "fraudulently" described Labhan Rao as a major in the sale-deed and the deed of surrender and compelled him to sign those documents. It is hard to imagine anything more ridiculous, though the finding of the learned Judge of the lower Court on this point is equally impossible. It is that the representation of Labhan Rao as of full age was made by his father, not by him and not even in his presence, but if it was made in his presence he "might not have been aware of his real age" and is, therefore, "not guilty of suppressing any fact by his silence."

There was next the allegation that in 1923, Labhan Rao, aged 16, and Lal Saheb, aged 2 or 3 had already separated from their father. This was followed by the totally irrelevant and contradictory pleas that Gulab Rao was much addicted to opium eating and that he had entered into the transaction of 1918 without consideration. The plaintiffs have not gone to the length of saying that Gulab Rao spent Rs. 13,000 on the purchase of opium, without which the allegation that he was addicted to this vice is no more relevant than one that he wasted most of his time in playing cards without stakes.

But the village on which Gulab Rao did spend the money is still in his possession, and anyhow, if he never got it from Sudarshan Prasad, he could not have spent it on debauchery of any kind. There is no suggestion that the purchase of Kamhli was a bad bargain. Even if it had been it could hardly be called illegal and immoral so as to relieve Gulab Rao's sons of the liability of repaying the money borrowed for it. And if the borrowing was by their father alone for his own evil purposes, or the debt is for any other reason not binding on them, the village belongs to him alone and they have no share in it. In that case, there can be no doubt about his having to repay Rs. 21,000 to Khushal or about the money being recoverable by attachment and sale of the village.

It was finally urged that as the sale of the proprietary rights in Sangli and the surrender of the occupancy rights in what had been *sir* land up to the time of that sale (which is miscalled by the impossible

name of a surrender of *sir* all through the case) were really one single transaction, which they undoubtedly were, and as the latter was "in clear violation of the law," both should .be set aside or at least the surrender should be set aside and the plaintiffs should be given back all the *sir* land. There was again no suggestion of their giving back the Rs. 15,000 or the village of Dandesara if they got back this land, nor does it seem to have been appreciated that if they did get it back without the village it would not be *sir* land but an occupancy holding. Even the decree of the lower Court describes it as *sir*, though it orders that the sale of .the proprietary rights in the village, which of course include those in the *sir* land, is to hold good.

Another of the many obvious points in the case which have escaped notice is that the plaintiffs on their own allegation could not possibly claim more than two-thirds of the village. Indeed, on the only plea put forward in the beginning which approaches relevancy, which was that Labhan Rao was a minor when he executed the two deeds, he could claim only one-third. Apart, however, from the question of the validity under the Tenancy Act of what is called the surrender of the *sir*, the case was tried on the plea never really taken that Gulab Rao had no right to transfer his sons' shares for that consideration, though even that was regarded as covering his one-third share as well. That way of treating the case, to which neither party has objected, happens to be based on a correct view of it, though nobody seems to have realized the fact. That view is that the two documents were really executed by Gulab Rao as manager of the joint Hindu family, and the signature of them by Labhan Rao as well makes no difference either way.

In spite of the correct finding that there was only one transfer, a sale of the village without reservation of the cultivating rights in the *sir* land which had not been sanctioned by a revenue officer, the judgment treats the transaction as the two of which the parties tried to give it the appearance and examines them separately. In regard to the sale of the proprietary rights in the village the findings are as follows: Of the Rs. 25,000 paid to Gulab Rao for the village of Sangli Rs. 21,000 went to satisfy the debt due to Sudarshan Prasad and Rs. 1,000 in repayment to another person who had agreed shortly before to buy the same property for the same price and had paid that sum as earnest-money but had backed out of the bargain. There is no evidence of what became of the remaining Rs 3,000. The sum of Rs. 22,000, therefore, constituted an antecedent debt due by Gulab Rao about which there was no immorality or illegality. The sale of the village cannot, therefore, be set aside, but the purchaser must pay to the plaintiffs the sum of Rs. 3,000 which he had already paid to their father without "legal necessity."

In respect of what is called the surrender of the *sir* land, it is held in the judgment that "it is in clear violation of the law prohibiting sale of *sir* land without proper sanction," because the agreements to sell the village and to surrender the land were made at the same time and are one transaction amounting to a sale of the *sir* land, although the deed of surrender was executed a few days later than the sale-deed; the land must, therefore, be restored to the plaintiffs, and, according to the ruling of a Bench of this Court in *Bhagwat* v. *Anandrao* (1), the defendant Khushal is not entitled to a refund of the Rs. 15,000 he paid for it.

The defendant Khushal Teli has appealed on two points only. He contends first, that of the Rs. 3,000 he has been ordered to "refund" Gulab Rao's share was Rs. 1,000, so that he ought to have been ordered to pay Rs. 2,000 only. The slack use of the entirely inappropriate word "refund" seems to be the primary cause of the inverted way in which the matter has been considered. There could be a refund only by the plaintiffs or Gulab Rao to the defendant Khushal, and what has been ordered is that, in addition to the Rs. 22,000 he has already paid to the plaintiffs and their father jointly and the Rs. 3,000 he has already paid to their father separately for the village, he must pay them another Rs. 3,000. That is preposterous.

The learned Judge seems to have proceeded on a sort of converse of the principle that has long been accepted as sound, that a sale of this kind can be set aside conditionally upon the sellers, or the coparceners, other than the manager of the family, repaying so much of the

(1) A.I.R. 1925 Nag. 302=22 N. L. R. 136.

consideration as was found to be proper; he has maintained the sale conditionally on the buyer paying over again so much of the consideration as was not found to be proper. The illegality of both has been explained by their Lordships of the Privy Council in *Sri Krishan Das* v. *Nathu Ram* (2), and again in *Gauri Shankar* v. *Jiwan Singh* (3). In the former case, however, the application of S. 65, Contract Act, if it does apply to the circumstances, would have nearly the same effect.

As has been said, the question of the authority of Gulab Rao to sell his sons' shares in the village arose in respect of the whole transfer, not separately in respect of either part. It has been considered in respect of the sale of the proprietary rights only, the inclusion in that sale of the right to occupy the *sir* land being set aside as a separate transaction for a reason which does not apply to it separately, but does apply to invalidate the whole of the transaction. But, in respect of the authority of Gulab Rao to make the alienation, it will be sufficient to examine the case of the sale of the proprietary rights separately, because the sale of the occupancy rights is manifestly justifiable on that ground. The family has the benefit of the village of Dandegara, so that the validity of the sale is proved against the plaintiffs to the extent of Rs. 15,000 out of the total consideration of Rs. 40,000, leaving for examination the Rs. 25,000 which was ostensibly paid separately for the proprietary rights.

The findings of the lower Court, on which the decision that the sale was improper in respect of Rs. 3,000, seem wrong both ways. The most impossible is perhaps the inclusion in the sum found to be an antecedent debt due by Gulab Rao of the Rs. 1,000 returned to the man who had previously agreed to buy the village and had paid that amount as earnest-money. That merely converted the Rs. 1,000 from earnest-money paid by him into earnest-money paid by Khushal. As to the remaining Rs. 3,000 there is good evidence of a great deal of it being proper "father's antecedent debts" or being due by the whole family, including a sum of Rs. 400 paid to a cloth merchant for goods previously supplied. But the propriety of the consideration so as to bind the whole family is established beyond doubt in respect of at least the Rs. 441-12-0 of which Rs. 375 went in purchasing the stamp for the sale-deed and Rs. 66-12-0 in getting it registered.

It is also beyond doubt, as it is in most cases of this kind, that the whole family got the benefit of any part of the consideration of which the application is not directly proved. It is inconceivable that Gulab Rao spent it all on himself; it went into the joint family fund and is still there or has been spent on food or clothing or agriculture or the like, to the benefit of the whole family.

But we are not concerned with any question of legal necessity in respect of small parts of the consideration. Though the matter has recently been explained by the Privy Council in the two cases already mentioned, the distorted view is still held in almost all Courts that legal necessity has to be proved, not for the transfer, but for each rupee of the consideration. The necessity for the transfer can in most cases be established only by proving necessity in respect of the consideration, but ordinarily proof in respect, of the greater part of the consideration is quite sufficient. In this case, for instance, if it was necessary for Gulab Rao to find only Rs. 21,000, he could not do it without selling the whole village. Nobody would give him that sum for "fourteen annas" of the village, and, therefore, it was legally necessary for him to sell the whole of it for its proper value in order to raise it.

In the usual way of dealing with this question it is by no means improbable that legal necessity for the transfer would have been held proved in the lower Court if the consideration paid had been only Rs. 22,000, the exact sum Gulab Rao was considered to require, as that could not be called an inadequate price for property worth not more than Rs. 25,000. Payment of the other Rs. 3,000 of the full value of the village surely makes the transaction more, not less, valid.

The proof of legal necessity or benefit is still more complete if we regard the transaction as what it really was, even if we disregard the benefit received by the whole family from that part of the consideration of which the application

(2) A. I. R. 1927 P.C. 37=49 All. 149=54 I. A. 79 (P.C.).
(3) A. I. R. 1927 P. C. 246.

has not been directly proved. Out of a consideration of Rs. 40,000 legal necessity or benefit has been established in respect of over Rs. 36,000, so that the balance for which the buyer has failed to account is less that 10 per cent of the total instead of 15 or 16. It is, however, admitted now that the plaintiffs are not entitled to a "refund" of anything, even if the amount in respect of which legal necessity has been proved was no more than twenty-one thousard out of twenty-five, so that the Rs. 1000 which is all that the defendant Khushal has claimed in appeal, must be given to him, though for reasons different from those on which he claimed it.

The other contention raised in the appeal of the defendant Khushal is that the village of Dandesara, purchased from him with the Rs. 15,000 he paid for the surrender of the occupancy rights in what had been *sir* land, should be returned to him now that the surrender has been found to be void. The surrender of the occupancy rights was not a void agreement at all. (Speaking of a void contract, as is so often done, is a contradiction in terms). It was not in contravention of any law, as was held in the lower Court, because there is no law that forbids the surrender of an occupancy holding by the tenant, even the day after he acquires the tenancy. Taken by itself the surrender was perfectly valid. So also was the sale of the proprietary rights in the village taken by itself.

But the two things combined in one transaction, that is, the sale of a village without reservation of occupancy rights in the *sir* land which has not been sanctioned by a revenue officer, do certainly constitute a void agreement. It is, however, the whole agreement that has to be set aside and not one or other of the two parts to which the parties tried to give the appearance of separate agreements. Further, it is under S. 23, Contract Act, that the whole agreement is void, as was held in the lower Court in respect of the surrender, but the reason is not that it is in contravention or violation of any law, because there is no law directly forbidding such a sale. The reason is that the object of the agreement "is of such a nature that, if permitted, it would defeat the provisions" of S. 49, Tenancy Act, completely.

A fundamental mistake made in the lower Court, which has already been mentioned, is the total disregard of the fact that the plaintiffs could not possibly claim more than two-thirds of the property. It is, however, more convenient to accept that and one or two other wrong views as correct for the further consideration of the case. In that view the relief to which the plaintiffs were entitled was the return of the village, with the *sir* land as *sir* land, but under S. 65, Contract Act only on condition of returning to Khushal all the advantage they had got out of the agreement, that is, Rs. 40,000, or the village of Dandesara and Rs. 25,000. Now the plaintiffs have not asked in appeal for the return of Sangli on this ground at all, but Khushal prays for the return of Dandesara to him. We have then to accept the further mistake of treating the surrender of the occupancy rights as a separate transaction and as void, though it is neither, and to examine the applicability to it in that light of S. 65, Contract Act.

There is undoubtedly a very prevalent idea that the opening words of S. 65, Contract Act, do not refer to what is often called "a contract void ab initio or *nudum pactum ab initio.*" Avoiding the use of a term that contradicts itself and of a language that is not one of the languages of this Court but is not infrequently misused in it, that amounts to saying that an "agreement discovered to be void" does not mean one that was void from the beginning, though it was supposed to be a contract, but one that was a contract in the beginning and subsequently became void. That would make one or other of the alternatives stated at the beginning of the section entirely otiose, as both would mean exactly the same thing. It is difficult to imagine also how an agreement can be discovered to be void, which must mean void from the beginning, unless it was void from the beginning. It is beyond doubt that the agreement mentioned at the beginning of S. 65, Contract Act, is an agreement, that was void from the beginning and never was a contract.

The idea that one side of a void agreement can be set aside, but not the other, arose out of a casual remark outside the case made by their Lordships of the Privy Council in March 1903 in *Mohori Bibee*

v. *Dharmodas* (4) to the effect that S. 65, Contract Act, did not apply to a case in which there was no contract at all. That was, however, corrected by their Lordships in November 1922 in *Harnath Kunwar* v. *Indar Bahadur Singh* (5). It may be mentioned that the application of the remark made by their Lordships in *Mohori Bibee's* case (4) is usually restricted, for no apparent reason, to cases in which only one of the essentials stated in S. 10, Contract Act, that would make the agreement a contract, is lacking, the competency of both parties. Very frequently it is further restricted, for even less reason, to cases of the one kind of incompetency that arises from the minority of one of the parties.

In examining this question it surely ought to be presumed, though it seldom is, that such an obvious violation of the most elementary principles of justice as has occurred in this case could not possibly be sanctioned by any interpretation of any law that ever existed, or was allowed to exist for a day after the discovery that such an interpretation of it was possible, or by any of the maxims that are so frequently accepted as law. That impossible position is, however, quite usually accepted without question, as was done here, and some attempt was even made on behalf of the plaintiffs to support it in this Court.

The arguments put forward are so manifestly unsound, that it would not be worth while to mention them, but for the fact that they are the stock arguments on this question and have so often been accepted. In the first place it was said that the defendant ought to be made to suffer for entering into this illegal agreement and breaking the law. The answer is that it was no offence ; if it were, it is not the duty of a civil Court to punish offences ; a fine of Rs. 15,000 is a monstrously excessive punishment for anything of the sort ; and the effect of imposing it is to give the plaintiffs a reward of Rs. 15,000 for being equally, if not more, guilty of exactly the same thing.

Reference was also made to the maxim, usually stated in Latin, that when both parties have done wrong, the Court will not interfere to restore to either of them any advantage he may have gained over the other. As to that, all that need be said is that the Court has interfered in that way in this case, as is done in most cases of the kind, but on one side only, and has refused to interfere on the other, and if there was any wrong doing of the sort to which that maxim refers it was practically all on the side in favour of which the Court has interfered ; it is surely much less wrong to buy from another man something that he can sell but is forbidden, in his own interest, to sell without permission, than for him to sell it.

The published judgments of this Court in *Mt. Muliabai* v. *Garud* (6), *Bhagwat* v *Anandrao* (1) and *Janardhan* v. *Vishwanath* (7) were also cited on behalf of the plaintiffs. In the first case the question discussed at length presumably arose from the facts of the case, but not from those stated in the judgment. In the second, which was decided by a Bench, no principle or law is stated ; the learned Judges merely said that in circumstances similar to those of the present case they were of opinion that, as the surrender by the plaintiffs of the occupancy rights was absolutely void, they were not bound to repay what they had received for it. In the third case a single Judge followed the ruling in *Mohori Bibee's* case (4) without adverting to the later decision of the Privy Council. But anyhow all three judgments, if they could be regarded as stating the view that S. 65, Contract Act, does not apply to the present case, would be contrary to the judgment of the Privy Council in *Harnath Kunwar* v. *Indar Bahadur Singh* (5), which we are bound to follow in preference to them.

As has been said, the only relief to which the plaintiffs were entitled, on the ground that the sale of the village defeated the provisions of the Tenancy Act, was the restoration to them of the village of Sangli with all the *sir* land in it as *sir* land, but on condition that they paid the defendant Rs 40,000 or paid him Rs 25,000 and restored the village of Dandesara to him. Even of that relief they could not get more than two-thirds. But they have accepted the decree of the lower Court refusing to give them back the village on that ground, and indeed they never asked for it on that ground,

(4) [1903] 30 Cal. 539=30 I. A. 114=7 C. W. N. 441=8 Sar. 374 (P. C.).
(5) A. I. R. 1922 P. C. 403=45 All. 179=50 I. A. 69 (P. C.).
(6) [1920] 16 N. L. R. 149=53 I. C. 65.
(7) A. I. R. 1927 Nag. 116=23 N. L. R. 8.

and it would seem that the other part of the single void agreement could not properly be set aside by itself. The defendant Khushal has, however, accepted the position that the plaintiffs and their father are to get back all the occupancy holding provided they give him back Dandesara. It is probable that if they had seen that they could not have both, they would have preferred the village to the land, even without realizing that it was an occupancy holding and not *sir* land; but up to the end they have refused to allow things to stand as they were, and they cannot be compelled to do so.

For all these reasons the decree of the lower Court will be set aside, and in its place a decree will issue ordering the defendant Khushal to put the plaintiffs in possession as occupancy tenants of the fields in Sangli mentioned in the plaint as *sir* and to pay them Rs. 2,000 and also ordering the plaintiffs and the defendant Gulab Rao to put the defendant Khushal in possession as owner of the village of Dandesara. The decree will also order the plaintiffs to pay the whole of their own and the defendant's costs in both Courts, including a pleader's fee of four hundred rupees in this Court.

N.K. *Decree set aside.*

A. I. R. 1928 Nagpur 238

FINDLAY, J. C.

Dajiba Atmaram and *another*—Plaintiffs—Appellants.

v.

Mahadeo Sadoo and *another*—Defendants—Respondents

Second Appeal No. 229 of 1926, Decided on 13th December 1927, from decree of Addl. Dist. Judge, Nagpur, in S. A. No. 88 of 1925.

Possession—Vacant site.

When plaintiff's title to a vacant plot was not only disputed by Government but was actually taken over formally as nazul to the plaintiff's knowledge:

Held: that the principle, that where a certain land is vacant legal possession is deemed to be with the owner, would not apply : 13 *N. L. R.* 25, *Dist.* [P 238 C 2]

R. N. Padhay—for Appellants.

G. P. Dick—for Respondent 2.

Judgment.—I have heard counsel in this case, but am wholly unable to see any ground for interference. Some stress has been laid on the point that the lower appellate Court did not record a specific finding on whether the plot in suit fell within nazul plot 79 or nazul plot 81. For my own part, I can see not the slightest reason to disturb the finding of fact of the first Court on issues 1, 2 and 3 in this connexion. If the plaintiffs had had any ground to suppose that any portion of the site they claim stood on plot 79, it is utterly impossible to suppose that they would not have moved the Settlement Commissioner for the release of that plot also in 1916 when they were successful in securing the release of plot 81. In the circumstances of the case, it must be presumed that they had full knowledge of the fact that plot 79 was also declared nazul, and there can be no question, in those circumstances, of their not having had ample notice that their title to the vacant plot was not only disputed by Government, but that it had been formally taken over as nazul. The whole case in the plaint was that the site in suit was included in the nazul plot which had been released by the Settlement Commissioner and it was explicitly denied that the site in suit was included in plot 79 : vide para. 5 of plaintiff 1's rejoinder.

Some attempt has been made to suggest in this Court that, even so, the question should now be considered of whether the site in suit or portion thereof was included in plot 79, although this was explicitly denied by the plaintiffs in para. 5 of their plaint. It is needless to say that a volte-face of this description cannot be allowed on second appeal. On plaintiff 1's own admission, as P. W. 5, the house which originally stood on the site disappeared some 60 or 65 years ago and on the evidence on record, the conclusion was inevitable that the appellants have not been in possession within 12 years of the date of institution of the suit. The reason for plaintiffs' father leaving the site, viz., that the locality had come to be occupied by sweepers, makes it all the more probable that there was definite abandonment. If plaintiffs' present position were a correct one, it is inexplicable why they did not apply to the revenue authorities for the release of No. 79 at the time when No. 81 was released in his favour.

The principle laid down in *Radhikadas* v. *Harmohanlal* (1) seems to me to have

(1) [1917] 13 N. L. R. 25=39 I. C. 54.

no application here, where the land was definitely recorded as nazul and where the circumstances show that the appellants must have been aware of the fact and did not contest the question of plot 79 being nazul, but only claimed plot 81. The evidence of the nazul officer leaves no doubt whatever that the site the plaintiffs now claim is included in nazul plot 79, and the plaintiffs have failed utterly to establish either title or possession thereto. The appeal fails and is dismissed. The appellants must bear the respondents' costs. Costs in the lower Courts as already ordered.

N.K./D.D. *Appeal dismissed.*

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* A. I. R. 1928 Nagpur 239

HALLIFAX AND MOHIUDDIN, A. J. Cs.

Raja Hazari and *others*—Defendants—Appellants.

v.

Bhagwandas and *others*—Plaintiffs—Respondents.

First Appeal No. 48 of 1927, Decided on 28th February 1928, from decree of Dist. Judge, Saugor, D/- 16th March 1927, in Civil Suit No. 2 of 1927.

* *Registration Act, Ss. 23 and 24—Several executants signing a document at intervals—Document must be registered within four months of the last execution in respect of all previoue executions whether they are within the four months or not.*

Execution mentioned in S. 23 is the complete execution of the document, and where a document is executed by several persons the section contemplates registration within four months of the last execution in respect of all previous executions, whether they were within the four months or not. S. 24 merely provides a safeguard for the case of a document never executed at all by one or more of the people by whom it was to have been executed, when each execution is good to the extent of the executant's interest in the subject-matter. [P 240 C 1]

Where out of five expected executants of a document four signed at intervals of four months and the fifth refused to sign and could not be compelled to do so:

Held: the last execution would be the fourth and registration would be time barred four months after it, but within those four months it would be within time against the first three executants also. [P 240 C 2]

K. K. Tiwari—for Appellants.

B. K. Bose—for Respondents.

Judgment.—The appellants and one Sambhusaran are members of one family of which appellant 1, Raja Hazari, is the head, and they all agreed to sell jointly to the plaintiffs certain property which they held in common. All of them except Sambhusaran executed the necessary sale-deed on 14th November 1925. On his refusal to execute the deed a suit for specific performance was filed against the whole family, which resulted in a decree ordering that Sambhusaran should execute the sale-deed also and that all of them should get it registered. In execution of this decree Sambhusaran's signature was affixed on 10th November 1926 to the document already signed by the others, and on 6th December 1926, 26 days later, it was presented for registration.

The Sub-Registratar held, in an order which was upheld by the District Registrar in appeal, that, under S. 24, Registration Act, the presentation was time barred against all the executants except Sambhusaran. The document seems to have been registered as against him. The plaintiffs accordingly filed the present suit under S. 77, Registration Act, against the executants other than Sambhusaran, claiming a decree directing the registration of the document. This decree they have been given, and the defendants have appealed against it.

It would be quite possible to hold that the effect of the decree ordering the addition of Sambhusaran's signature to those already on the documents, with the further order that all the executants should get it registered, was that the executants other than Sumbhusaran must be regarded as having executed it again with him, without the unnecessary trouble of affixing their signatures to it again. In that view no question of the meaning of S. 24, Registration Act, would arise. That aspect of the case, however, has not been examined and, as the decision is correct for other reasons, it need not be discussed.

The contention of the appellants as to the effect of Ss. 23 and 24, Registration Act combined, on a document executed by different persons at different times, is that registration of it is time barred against each executant four months after his execution. That is entirely impossible because it involves an amendment of the existing law by the substitution of "must" for "may" in S. 24, which is a matter for the legislature. If it had been intended to allow four months only after each execution, effect could have been given

to that intention by the use of the word "must" in S. 24—though that would be a peculiarly clumsy way of doing it—the simpler and much more probable way would be to add an explanation to S. 23 to the effect that the execution mentioned in it meant each execution when there were several.

It is quite clear that, if S. 24 had been intended to mean that registration was to be valid only against the last executant or those who had executed within the previous four months, its terms would have been mandatory not permissive. That it does not mean anything of the sort is clearer, if possible, from a perusal of S. 26 of the Act; if that is interpreted in the way suggested for S. 24, which must be done if that way is correct, it is entirely nugatory. That interpretation would result in still another absurdity in the case of documents that are of no effect at all, till they are signed by more than one person; it would have to be applied to such documents just as much as to those of which each execution is good to the extent of the executant's interest in the subject-matter, as in the present case.

In the case of such a document, requiring the signatures of two persons before it could be said to be executed at all and signed by one of them more than four months after the other, the result of the suggested interpretation of S. 24 would be that the document must be registered before the second signature, that is before it is really executed at all. That is manifestly impossible, and the further absurdity would arise that, if the document were not registered before complete execution, it could not be effectively registered at all; if registration after the second execution is not good against the first executant, the whole document is without effect, and registration is not good against the second executant either.

It is beyond doubt that the execution mentioned in S. 23 is the complete execution of the document, and the section contemplates registration within four months of the last execution in respect of all previous executions, whether they were within the four months or not. S. 24 merely provides a safeguard for the case of a document never executed at all by one or more of the people by whom it was to have been executed, when each execution is good to the extent of the executant's interest in the subject-matter.

If out of five expected executants of such a document four signed at intervals of four months and the fifth refused to sign and could not be compelled to do so, the last execution would be the fourth and registration would be time barred four months after it; but within those four months it would be within time against the first three executants also. In not taking advantage of the permission given in S. 24 to get their sale-deed registered within four months of its execution by the defendants without Sambhusaran, the plaintiffs ran the risk of failing to compel Sambhusaran to execute it as well, in which case the last execution would have been that of the defendants But, as it is, the last execution is that of Sambhusaran.

It may be mentioned that the defendants' case would be futile even if there were anything in their contention in respect of the meaning of S. 24, Registration Act. If this appeal succeeded the respondents could at once execute the decree for specific performance against them and compel them to execute another sale-deed, in place of the first, and there would be no difficulty about registering that. It would probably be contended for them that the decree did not order them to execute a fresh document, in the same short-sighted way in which it has been contended here, that registration is time barred against them. Probably the decree could be put right by amendment; but, if not, it would be no bar to a fresh suit in which a decree ordering all the present defendants to execute a fresh sale-deed would be inevitable.

The appeal will be dismissed and the appellants will be ordered to pay the whole of the costs in both Courts. The pleader's fee in this Court will be fifty rupees.

N.K. *Appeal dismissed.*

* A. I. R. 1928 Nagpur 241

HALLIFAX AND MOHIUDDIN, A. J. Cs.

Commissioner of Income-tax—Applicant.

v.

Nanhelal—Opposite Party.

Misc. Judicial Reference No. 27 of 1927, Decided on 25th January 1928, made by applicant, D/- 27th April 1927.

* *Income-tax Act, S. 13—Interest due to the assessee but not paid to him—Amount of such interest shown on the credit side for himself—It is not to be treated as income or profit.*

If interest has fallen due to an assessee but has not been paid to him and he shows the amount due on his interest ledger (byaz Khata) on the credit (jama) side for himself according to the mercantile system of accounts which he has adopted, the amount so shown is not to be treated as income, profit or gain under S. 13: *A. I. R.* 1927 *Mad.* 841, *Dist.*

[P 242 C 1]

D. N. Choudhri—for Applicant.

B. K. Bose and *J. Sen*—for Opposite Party.

Order.—The Commissioner of Income-tax referred three questions to this Court under S. 66, Income-tax Act on the application of the assessees. They were stated as follows by the assessees, and sent on by the Commissioner without alteration:

1. Whether interest which has not been actually received or realized by the assessees but which has been merely entered in their account books for the purpose of proper account keeping can be said to be income, profit or gain, which is liable to assessment of income tax.

2. Whether interest which has not been actually received or realized by the assessees but which is merely acknowledged by the debtors to save limitation can be said to be income, profit or gain which is liable to assessment of income-tax.

3. Whether interest which has not been actually received or realized by the assessees but which has been taken into consideration in executing or renewing a bond by the debtors in order to save limitation can be said to be income, profit or gain, which is liable to assessment of income-tax.

The assessees later put in an application for the reference of a fourth question which the Commissioner rejected because it had not been made within the time allowed. That question was stated as follows:

Whether interest which has not been actually received or realized by the assessees but which is included in decretal amount can be said to be income, profit or gain, which is liable to assessment of income-tax.

In his statement of the case, the Commissioner points out that the three questions he submitted for decision are all the same. That is true, and the fourth is also exactly the same but they cannot be said even to contain a question of principle. What they come to is this: If interest has fallen due to an assessee, the fact being established in one of four different ways, and he has entered the amount of it in his account books as due to himself, but has not realized it and may never realize it, can the amount of that interest be called the income, profit or gain of the assessee? The answer is fairly obviously in the negative.

But it is quite clear from the Commissioner's statement of the case and the arguments advanced on his behalf that the question he and the assessees intended to put was this: If interest has fallen due to an assessee but has not been paid to him and he shows the amount due in his interest ledger (byaz khata) on the credit (jame) side for himself, according to the mercantile system of accounts which he has adopted, is the amount so shown to be treated as income, profit or gain under S. 13, Income-tax Act? The Commissioner would answer this question in the affirmative.

That answer is based on a misreading of S. 13 of the Act, and perhaps a greater misunderstanding of the judgment of the High Court of Madras in the *Commissioner of Income-tax Madras* v. *Subramaniam Chettiyar* (1). That judgment was cited in this Court as supporting the proposition that S. 13 of the Act means what it says, which hardly needs support. In that case certain sums of interest which had not been paid in cash were shown in the assessee's books as received, by book-transfer or otherwise, in accordance with the method of accounting regularly followed in those books; the learned Judges naturally held that any sum shown as income or profits in the books must, under S. 13 of the Act, be regarded as income or profits whether it had been received in cash or what is called "constructively received."

But in the present case the sums of interest are not shown as income or profits received in any way, whether in cash or by adjustment of accounts; they are shown as still due, that is to say not yet received and perhaps never to be

(1) A. I. R. 1927 Mad. 841=50 Mad. 765 (F. B)

received. The most that can be said of them is that, they are shown in the accounts as assets, and that not, of the amounts stated, but of so much of them as may be recovered hereafter.

Section 13 merely lays down that sums shown in the accounts as received, whether actually or constructively (and there is little real difference) must be treated as income. It would be to stultify the legislature to suggest that it lays down that sums shown as not received at all must be treated as income. Our answer to the particular question in this case is that the sums shown in the accounts as having fallen due but not received cannot be treated as income. The costs of these proceedings must be paid by the Commissioner of Income-tax. The pleader's fee will be two hundred rupees.

N.K. *Order accordingly.*

A. I. R. 1928 Nagpur 242

KINKHEDE, A. J. C.

Gunwant Parashram Naik — Complainant—Applicant.

v.

Govind Bhau—Accused — Non-applicant.

Criminal Revn. No. 211-B of 1927, Decided on 19th December 1927, against order of Sub-Divisional Magistrate, Akola, D/- 16th August 1927, in Criminal Case No. 20 of 1927.

Criminal P. C., S. 561A—Objectional remarks in lower Court's judgment were deleted without notice under inherent power.

The High Court can expunge suo motu objectionable remarks in the lower Court's judgment in the exercise of its inherent jurisdiction without notice to trying Magistrate or the District Magistrate. [P 242 C 2]

G. G. Hatwalne—for Applicant.

Order.—The object of this revision application was threefold : (a) to obtain an enhancement of the sentence : (b) to alter the charge from S. 355 to 353, I. P. C.: and (c) to expunge certain remarks from the judgment of the trying Magistrate against the complainant on the ground that they are objectionable.

As to the first object : it is conceded that on the authorities, the High Court would not ordinarily exercise its power of enhancement except on the motion of the local Government, so I need not discuss that point. As to object (b) : I fail to see the propriety of it unless it be to enhance the sentence, which I decline to do at the instance of a private complainant. As to object (c) : a very long argument was addressed to me, with a view to show that the accused inserted some words in the endorsement in the visitors book underneath the remarks passed by the complainant as president imputing theft of registers to him. Suffice it to say that the Sessions Judge has rightly held that the whole of the endorsement was there, and the story told by the complainant, that he forgot to draw the attention of the Deputy Inspector, pointed to its existence long before the time, he now says it was inserted in it. The trying Magistrate had no specific need to indulge in those remarks and use the strong language unless it was intended to show that there were extenuating circumstances which showed that the sentence must be very light. The sentence imposed by him was one of imprisonment which offence, however, was altered to one offence only by the appellate Court. This shows that the case did not deserve any serious condemnation of the complainant in order to lessen the magnitude of the guilt of the accused. In the exercise of my jurisdiction under S. 551-A, Criminal P. C., I order that the following remarks do stand deleted from the trial Magistrate's judgment, para. 12.

Paragraph 12 :

The several matters disclosed by the evidence on record do not become the complainant as a President of the School Committee . . . . Several mischievous and misleading statements which he was not able to prove . . . he does not deserve that respect which a gentleman acting as President of a committee . . . can claim.

As I exercise the inherent jurisdiction vested in the High Court, I have not thought fit to issue any notice to the trying Magistrate or the District Magistrate to show cause why the objectionable remarks should not be deleted. I have done so suo motu, as it were, as the record has come up before me.

R.K. *Order accordingly.*

A. I. R. 1928 Nagpur 243 (1)

HALLIFAX AND MOHIUDDIN, A. J. Cs.

Pratab Singh—Plaintiff—Appellant.

v.

Nanhelal and *another* — Defendants—Respondents.

First Appeal No. 7 of 1927, Decided on 22nd February 1928, from decision of Addl. Dist. Judge, Hoshangabad, D/- 11th Nov. 1926, in Civil Suit No. 29 of 1926.

Court-fees Act, S. 7.(iv) (c)— Suit for declaration by a reversioner that a certain holder of property which was about to be sold for a certain sum should be prevented from being sold— Court-fee payable on such a claim is the ad valorem fee on that sum.

Where the plaintiff's case was that he was the next heir to an inalienable estate which the then holder was about to sell for Rs. 40,000 and he prayed for a decree in the form of a declaration that would prevent him from doing so:

Held : that the Court-fee payable for such a claim was the ad valorem fee on that sum.

[P 243 C 2]

S. B. Gokhale and *K. K. Gandhe*— for Appellant.

N. G. Bose and *J. Sen*—for Respondents.

Judgment.—Stripped of all superfluities the plaintiff's case is that he is the next heir to an inalienable estate which the present holder is about to sell for Rs. 40,000 and he prays for a decree, in the form of a declaration, that shall prevent him from doing so. What right he has to prevent the present holder from alienating the estate for the term of his own life is not apparent, nor, if he had the right, does it appear how he could enforce it in a suit to which the present holder is not a party; it is admitted that a lease of the whole estate granted by him for that period would be perfectly valid, and it would seem that the utmost the plaintiff could claim with any hope of success is a declaration that after the death of the present holder the sale will be ineffective against the next heir, whoever he may be. The Court-fee payable on a plaint with such a claim would of course be the fixed fee of ten rupees, as in the many similar suits by reversioners against Hindu widows. But the claim here is much more ; it is that the present holder of the estate shall be prevented from alienating, even for the term of his own life, a claim which that present holder would doubtless support if he were made a party to the suit, as the consideration has already been paid and he is being forced to sell. As the amount for which it is proposed to sell the property is Rs. 40,000 it is beyond doubt that the Court fee payable is the ad valorem fee on that sum. The appeal will accordingly be dismissed and the appellant must pay the costs of both parties. The pleader's fee in this Court will be fifty rupees.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 243 (2)

HALLIFAX, A. J. C.

Kasturchand—Applicant.

v.

Secretary, Municipal Committee, Betul —Non-applicant.

Civil Revn. No. 262 of 1927, Decided on 12th December 1927, reference made by Deputy Commissioner, Betul, D/- 3rd August 1927.

C. P. Municipalities Act, S. 66 (n)— "According to their circumstances and property within those limits" meaning explained.

When the Act speaks of circumstances within certain limits it means circumstances within those limits and not property giving rise to them and circumstances arising out of agricultural property (situated in the same district as the limits mentioned or elsewhere) are in this respect not different from circumstances arising out of other kinds of property.

[P 244 C 2]

Malguzari villages outside the limits of the Municipality cannot be called circumstances within the limits of the Municipality. But words "within those limits" do qualify the "circumstances" and "the circumstances" do not include land revenue payable. [P 244 C 2]

M. B. Niyogi—for Non-applicant.

Order. — Under S. 83 (2) Municipalities Act, the Deputy Commissioner of Betul has referred to this Court a question concerning the principles of the assesment of haisiyat tax on Seth Kasturchand under S. 66 of the Act. The same question is submitted in respect of the assessment on Seth Misrilal (Civil Reference No. 265 of 1927). Each of them lives in the Betul Municipality and owns villages outside the Municipality, but in the Betul District, from which he derives an income.

The question on which the Deputy Commissioner says he has reasonable doubt is nowhere formulated, but it is in respect of the words of Cl. (n) of S. 66 (1), which says that a haisiyat tax can be imposed on residents within the limits of a Municipality "according

to their circumstances and property within those limits." It is stated in the reference that the assessee in each case "says that his malguzari villages are not property within the Municipal limits of Betul, nor can they be called circumstances within those limits" and that "the Municipal Committee on the other hand says that they constitute his circumstances within those limits." The opinion expressed in the reference is that in the phrase under consideration, the words "within those limits" do not qualify the word "circumstances," but only the word "property" and also that "the word 'circumstances' includes land revenue paid by the assessee."

The mention of land-revenue in this last phrase and in other parts of the letter of reference is only a minor instance of the laxity of thought displayed all through the case. In the assessment it was found that the annual income from the villages was a certain sum of money, and that finding has been accepted by everybody. That sum happens to be the same as the land revenue payable on the villages, and indeed that fact was the basis of the finding ; but we are in no way concerned with that.

But the cases themselves and the references in them have arisen out of such deplorably careless and distorted thinking that it can hardly be called thought at all. It has been assumed by everybody, even in the argument of the matter in this Court, that in one particular case, which is not very clearly defined, the word "circumstances" does not mean circumstances at all, but the source of the income which creates those circumstances and is the proper measure of them. The case so excepted seems to be the case of income derived from agriculture in the same district as that in which the Municipality is situated (or perhaps the same province). It is not considered apparently that money received by the assessee in Betul is not a part of his "circumstances" if it is derived from agriculture in the Punjab or in England or from shares in a Mill in Manchester or even in another town of the Betul District.

It is always hard to explain the obvious, and I cannot see that the meaning of the words under discussion could possibly have been put more clearly, but perhaps, the mistake that has been made can be explained in this way : The contention of the assessee, that his malguzari villages outside the limits of the Municipality cannot be called circumstances within those limits, is obviously correct, and that of the Municipality, that they constitute circumstances within those limits, obviously incorrect, villages cannot possibly be called circumstances nor can they constitute circumstances. But ownership of them can gives rise to circumstances, which may exist in them or elsewhere, and we are concerned with the place where the circumstances exist, not with the place where the property out of which they arise is situated. It is of course equally incorrect to say that the words "within those limits" do not qualify the circumstances, or that the circumstances include land revenue payable.

If any further or more specific answer to the reference is required it may be stated as follows : When the Act speaks of circumstances within certain limits it means circumstances within those limits, and not property giving rise to them, and circumstances arising out of agricultural property (situated in the same district as the limits mentioned or elsewhere) are in this respect not different from circumstances arising out of other kinds of property.

It cannot be said that either party is more to blame than the other for the deplorable waste of time and money that has occurred in these futile proceedings. There will, therefore, be no order in respect of the payment of costs.

A.L./R.K. *Reference answered.*

A I. R. 1928 Nagpur 244

PRIDEAUX, A. J. C.

Deorao—Plaintiff—Appellant.

v.

Dhondirao and *others*—Defendants—Respondents.

Second Appeal No. 436-B of 1926, Decided on 20th February 1928, from decree of 2nd Addl. Dist. Judge, Amraoti, D/- 1st October 1926, in Transfer Appeal No. 44 of 1924.

(a) *Evidence Act, S. 70—Admission must be in the proceedings—Admission of execution before the registering officer is not sufficient.*

Section 70 applies only to an admission made in the course of the proceedings in which the

attested document is produced. The presence of an admission of execution in the registration endorsement does not relieve the party propounding the document from compliance with R.68: 13 *N.L.R.*197, *Rel.on.* [P 245 C 2, P 246 C 1]

(*b*) *Evidence Act, S.* 68—*Suit on mortgage—Execution of mortgage admitted but attestation denied—Plaintiff not examining any attesting witness (one being dead, the other's whereabouts not known)—Mortgage was held not proved*: [*cf. Act* 31 *of* 1926].

Mortgagee brought a foreclosure suit against the mortgagor and his purchasers. Mortgagor was ex parte. His purchasers admitted execution and consideration, but denied attestation. The only evidence on behalf of the plaintiff was that the writer and one attesting witness were dead and whereabouts of the other were not known. One witness said that he identified the mortgagor before the registering officer.

Held: that though one of the two attesting witnesses was dead, and the plaintiff deposed that the whereabouts of the other were not known, he did not examine the persons from whom he made the enquiry about the living witness. He had not, therefore, complied with the provisions of S. 68, Evidence Act, which require that one attesting witness at least should be examined to prove execution. [P 246 C 1]

D. W. Kathalay—for Appellant.

A. V. Wazalwar—for Respondents 1 and 2.

Judgment.—In this case the plaintiff claims a foreclosure decree for Rs. 800 against defendants 1 to 3 on a mortgage-deed, dated 8th February 1918, executed by defendant 1. Defendants 2 and 3 are subsequent purchasers on a sale-deed (Ex. 2. D-1), dated 30th March 1918. The plaintiff claims double the principal of his mortgage. The case proceeded ex parte against defendant 1. Defendants 2 and 3 admitted execution of the mortgage for full consideration, but denied its due attestation. They stated that just before the sale defendant 1 paid Rs. 415 to the plaintiff in full satisfaction of the mortgage, but the plaintiff neither passed a receipt nor returned the document. The trial Court found that defendant 1 executed the mortgage (Ex. P-1) for which he was paid Rs. 400 and that the mortgage was duly attested. It found that the repayment of Rs. 415 to the plaintiff had not been established and that Rs. 800 were due on the mortgage.

On appeal the lower appellate Court found that the attestation had not been established. It also held that the mortgage-debt had not been satisfied and that further interest from the date of suit was allowable. A simple money decree for Rs. 800 was passed against defendant 1 which carried interest at 6 per cent. per annum from the date of suit till realization.

On appeal to this Court (Second Appeal No. 51-B of 1925) the case was remanded, it being held that the lower appellate Court had apparently not taken the piece of evidence, given in the Sub-Registrar's endorsement as to the execution of the document against the defendants, into consideration. The lower appellate Court now holds that though one of the two attesting witnesses is dead and the plaintiff deposed that the whereabouts of the other were not known, he did not examine the persons from whom he made the enquiry about the living witness. He has not, therefore, complied with the provisions of S. 68, Evidence Act, which require that one attesting witness at least should be examined to prove execution. The Judge further states:

Even supposing that none of the attesting witnesses are available, the plaintiff, in order to establish the fact of execution of a document required to be attested, ought to prove that the attestation of one attesting witness at least is in his handwriting, and the signature of the person executing the document is in the handwriting of that person. But the plaintiff failed to prove these points also. It is thus clear that he did not comply with the provisions of S. 69.

It was held that the admission in the Sub-Registrar's endorsement was not sufficient to prove execution: the admission must be made in the course of the trial. The lower appellate Court held that the judgment of his predecessor, delivered on 30th October 1924, stands in its entirety.

The plaintiff comes here in appeal. I am referred to *Gangaram* v. *Umai* (1), decided on 28th June 1927, by my brother Kinkhede, A. J. C. In that case he held that, since the passing of the Transfer of Property Amendment Act No. 27 of 1926, the executant's admission of execution to the attesting witnesses and the latter's attestation on the strength of such admission of execution is sufficient. He followed 51 *M. L. J.* 641 (2), which is contrary to the opinion of the Allahabad High Court. (The judgment then quoted Ss. 68 to 71, Evidence Act, and proceeded.) The amendment to S. 3, T. P. Act, added by Act 27 of 1926 gives the present meaning of the word "attesting"; and by Act 10 of 1927, in S. 2, in the definition of the word "attested" after the word "means" the words "and shall be

(1) A. I. R. 1928 Nag. 70.
(2) A. I. R. 1927 Mad. 85.

deemed always to have meant" are inserted. I am referred to *Gobinda Chandra Pal* v. *Pulin Behary Banerji* (3). The execution of the mortgage and receipt of consideration was admitted by defendants 2 and 3, but they specifically denied attestation. The plaintiff, examined as a witness, states that Govinda, the writer, is dead, and that Sheikh Ahmad, one of the attesting witnesses, is also dead. He had enquired about Sadasheo from Kisen, stamp-vendor and Nana, petition-writer. But his whereabouts are not known. One of the attesting witnesses states that he had identified Mahadeo before the registering officer. This is all the evidence for the plaintiff. He has made no attempt to prove the handwriting of the writer or of either of the attesting witnesses. He had to prove that the executant signed in the presence of the attesting witnesses, or to prove their signatures. One of the attesting witnesses was said to be alive at the trial in the lower Court, and the plaintiff was bound either to obtain his appearance or, if he was dead also, he was bound to prove the. signature of at least one of the attesting witnesses.

We have the authority of *Mt. Sarja* v. *Murlidhar* (4) which states that

> the certificate of admission of execution endorsed by the registering officer upon a document registered by him cannot be used as an "admission" of execution within the meaning of S. 70, Evidence Act, 1870. That section applies only to an admission made in the course of the proceedings in which the attested document is produced. The presence of an admission of execution in the registration endorsement does not relieve the party propounding the document from compliance with S. 68, Evidence Act, 1872.

Under the present law it seems to me that the lower Court is right in the conclusion it has come to.

The result is that this appeal fails and is dismissed with costs. The appellant will pay the respondent's costs.

R.K. *Appeal dismissed.*

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(3) A. I. R. 1927 Cal. 102.
(4) [1917] 13 N.L.R. 197=42 I.C. 715.

A. I. R. 1928 Nagpur 246

KINKHEDE, A. J. C.

Ganpat Kadtaji—Defendant 2—Appellant.

v.

Shamlal Bisandas and *others*—Plaintiff and Defendants 1 and 3—Respondents.

Second Appeal No. 90-B of 1927, Decided on 2nd February 1928, from decree of 1st Addl. Dist. Judge, Akola, D/- 29th November 1926, in Civil Appeal No. 13 of 1926.

(a) *Specific Relief Act, S. 27 (b)—Subsequent transferee shall be presumed to have notice of the prior contract of sale.*

The law imputes a notice to the subsequent transferee of the prior contract of sale, so as to prevent him (subsequent transferee) from asserting his rights as against a prior contractee whose rights have germinated in a prior contract of sale. [P 247 C 2]

(b) *Transfer Property Act, S. 95—S contracting to purchase and obtaining decree for specific performance against C—Mortgage by C to A in the meantime—G purchasing subsequent to decree and redeeming the mortgage—S's decree is binding on G subject to proportionate repayment of the mortgage debt by S—T. P. Act, S. 52.*

Plaintiff contracted to purchase a certain field from *C* in 1909, and obtained a decree for specific performance in 1913. In 1910 *C* had mortgaged his property together with the field to one *A*. In 1916 *G* purchased the field and redeemed the same from *A* and resisted plaintiff's right to possession :

Held : that the decree for specific performance was binding on *G* ; but he was entitled to recover the proportionate share of the debt allottable to the field at the date of mortgage with interest. [P 248 C 1]

D. W. Kathale—for Appellant.
G. R. Deo—for Respondent 1.

Judgment.—Defendant Ganpat, whose transfer was affected by the doctrine of lis pendens as against the plaintiff Shamlal, redeemed the prior incumbrance dated 20th April 1910 for Rs. 1,500 by payment of Rs. 1,500 to the mortgagee Anantram Mangalchand of Pipri on 7th March 1917. The plaintiff, who had made a contract of purchase of field No. 8 on 3rd December 1909 with his vendor Chandrabhan, sued for specific performance of that contract of sale and obtained a decree on 12th November 1913 and secured a registered conveyance through Court and tried to enter into possession thereof, but was resisted by the defendant Ganpat. By a chain of transfers Ganpat acquired a title to the said field which originated in a sale made by Chandrabhan on 16th September 1916 in

favour of Nemichand. But the sale being subsequent to the passing of the decree dated 12th November 1913 against him even the sale in favour of defendant Ganpat was invalid and could not affect the rights of the plaintiffs But as the present defendant Ganpat's predecessor-in-title, Nemichand, had satisfied the incumbrance dated 20th April 1910, so far as field No. 8 was concerned by the aforesaid payment of Rs. 1,500 he claimed subrogation and asked that, if he was not entitled to resist plaintiff's right to possession as owner, he should be held entitled to be subrogated to the position of the mortgagee Anantram and be reimbursed with the amount which was paid for freeing field No. 8 from the mortgage incumbrance.

According to the plaintiff, defendant Ganpat was not entitled to be reimbursed with the amount spent by him in redemption as his sale was invalid and his payment was officious or at any rate one made by him in performance of his own undertaking. On the other hand the defendant Ganpat's contention is that the plaintiff is not entitled to oust him from possession as it was never pleaded by him that his transfer was with notice of his prior contract of sale and that, in any case, the price of redemption paid by him, namely, the whole of Rs. 1,500 should be made good to him as a condition precedent to his being ordered to vacate possession in plaintiff's favour. In short, there should be no apportionment or proportionate reduction of the amount payable to him in this suit.

The lower appellate Court held that Rs. 1,500 were paid to the mortgagee for redemption of the mortgage by Nemichand and that taking the proportion of the value of field No. 8 in the same ratio which the entire principal sum of Rs. 1,500 bore to the value of the entire property covered by the mortgage of 1910, the amount of debt allottable to field No. 8 came to Rs. 285-9-0 only. Accordingly the decree for possession was made conditional on payment of Rs. 285-9-0. Both the parties being dissatisfied with the decree as passed have come up in second appeal. I think the plaintiff's appeal must fail and that of defendant Ganpat must partially succeed. I will deal with the defendant Ganpat's appeal first.

Ganpat's predecessor-in-title, Nemichand, acquired no rights as a purchaser as against the plaintiff. It is for the transferee for value to plead and prove that the purchase was without notice of the prior contract of sale. This is clear from S. 27 (61), Sp. Rel. Act. The law will impute notice to the subsequent transferee, of the prior contract of sale, so as to prevent him (subsequent transferee) from asserting his rights as against a prior contractee whose rights have germinated in a prior contract of sale. The transfer to defendant Ganpat's predecessor-in-title cannot, therefore, have any precedence over plaintiff's. The result, therefore, was that so far as the transfer of equity of redemption and the right to possession was concerned they became effectively transferred to plaintiff by virtue of the decree and conveyance enforcing the contract instead of to the defendant Ganpat's predecessor, Nemichand. The title of Nemichand as purchaser, therefore, failing, Ganpat's title also failed and he was rightly held liable to hand over the purchase to plaintiff.

But by virtue of the payment which Nemichand made to Anantram, the mortgage debt so far as it related to field No. 8 was satisfied, and to that extent, Nemichand became clothed with the rights of Anantram, as mortgagee. The question is: Could the defendant set up those rights in answer to the plaintiff's claim. I think, he could do so on the authority of the following rulings :

Syamalarayudu v. *Subbarayudu* (1) ; *Chama Swami* v. *Padala Anandu* (2) ; *Tangya Fala* v. *Trimbak Daga* (3) and *Ramprasad* v. *Jaskaran* (4).

The next question is: what was the price of redemption he should have paid, or in other words should he be reimbursed with the whole of the expenses incurred by him in freeing field No 8 or with only the expenses properly incurred, namely, the proportionate amount of the debt which fell to the share of that field on the same ratio which the whole of the principal sum bore to the value of the whole of the mortgaged property in 1910.

No doubt, the defendant, by getting only field No. 8 freed from the mortgage which comprised other fields also, has conferred a special benefit on the said

(1) [1898] 21 Mad. 143.
(2) [1908] 31 Mad. 430=18 M. L. J. 306.
(3) [1916] 40 Bom. 646=35 I. C. 794=18 Bom. L. R. 700.
(4) A. I. R. 1925 Nag. 73=21 N. L. R. 21.

field and the plaintiff has derived advantage from it. Ordinarily, the rule is that he who wants to retain the benefit must bear the burden also, and, therefore, plaintiff must pay back to defendant-appellant the entire amount paid to the mortgagee. But the persons interested in the properties not so released are not parties to this appeal, and since, as held in *Imam Ali* v. *Baij Nath Ram Sahu* (5), they are not bound by the apportionment which defendant chose to make with Anantram, and it is their right to insist that not more than a proportionate share of the mortgage debt shall be levied upon the properties in their hands, and since it is also clear that plaintiff is not bound by the defendant's apportionment of the debt in a ratio different from the one applicable to such cases, I think, I must hold, in view of the provisions of S. 95, T. P. Act, that plaintiff is liable to repay to defendant only such expenses as could be said to be properly incurred. Any expenses incurred which were in excess of the proper share of the debt could not be treated as properly incurred. I, therefore, hold that plaintiff is liable for the proportionate amount of principal money allottable to field No. 8 at the date of the mortgage, and its subsequent interest down to the date of the satisfaction, i. e., from 1910 to 1917.

The lower appellate Court, however, held plaintiff liable for the principal sum of Rs. 285-9-0 only, and setting off interest against usufruct decreed possession subject to payment of Rs. 285-9-0. In doing so it committed an error of disallowing interest for the period during which the defendant-appellant or his predecessor had not enjoyed profits The interest on Rs. 285-9 0 for such a period subject to the rule of damdupat must be allowed to the extent of only Rs. 285-9-0. The plaintiff was, therefore, liable to make good to defendant-appellant Rs. 285 9-0 + Rs. 285-9-0 + Rs. 571-2-0 out of Rs. 1,500, which the latter had paid to the mortgagee for redeeming field No. 8 and nothing more. I, therefore, allow the appeal of Ganpat to the extent of Rs. 285-9-0 only with proportionate costs. The contesting respondents shall bear their own costs of this appeal.

This finding disposes of the plaintiff's appeal also as he is held liable to make good the aforesaid amount. As a consequence of this, plaintiff's appeal must fail and the same is dismissed with costs.

R.K. *Plaintiff's appeal dismissed.*
Defendant's appeal allowed.

(5) [1906] 33 Cal. 613=3 C. L. J. 576=10 C. W. N. 551.

A. I. R. 1928 Nagpur 248

FINDLAY, J. C.

Tarachand—Plaintiff—Appellant.

v.

Nokhe Singh—Defendant—Respondent.

Second Appeal No. 294 of 1927, Decided on 9th February 1928, from decree of Dist. Judge, Chhindwara, D/- 27th April 1927, in Civil Appeal No. 6 of 1927.

C. P. Tenancy Act (1898), *S.* 70 (5)—*Mortgage property including trees and a well in an ordinary field—Registration of the mortgage is invalid as a whole.*

Where, by a mortgage-deed, a house and crops situated in occupancy and ordinary fields as well as certain trees and a well situated in an ordinary field were hypothecated:

Held: that under S 70, sub-S. (3), the mortgage of the well and trees situated in the ordinary field was invalid and that the whole mortgage-deed was, therefore, void, having been registered in contravention of S. 70, sub-S. (5): 13 *N.L.R.* 165 and 1 *N.L.R.* 112, *Foll.*: *A.I.R.* 1928 *Nag.* 41, *Expl.* and *Dist.* [P 249 C 2]

N. G. Bose and *G. R. Pradhan*—for Appellant.

G. R. Trivedi—for Respondent.

Judgment. — The plaintiff-appellant, Tarachand sued the defendant-respondent, Nokhe Singh on a mortgage-deed, dated 21st August 1917, in the Court of the Subordinate Judge, First Class, Chhindwara. Under the mortgage-deed, a house and crops situated in occupancy and ordinary fields, as well as certain trees and a well situated in an ordinary field No. 153, were hypothecated. Apart from a plea of the satisfaction of the mortgage-debt, with which I am not now concerned, the only other defence raised was that, under S. 70, sub-S. (3), C. P. Tenancy Act, 1898, the mortgage of the well and trees situated in the ordinary field was invalid and that the whole mortgage-deed was, therefore, void, it having been registered in contravention of S. 70, sub-S. (5), Tenancy Act, 1898. In reply to this allegation, the plaintiff in the first Court gave up his claim against the trees and the well, and claimed that the mortgage-deed was otherwise valid. The Subordinate Judge held that, under the decision

in *Nilkant* v. *Ghulya* (1), the defendant was entitled to challenge the mortgage on the grounds stated. He accordingly held that the whole deed was invalid, the personal relief even being barred by time. This latter point as regards the personal relief was admitted in the course of argument in this Court and I am thus only concerned with the question of the validity or invalidity of the mortgage-deed as a whole on the grounds stated.

The plaintiff appealed to the Court of the District Judge, Chhindwara, and he took the same view, e. g., that the mortgage could not be enforced for lack of legal registration. In this Court the appellant has urged, on the strength of the decision in *Narayan* v. *Mahadeo* (2), that it was possible to hypothecate the trees and also the well apart from the ordinary tenancy right contemplated under S. 70, sub-S. (3) of the old Tenancy Act.

It is true that, at the time the learned District Judge delivered the judgment under consideration, the decision in *Narayan* v. *Mahadeo* (2) had not been delivered, much less officially reported, but a perusal of that case will show that the facts thereof were very special. I therein held that the mortgage-deed concerned in that suit implied that the trees were held under a different title from the land and were, unlike the land, capable of being validly mortgaged. In the present case the position is entirely different. The very fact that, on 15th September 1926, the plaintiff in terms gave up his claim against the trees and the well necessarily implied that they were invalidly mortgaged as being an integral part of the ordinary holding. This being so, it seems to me that the mortgage-deed was invalidly registered under the decision reported in *Daji Vithal Dhok* v. *Moreshwar Venkatesh* (3) as well as that in *Nilkant* v. *Ghulya* (1).

I desire to add that in the present case, even apart from the trees, there is a further reason why the mortgage-deed was invalid. The well cannot possibly, in my opinion, be regarded as anything else than an integral part of the field. It is possible that other fields may be irrigated therefrom, but prima facie the primary benefit from the well would, in the normal case, be derived by the fields in which it is situated. The well in this connexion stands on a wholly different position from the trees. It is conceivable that there would not be any detraction from the amenity of the holding by the removal of a tree; there might be even benefit to the holding owing to the sustenance which the tree draws from the ground. The position is precisely the reverse as regards the well, and, from every point of view, therefore, it seems to me that the well must be regarded as an integral part of the holding. As I have already pointed out, even as regards the trees, there was no plea in this case by the plaintiff that they were held on a separate title from the rest of the holding, and the very fact that, in the first Court, the claim to the trees and well was expressly given up, implied an admission to the contrary effect. In those circumstances, on the facts of the present case, it seems to me that the mortgagor here professed to mortgage a portion of the holding as contemplated in S. 70, sub-S. (3) of the old Tenancy Act, and it follows ipso facto that the whole mortgage-deed was bad and was invalidly registered.

These findings govern the appeal which is dismissed. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered,

R.K. *Appeal dismissed.*

(1) [1917] 13 N. L. R. 165=42 I. C. 384.
(2) A. I. R. 1928 Nag. 41=23 N. L. R. 174.
(3) [1905] 1 N. L. R. 112.

A. I. R. 1928 Nagpur 249

FINDLAY, J. C.

Balaji Koshti — Defendant — Appellant.

v.

Rambilas—Plaintiff—Respondent.

Misc. Appeal No. 45 of 1927, Decided on 14th February 1928, from decree of Dist. Judge, Nagpur, D/- 28th September 1927, in Civil Appeal No. 70 of 1927.

C. P. Tenancy Act, S. 6 (2) — Tenant a minor—His mother contracting to sell the field —Notice to landlord and he exercising his right of pre-emption—Plaintiff cannot subsequently recover possession on the ground of want of legal necessity.

Plaintiff's mother, as guardian, entered into an agreement to sell an occupancy field to a third party. In accordance with sub S. (2), S. 6, she gave notice to the lambardar of her intention to sell, who claimed the right to purchase the field in exercise of his pre-emp-

tive title. In the revenue proceeding, the question of valuation alone was contested. The plaintiff brought a suit for possession alleging that there was no legal necessity for his mother to have made the transfer to the third party and the possession of the field by the defendant was illegal and that the plaintiff was entitled to retain possession.

Held : that the statutory right of pre-emption given to the landlord under S. (2) cannot be regarded as an ordinary transfer. That right having been duly exercised, having regard to S. 105 (a) of the Act, the jurisdiction of the civil Court was excluded and it was not open to the plaintiff, to come to Court on the alleged cause of action of want of legal necessity for the intended transfer [P 251 C 1]

M. R. Bobde—for Appellant.

K. P. Vaidya—for Respondent.

Judgment.—A somewhat interesting question of law arises in the present case. The minor plaintiff-respondent brought the present suit against the defendant-appellant Balaji for possession of absolute occupancy field No. 37 in mouza Kinhi (Nagpur) on the following allegations. His estate was being looked after by his mother, Mt. Rukmabai, and she entered into an agreement to sell the field to a third party for Rs. 3,400 on 15th May 1924. In accordance with sub-S. (2), S. 6, Ten. Act, 1920, she gave notice to the defendant of her intention to sell. The defendant claimed the right to purchase the field in exercise of his pre-emptive title. In the revenue proceeding, the question of valuation alone was contested. The plaintiff's case is that there was no legal necessity for his mother to have made the transfer to the third party, Sheoram, and that, therefore, the possession of the field by the defendant is illegal and the plaintiff is entitled to retain possession. The defence was that the plaintiff's remedy, if any, lay under the Tenancy Act ; that the suit was barred under S. (105) thereof ; that the defendant had entered into possession, not by virtue of a transfer but by the enforcement of his statutory right ; and that the suit did not lie. The Subordinate Judge accepted the defendant's contentions and held that the question of legal necessity did not arise and could not arise with regard to the proceedings under S. 6, Ten. Act. The suit was accordingly dismissed.

The plaintiff appealed to the Court of the District Judge, Nagpur, and succeeded in that appeal. As a result, the defendant has come up on appeal to this Court against the remanding judgment of the District Judge, dated 28th September 1927. The District Judge was of opinion that the suit contemplated only the setting aside by a minor of a transaction on the general ground that it was not for his benefit and, in arriving at the decision he did, he relied on a judgment of this Court passed in *Deoram Gujar* v. *Biju Gujar* (1).

Under S. 6, Ten. Act, two classes of cases may arise in this connexion : the first, where the tenant has an intention of transfer ; and the second, where a transfer has been made without reference to the landlord. We are concerned here in the present case with the first class. In my opinion, the judgment of the learned District Judge shows some confusion of thought. There was here no transfer whatever to the third party Sheoram. There was an intention to transfer, and the action taken by the present defendant-appellant followed the statutory course laid down for him under S. 6, sub-S (2), Ten. Act. It is the mere intention to transfer which gives the landlord the right to step in under the provision of law quoted and, in those circumstances, it does not seem to me that, on the facts of the present case, it is open to the plaintiff-respondent to come now to the civil Court and allege that the intended transfer to Sheoram would not have been for legal necessity. In the present case I am of opinion that the revenue Court had an exclusive jurisdiction, having regard to the comprehensive language contained in the preamble to S. 105 and to Cl. (a) thereof : cf. *Fakira* v. *Ramkisan* (2), and *Lalsingh* v. *Waman Rao* (3). The facts of the case decided by me in *Deoram* v. *Mt. Biju* (1) were very different, and I do not think that decision applies proprio vigore to the circumstances of the present case.

There is another reason, moreover, why the present suit could not possibly lie. It was open to the minor plaintiff in the revenue proceedings to offer any plea he liked, viz., that there had been no intention to transfer or that the intended transfer to Sheoram was not in his interests. No such plea was offered ; on the contrary, the jurisdiction of the revenue Court was accepted and only

(1) A. I. R. 1927 Nag. 226.
(2) A. I. R. 1925 Nag. 277=21 N. L. R. 25.
(3) A. I. R. 1926 Nag. 499=22 N. L. R. 114.

the question of valuation was agitated. His very position in that Court was that there was an intention to make a valid transfer and he now indeed seeks to come to this Court on a diametrically opposite position. Some argument has been offered by the pleader for the respondent on the strength of the word "purchase" in sub-S. (2), S. 6, but I do not think that the statutory right of pre-emption given to the landlord under this provision can be regarded as an ordinary transfer. What the law in this connexion lays down in the Tenancy Act is that the malguzar, as the ultimate or superior owner of the village, has, in any case of intended transfer, a statutory right of pre-emption. That right has been duly exercised in the present case, and having regard to S. 105 (a), Ten. Act, it seems to me that the jurisdiction of the civil Court is necessarily excluded. I may add that the Tenancy Act makes no special exception in favour of a minor tenant and that, in my opinion, therefore, it is not open to the plaintiff in the present case to come to Court, as he does, on the alleged cause of action of want of legal necessity for the intended transfer.

I am, of opinion, therefore, that the judgment of the first Court was a correct one and that the present suit did not lie. The judgment of the lower appellate Court is accordingly reversed and that of the first Court is restored. The respondent must bear the appellant's costs in this and the lower appellate Court. I allow Rs. 30 as pleader's fees.

R.K. *Judgment reversed.*

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* A. I. R. 1923 Nagpur 251

HALLIFAX, A. J. C.

Rambhau and *another*—Defendants 1 and 2 Appellants.

v.

Waman Rao and *another*—Plaintiff and Defendant 3—Respondents.

Second Appeal No. 84-B of 1927, Decided on 10th August 1927, against decree of Dist. Judge, Amraoti, dated 11th February 1927, in Civil Appeal No. 119 of 1926.

(a) *Hindu Law—Money lent to manager—Question of enquiry into necessity arises only when no proof of necessity exists—When lender is familiar with all circumstances of the family the liability arises only when necessity is proved.*

Where money is lent to the manager of joint family the question of enquiry into the necessity or of reason to believe in its existence can only arise when there is no proof of its existence or proof that it did not exist; then the lender is covered by proof that he believed it to exist, even if it did not. When the lender is familiar with all the circumstances of the family to which the money is lent and he knows whether the necessity for borrowing arose or not, the only way in which the family could be made liable in such a case would be by proof that the necessity did exist.

[P 251 C 2, P 252 C 1]

* (b) *Hindu Law—Joint family—Money borrowed used for family—Existence of necessity is immaterial.*

When the whole of the money borrowed by manager for the family is spent on it or by it, whether on necessities or luxuries the question of the actual existence of the necessity does not arise. [P 252 C 1]

V. Bose—for Appellants.

Judgment.—It has been found, and it is beyond all possibility of doubt, that Bhaurao was the manager of the joint Hindu family consisting of himself and the appellants and that they knew he was dealing with the plaintiff and everybody else and was borrowing money from the plaintiffs in that capacity. Apart from the false allegation that this was not so, the pleas put forward for them are that there was no necessity for the borrowings, as the family had a sufficient income for its needs, and the plaintiff did not satisfy himself by proper enquiries that there was any such necessity.

In a large number of such cases, if no actual necessity for borrowing is proved, the lender can have had no reason to believe in its existence unless he made enquiries from the borrower at or shortly before the time the loan was made. From this the idea has arisen, and is now very common, that it is necessary to prove in every such case, that the lender formally asked the borrower on each occassion whether the money was really required or not, and he replied that it was and explained how and why. Such an enquiry would ordinarily indicate that there had been no proper enquiry at all. The confusion arises out of substituting "enquiry" for "reasons to believe." The matter in issue is not the enquiry but the belief based on information that could reasonably give rise to it, whether that information was obtained by direct or indirect enquiries or in any other way.

But in the present case the lender was familiar with all the circumstances of the

family to which the money was lent, and he knew whether the necessity for borrowing arose or not. The question of enquiry into the necessity or of reason to believe in its existence can only arise when there is no proof of its existence or proof that it did not exist; then the lender is covered by proof that he believed it to exist, even if it did not. But he cannot possibly prove that here, because, if it did not exist, he was well aware that it did not. The only way in which the family could be made liable in such a case would be by proof that the necessity did exist. As to that it has been found in the lower appellate Court that the family was in chronic need of cash, and I can see no reason for disturbing that finding even if I were allowed to do so.

But even the question of the actual existence of the necessity does not arise. If a person borrows money for me, without my authority and even without my knowledge and though I have plenty of money of my own already, and I take the money from him and spend it myself, I am surely bound to repay it to the lender. That is made clear in more than one section of the Contract Act. Now it is beyond doubt that the whole of the money borrowed by Rambhau for the family was spent on it or by it, whether on necessities or luxuries or even debaucheries. That fact has been practically admitted all through. The only approach to a denial of it is to be found in a pleading in which the word "benefit" appears at the end, though the meaning of the whole plea is clearly that the family did not benefit by the borrowing, not that it did not receive the money. Even if it had been pleaded that the family did not receive the money, there is no evidence to that effect, and the facts that the manager for a long time openly borrowed the money in its name in the same village, of which nearly a half is now admitted to have been spent on the family, is proof that it did.

But even if we accept the impossible suggestion that Bhaurao went on all that time borrowing money openly in his own village in the name of his family, and spent more than half of it on himself. the appellants are little better off. Their actual plea, if any such plea was ever taken, was of course that Bhaurao spent the whole of the money on himself, but it is now admitted that the plaintiff has proved, without the help of the absence of any denial by the appellants, that the family did receive the benefit of a sum of Rs. 2,160, expended on wheatseed, the building of a house, the payment of lease money and the assessment on their land. That leaves Rs. 2,976 shown as borrowed for "cultivation and household expenses" which, according to the appellants, Bhaurao spent on himself and they never saw. But Bhaurao repaid Rs. 2,125, and there is no more evidence of that having come out of family funds than of the Rs. 2,976 having gone into them, so that all that is left of the sum that Bhaurao spent on himself is Rs. 851, and the balance due by the appellants on the account would be Rs. 1,309 instead of the Rs. 2,160, the plaintiff says it is.

The appeal is dismissed without notice to the respondents.

R.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 252

KINKHEDE, A. J. C.

Balkisansingh and *others*—Plaintiffs—Appellants.

v.

Govindsingh—Defendant—Respondent.

First Appeal No. 56 of 1927, Decided on 28th February 1928, against decree of 1st Class Sub-Judge, Bhandara, D/- 16th February 1927, in Civil Suit No. 38 of 1926.

(a) *Specific Relief Act, S. 42—Plaintiff's title admitted after the arising of cause of action—Such admission does not destroy the cause of action but keeps the right of suit alive.*

After a cause of action has arisen, if the plaintiffs' title is admitted by his opponent in clear terms the admission operates to keep their right of suit alive and in time, and cannot destroy the same. A cause of action thus does not disappear by the admission which the plaintiffs' opponent makes, while the right of suit continues in existence [P 253 C.2]

(b) *Record-of-Rights—Order in mutation proceedings per se does not create title—But if accompanied by acts of possession, adverse inference of hostile title may arise.*

Although an order made in mutation proceedings may not per se create any title, but if accompanied or followed by overt acts of possession such an order might give rise to an adverse inference of an assertion of a hostile title: *A.I.R.* 1926 *P. C.* 100, *Rel. on.* [P 253 C 2]

B. K. Bose and *P. N. Rudra*—for Appellants.

P. A. Pandit—for Respondent.

Judgment.—This appeal arises out of a suit brought by the appellants against the respondent for a declaration that they are the owners of the 8 annas malguzari share which was recorded in the mutation register in the name of the respondent during their minority. In short, the suit was for a declaration that defendant-respondent does not own and possess the 8-annas share which stands mutated in his name.

The defendant pleaded that he is entitled to the 8-annas share in the two mouzas and has been rightly recorded as a cosharer, that the suit is not maintainable and that the same is barred by limitation in view of the fact that the Settlement Officer and revenue officers had rejected plaintiffs' application for removal of the defendant's name from the record more than six years prior to suit. The Court below held that the suit was barred by limitation under Art. 120, Lim. Act, and that, even assuming that the suit was within time, it would decline to grant a declaration which would have the effect of cancelling the entry in the settlement record of 1917. The prayer for the amendment of the plaint was also rejected. Hence this appeal.

I think that the lower Court has not properly grasped the object of the present suit. The plaintiffs alleged that they were in possession and enjoyment of the property in suit, but that, ever since the defendant was shown as their sarbarkar during their minority, his name was associated with theirs only as a person looking after the affairs in their interest and on their behalf and not as a co-owner or as an independent owner entitled to hold the property in his own right. In support of this allegation of theirs and with the object of showing that, although their cause of action had arisen long ago the same was either kept in time by reason of the defendant's acknowledgment of plaintiffs' title down to 1922 or that it was a recurring cause of action, they filed a letter dated 17th September 1922. The Subordinate Judge, however, brushed aside the acknowledgment of the title in that letter and without caring to assess the evidentiary value of the said letter, dated 17th September 1922, written by the defendant to plaintiff 2, threw out the claim as barred by limitation; and also rejected the letter as unproved and dismissed the suit with costs.

I gave the plaintiffs-appellants an opportunity to produce that letter before me, and called upon the defendant-respondent to admit the same. He has admitted it, but at the same time ventured an explanation as to the circumstances under which, he wrote it, or made the so-called admission of plaintiffs' title to the 8-annas share of the two villages being subsisting in 1922. Had the Subordinate Judge taken the least care to look into the contents of this letter and scrutinized them, he would certainly have found in it a very substantial admission of a subsisting title which would necessarily have shifted the onus of proof on the defendant to explain it away by showing that it was erroneous in point of fact. It is, however, argued on behalf of the respondent that if the document served such a purpose, it would make the suit, if not barred by limitation, at least unmaintainable. I fail to see the correctness of this argument; because, after a cause of action has arisen, if the plaintiff's title is admitted by his opponent in clear terms the admission operates to keep their right of suit alive and in time, and cannot destroy the same. A cause of action thus does not disappear by the admission which the plaintiffs' opponent makes, while the right of suit continues in existence.

Moreover as held in *Nirman Singh* v. *Rudra Partab Narain Singh* (1):

> It is well established that an order made in mutation proceedings is not a judicial determination of title or proprietary interest.

It may not per se create any title, but if accompanied or followed by overt acts of possession, such an order might give rise to an adverse inference of an assertion of a hostile title. The very circumstance that the defendant in his pleadings has, in spite of his previous admission in 1922, chosen to insistupon the continuance of his name in the mutation register and successfully maintained his name in the register, is likely to take away the plaintiffs' legal character in course of time. Further this denial of plaintiffs' title might, if acquiesced in for a long time, and hereafter followed up by actual snatching away of possession from the hands of plaintiffs by some

(1) A. I. R. 1926 P. C. 100=48 All. 529=29 C. C. 316=53 I. A. 220 (P. C.).

unfair means by the defendant, create many more complications. If the defendant's present pleadings mean anything, they certainly show defendant's attitude towards plaintiffs to be clearly hostile and, therefore, it was absolutely necessary that plaintiffs should have sued for securing the declaration of their own title which necessarily involved the negation of that of the defendant to the 8-annas share of the two mouzas. The plaintiffs thus have a valid cause of action to sue for the declaration.

The case having been decided on a preliminary point must go back for a proper decision on the merits in accordance with law and with advertence to the above remarks.

The appeal is allowed with costs to be paid by the respondent. The appellants will get refund of Court-fee paid on the memorandum of appeal. Costs in the Court below will abide the result.

R.K. *Case remanded.*

A. I. R. 1928 Nagpur 254

FINDLAY, J. C.

Mt. Anjira Bai—Plaintiff—Appellant

v.

Annapurna Bai and *another*—Defendants—Respondents.

Second Appeal No. 197 of 1927, Decided on 14th February 1928, against decree of Dist. Judge, Chhindwara, D/- 17th December 1926, in Civil Appeal No. 56 of 1926.

(*a*) *Registration Act, S.* 17 (1) (*b*)—*Compromise in mutation proceeding—Arrangement mutual and for family enjoyment not limiting anybody's right need not be registered.*

A compromise in mutation proceeding which is an arrangement purely mutual and family one for the enjoyment of the property without limiting or extinguishing of anybody's right, does not require registration: *A.I.R.* 1921 *All.* 248 and *A.I.R.* 1926 *P.C.* 100, *Ref.* [P 255 C 1]

(*b*) *Family Arrangement—Compromise worked out by parties should not ordinarily be disturbed.*

Where a compromise is no longer to be regarded as a merely executory agreement, but is accepted and worked on by parties, such a family compromise should not on grounds of equity and good conscience be disturbed unless there are strong and valid reasons for doing so.

[P 255 C 2]

M. B. Niyogi and *V. R. Dhoke*—for Appellant.

S. B. Gokhale—for Respondents,

Judgment.—The facts of this case are clearly given in the judgments of the two lower Courts. The Subordinate Judge held that the compromise in question was not void for want of consideration or registration, but went off somewhat at a tangent and came to the conclusion that the parties to the compromise were labouring under a mistake of fact as to the plaintiff-appellant's rights. He accordingly held that the compromise was void and that the plaintiff's suit must succeed.

The learned District Judge very properly pointed out that the finding of the first Court as to Madhorao having influenced the plaintiff into making a bargain disadvantageous to herself was, in the circumstances, an unjustified one. Confirming, as he did, the findings of the first Court on other points, the suit was necessarily dismissed. The plaintiff has now come up to this Court on second appeal.

The main stand taken on the plaintiff's behalf has been that the compromise was void as being one of which registration was compulsory under S. 17 (1) (b), Registration Act. The learned Dist. Judge, following the decision of the Allahabad High Court in *Baldeo Singh* v. *Udal Singh* (1), held that the compromise did not require registration. In this connexion I have been referred to the decision of their Lordships of the Privy Council in *Nirman Singh* v. *Rudra Partab Narain Singh* (2). At p. 539 of the said volume, their Lordships remark as follows :

> The perusal by their Lordships of the judgment of the Court of the Judicial Commissioner of Oudh leads their Lordships to think that its judgment is to a great degree based on the mischievous but persistent error that proceedings for the mutation of names are judicial proceedings in which the title to and the proprietary rights in immovable property are determined. They are nothing of the kind, as has been pointed out times innumerable by the Judicial Committee. They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with the greater confidence that the revenue for it will be paid.

The said decision obviously to a large extent nullifies the reasoning of Piggot and Kanhaiya Lal, JJ., in *Baldeo Singh* v. *Udal Singh* (1) quoted above, but for my

(1) A.I.R. 1921 All. 248=43 All. 1.
(2) 48 All. 529=A.I.R. 1926 P.C. 100=29 O.C. 316=53 I.A. 220 (P.C.).

own part I do not regard the compromise in question in the present case as one which fell within the purview of S. 17 (1) (b), Registration Act. It must be remembered that the compromise in question was merely with reference to the pending mutation proceeding. In that proceeding, Mt. Anjira Bai had applied for her name being entered in respect of the 4-annas village share. Mt. Annapurna Bai and Mt. Itha Bai applied on the contrary that their names should be entered. The compromise arrived at was that a annas 2 share should be mutuated in Mt. Anjira's name. Mt. Anjira Bai was to hold the share for her life and would maintain herself on it. She was to have no power to hypothecate or sell the share or any part of it and, further, her holding of the share was to be contingent on her continuing to be of a good character. In respect of the remaining annas 2 share, Mt Annapurna Bai's and Mt. Itha Bai's names were to be entered and it was expressly stated and agreed upon by the parties that Mt. Laxmi Bai was to continue to be manageress of the annas 4 share. The arrangement thus was a purely mutual and family one for the enjoyment of the property. There was no limiting or extinguishing of anybody's right and the document contains not a word which can be construed as meaning that Mt. Anjira Bai ever gave up her right in the property save in the case of unchastity. The contending parties' names were in effect mutated in respect of half the property, and Mt. Laxmi Bai was retained as manageress of the whole annas 4; of such a document, registration was, in my opinion, unnecessary.

It has again been urged on behalf of the plaintiff-appellant that there was in reality no bona fide dispute at the time, and that, in those circumstances, a fortiori, there could be no valid compromise. It has been urged in this connexion that Mt. Anjira Bai was under a mistake of fact as to what her rights were under the Benares school of law and that she was in effect the only heir. I do not think it is possible to premise this as correct on the evidence on record. She had a father and other relatives to advise her and I have little doubt that her story that she was ignorant of her rights and had been misled is an invention brought into existence for the purposes of the present suit. In any event this question was one of fact and the lower appellate Court's finding thereon must necessarily stand.

Moreover, in the present case, it is clear that action was taken on the compromise. Mt. Laxmi Bai entered on the property under the arrangement and maintained the two daughters of Anad Rao and mutation was effected. Counsel for the appellant has relied on the decision in *Jagrani* v. *Bisheshar Dube* (3). For my own part, I am of opinion, that, in the circumstances of the present case, any locus penitentiæ, which existed in favour of the plaintiff has necessarily disappeared The compromise in question can no longer be regarded as a merely executory agreement. It was accepted and worked on by the parties for the time being. It is unnecessary for me to emphasize the desirability that such a family compromise as the present should not, on grounds of equity and good conscience, be disturbed unless there are strong and valid reasons for doing so, and the strongest possible reason against the possibility of disturbing the arrangement is that in the present instance there has undoubtedly been mutual or part performance of the compromise : cf. *Kunti* v. *Gujraj Tiwari* (4).

For these reasons, therefore, I am of opinion that the plaintiff's suit was bound to fail. The appeal is accordingly dismissed. The appellant must bear the respondents' costs. Costs in the lower Courts as already ordered.

R.K. *Appeal dismissed.*

(3) [1916] 38 All. 366=35 I.C. 701=14 A.L.J. 449 (F.B.).
(4) A.I.R. 1924 All. 826=46 All. 847.

A. I. R. 1928 Nagpur 255

MOHIUDDIN, A. J. C.

Emperor—Applicant.

v.

Raghunath and *another*—Non-applicants.

Criminal Revn. No. 317 of 1927, Decided on 3rd January 1928, on a reference by Sess. Judge, Raipur, under S. 438, Criminal P. C.

(a) *Criminal P. C., S. 145—Order under, not discussing evidence and not stating reasons, is not legal and should be set aside.*

Where an order only contains a very brief statement of some of the facts of the case, does not discuss the evidence adduced by the parties and states no reasons as to why the claim of actual possession by any particular person is true, such an order is not a decision as required by the law and must be set aside. [P 265 C 1]

(b) Criminal Trial — Evidence—Roznamcha report—Contents of, must be proved like other facts.

Roznamcha reports, even if proved, will not be evidence of the facts mentioned in the reports which must be proved like other facts.

[P 256 C 1]

Order.—The order dated 20th June 1927, passed by Mr. Purshottam Lal, Sub-Divisional Magistrate, Bilaspur, in Miscellaneous Criminal Case No. 27 of 1927, gives no reasons for the decision he has arrived at. The order only contains a very brief statement of some of the facts of the case, does not discuss the evidence adduced by the parties and states no reasons as to why the claim of actual possession by the said Raghunath Singh is true. Such an order is not a decision as required by the law and must be set aside.

The preliminary order dated 31st March 1927, does not contain a proper description giving dimensions and boundaries of the land in dispute. This must be done now. The sale-deed, dated 13th March 1927, filed by Bori is about a plot 120 cubits by 20 cubits, while Bhairao Prasad says that he had given a plot 60 cubits by 14 cubits to Raghunath Singh. It is thus clear that the parties are not agreed about the dimensions of the plot in dispute.

Bori in his written statement, dated 16th May 1927, para. 4, stated as follows. "Hence there is no fear of the breach of the peace." Raghunath Singh did not say anything about the likehood of the breach of the peace. The witnesses also do not say much about it. It seems that they have not been properly examined on that point in this case.

The reports filed by the Station House Officer, Kota, have not been proved. They are only roznamcha reports and even if proved will not be evidence of the facts mentioned in the reports which must be proved like other facts.

The preliminary order and the final order are, therefore, set aside, and it is ordered that the case be re-opened at the point reached on 31st March 1927, and that after recording a proper preliminary order, hearing the parties afresh, recording further evidence if necessary and recording a statement of his reasons for the decision, the learned Magistrate do dispose of the matter in accordance with law.

R.K. *Order set aside.*

A. I. R. 1928 Nagpur 256

MACNAIR, A. J. C.

Lalsingh—Defendant—Appellant.

v.

Jiwanram—Plaintiff—Respondent.

Misc. Appeal No. 31-B of 1925, Decided on 1st September 1927, from decision of Addl. Dist. Judge, Akola, D/- 26th September 1925, in Civil Appeal No. 19 of 1926.

Limitation Act. Arts. 62 and 89—Suit for profits of fields held by defendant on plaintiff's behalf—Art. 62 or Art. 89 applies.

J sued the son of one *H* for an account of the produce of certain fields for some years. He alleged that *H* retained the produce of the fields during these years on his behalf.

Held: that Art. 62 or Art. 89 would govern the suit.

W. R. Puranik—for Appellant.

M. B. Niyogi—for Respondent.

Judgment.—Jiwanram, the respondent in this Court sued the defendant, the adopted son of one Hari Singh, for an account of the produce of certain fields for the years 1913 to 1919. He alleged that Hari Singh retained the produce of the fields during these years on his behalf. It appears quite clear that on the plaint allegations either Art. 62 or Art. 89, Lim. Act, would govern the suit. In either case, the claim was barred by time. The lower appellate Court considers that because the defendant is not actually a contracting party, Art. 89, Sch. 1, Lim. Act, will not apply. There is no force in this reasoning and it receives no support from any dicta in *Kumeda Charan* v. *Aushutosh* (1).

If there were something in the nature of a contract of agency, the agent or his representative could be sued, and the suit would fall under Art. 89. Apart from this, it is admitted before me that Hari Singh returned the fields in his lifetime, so that the cause of action accrued when he returned the fields. The defendant stated that the fields were given to him on a lease in order to satisfy a debt due to him. If this is the case, there was probably an implied promise to pay the surplus profit to the plaintiff, but clearly a suit for such profit would be governed by Art. 62, Lim. Act. The lower appellate Court has failed to

(1) [1913] 17 C. W. N. 5=16 I. C. 742=16 C. L. J. 282.

come to a clear finding regarding the facts but in any case the suit is barred by limitation. The order of the lower appellate Court, directing further enquiry into questions of fact is therefore set aside, and the decree of the first Court, dismissing the suit is restored. Costs in all Courts will be borne by the plaintiff. Pleader's fee in this Court Rs. 50.

R K. *Order accordingly.*

A. I. R. 1928 Nagpur 257

KINKHEDE, A. J. C.

Mt. Shevanti—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 126-B of 1927, Decided on 15th February 1928, from decision of Sess-Judge, Akola, D/- 12th December 1927, in Sessions Trial No. 11 of 1927.

(a) *Criminal trial—Prosecution must affirmatively prove the case—It cannot take advantage of the want of explanation by accused.*

Undoubtedly the proof of the case against an accused must depend for its support not upon the absence or want of any explanation on the part of the accused himself, but upon the positive affirmative evidence of his guilt that is given by the Crown. [P 259 C 2 ; P 260 C 1]

(b) *Penal Code, S. 107—Person aiding must know that he is aiding a criminal act—Abetment by omission, omission must be illegal—The abettor must be connected with also the criminal part of the transaction.*

If the person who lends his support does not know or has no reason to believe that the act which he is aiding or supporting was in itself a criminal act it cannot be said that he intentionally aids or facilitates the doing of the offence : *A. I. R.* 1925 *All.* 230, *Foll.* [P 261 C 1]

Abetment by omission would only be punishable if the omission were an illegal omission : 9 *Bom. L. R.* 159, *Foll.*

In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal : 20 *W. R. Cr.* 41, *Foll.* [P 261 C 1]

(c) *Criminal P. C., S. 309—Distinct opinion on each charge must be taken.*

The words "on all charges" must be interpreted to mean that distinct opinion on each charge must be taken and recorded : 22 *W. R. Cr.* 34, *Foll.* [P 261 C 2]

(d) *Criminal Trial—Circumstantial evidence—To convict a person the inculpatory facts must be incompatible with innocence.*

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The proof of guilt must displace all reasonable doubt. [P 262 C 2]

S. A. Pande and *G. G. Hatwalne*—for Appellant.

G. P. Dick—for the Crown.

Judgment.—One Sampat Teli (P. W. 7) of Telhara in the Akot taluk is the husband of the appellant Shevanti who was married to him when she was 8 or 9 years old. After attaining the age of puberty she lived with her husband. In Divali of 1926 she was brought to Danapur to stay with her mother and brothers Shiva (D. W. 1) and Pundalik (P. W. 15). One Baliram (P. W. 16), who is her cousin, also lives in Danapur. At a caste panchayat held some time in May 1927 the appellant's brothers, Shiwa and Pundalik, were remonstrated for having kept their sister Shevanti away from her husband for a very long time. Within a few days of this, Sampat came and took her away to Telhara.

On 24th August 1927 Shevanti came back from Telhara to Danapur with her husband Sampat. The police patel Sukdeo (P. W. 8) saw them both that evening at the house of Baliram (P. W. 16). She was then lying ill and groaning on a cot. The next day Sukdeo Patel learnt that the dead body of a child had been found in the river Wan of the village. Sukdeo Patel accordingly went to the bank of the river and saw the body entangled among thorns at some distance from the bank. At some distance from the body, a piece of red chhit being a shirt or upper bodice of a Mahomedan woman was also found in the water. After taking out the body and wrapping it in the said cloth he caused it to be kept on the bank and sent a report (Ex. P-12) to the Hiwarkhed station house. The usual inquest was held by the police and the body of the child was sent for post-mortem examination to Akot. Ex. P 2 is the inquest report. The post-mortem report (Ex. P-10) made by Pandurang, Assistant Medical Officer (P. W. 9), shows that the child was born alive and that its death was due to drowning.

The police investigation brought to light certain facts which created suspicion about Shevanti being pregnant with an illegitimate child and having been recently delivered and being concerned in drowning the new-born child in the river.

Acting on this suspicion a search was caused to be made at the houses of Pundalik and Baliram, and certain blood-stained clothes were got hold of (Ex. P-6, P-7 and P-8). On a report of the Sub-Inspector of Hiwarkhed put up before the Sub-Divisional Magistrate, Akot, the latter officer ordered the appellant to be examined by the Civil Surgeon, Akola, with a view to ascertain whether she was recently delivered. She was accordingly examined on 29th August 1927 by the Assistant Civil Surgeon (P. W. 14) and Ex. P-9 is his report. A challan under S. 302, I. P. C., was accordingly drawn up and lodged before the Sub-Divisional Magistrate, Akot, on 5th September 1927 implicating the appellant, Shevanti. The committing Magistrate, after examining several witnesses, disbelieved the story as to Sheventi having gone to the river at 9 p. m. and to have delivered on the road as shown in the map (Ex. P-13). He also held that it was impossible for a woman recently delivered to walk all the distance to and fro, and that the probability was that the delivery took place before evening at the place where she was found lying by the police patel (P. W. 8). He inferred that her husband Sampat (P. W. 7) had a hand in the disposal of the child ; but that matter was of no consequence as the commitment was only of Mt. Shevanti under S. 302, I. P. C.

The trial commenced in the Sessions Court on 5th December 1927. To the charge of murder under S. 302, the Sessions Judge, that very day, added an alternative charge of secretly disposing of the dead body of the child by throwing it into the river, Wan, and in the alternative of handing over the child to some one else with the intention that it should be so disposed of, under S. 318 or 318-109, I. P. C., and then proceeded to examine the witnesses for the prosecution. After having examined 16 witnesses for the prosecution on 5th and 6th December 1927, the learned Sessions Judge on 7th December 1927 added a further alternative charge under S. 317 or 317-109, I. P. C., to the effect that the appellant was exposing or allowing to be exposed, her newly-born alive child with the intention of wholly abandoning it. Thereafter the appellant was examined and her defence also recorded and the evidence of two of her witnesses was taken down. The case was then argued and the assessors were required to state their opinions. The assessors are all agreed that the appellant was pregnant and that a child was born to her. Two of them are agreed that she was confined and the child was born to her at Baliram's house, and that it was legitimate ; one called it illegitimate, and the remaining fourth assessor doubted whether it was legitimate or illegitimate. One of the assessors says that the child found on the river was of Shevanti, but the rest three others think that there is no proof of the identity of the child found on the bank of the river Wan with that born of Shevanti. The assessors differ as to the child being born alive : one being doubtful, and the other three being positive that it was not born alive. All of them are, however, agreed that as Shevanti was insensible and did not know anything, she was not responsible for what may have happened to her new-born babe. It is noticeable that the learned Sessions Judge did not require the assessors to state their opinion as to whether the appellant, if not guilty of the substantive offence punishable under S. 317, was, at any rate, guilty of the abetment thereof.

The Sessions Judge found that Sheventi's denial of pregnancy was futile. The evidence of Assistant Civil Surgeon (P. W. 14), her husband Sampat (P. W. 7), the professional *dai* or midwife Manji (P. W. 11) and her mother-in-law Soni (P. W. 13) clearly shows that she was pregnant. Her pregnancy being thus satisfactorily proved, the further fact that she was recently confined is proved by the medical evidence given by P. W. 14, according to whom the confinement must have taken place a week before his examination. The circumstances detailed in para. 11 of the Sessions Judge's judgment and the evidence discussed therein clearly point to the conclusion that the child born of Shevanti was illegitimate. The Sessions Judge has also rightly held that her delivery took place at Baliram's house and not on the river or on the road. The point that the death of the child whose dead body was found in the river was due to drowning is also clearly established by the medical evidence of Pandurang (P. W. 9). But the important point still remains whether the identity of the child whose dead body was found in the river with that born of Shevanti is satisfactorily proved by the prosecution. As

to this there is really no direct or satisfactory proof on record; the Sessions Judge had to depend upon certain inferences from the surrounding facts and circumstances of the case. The question, therefore, is whether the inferences drawn in the case have been correctly drawn by the Sessions Judge.

It is argued before me that both Shevanti and her husband are of dark colour and the child found in the river being of fair complexion, the proper inference to be drawn from this was that it was not theirs. It appears that from these very premises the Sessions Judge has drawn the inference that it was not Sampat's. So far his conclusion is unimpeached. The learned pleader, who appeared for the appellant before me, has asked me to draw the further inference that it was not Shevanti's. In this connexion my attention is drawn to the additional circumstance that the cloth found in the river at some distance from the dead body of the child had the appearance of a shirt or upper bodice of a Mahomedan woman, the suggestion being that the dead body is of a child of Mahomedan origin. The learned Sessions Judge has discarded a similar suggestion, in the penultimate sub-paragraph of para. 14 of his judgment for two reasons: firstly that the police investigation did not bring to light any other case of the birth of an illegitimate child in the neighbourhood; and secondly that it was quite possible that the cloth might have been left there by some woman when washing her clothes and been carried away by the stream. There is nothing to show how far the investigation probed the matter, and, as to the second reason, suffice it to say that it appears to be a mere conjecture and cannot supply the place of positive evidence. The conclusion that the dead body was of the child of Shevanti is to my mind not fully supported by the evidence on record and the probabilities of the case. I differ from the Sessions Judge on this point of identity.

Naturally, then the question arises, firstly, as to what has become of the child whom Shevanti had recently given birth, and whether she had any hand in disposing it of and secondly, who must account for the absence of the child? The medical evidence of the Assistant Civil Surgeon (P. W. 14) affords sufficient data for holding that the first delivery is more painful than subsequent ones, and that pain may start days before or 24 hours before. The Sessions Judge has discussed this question in para. 19 to 23 of his judgment. He thinks that in this case the burden of explaining certain facts was upon the accused. The explanation elicited by the examination of the accused was that she did not know what happened, and it must be taken for what it is worth. The Sessions Judge, however, has rejected the explanation on a theory of his own that women are not unconscious on delivery in normal cases. But in doing so he has assumed that the present was a case of a normal delivery. He based his assumption on the fact that the appellant was going about her household duties soon after and performed her journey on Saturday following, and did not complain of the loss of her new-born child. I think the Sessions Judge was not justified in the circumstances of the case, in making such assumptions by throwing the burden on the appellant of offering explanation in this connexion. I cannot but observe that it would have materially helped the case for the defence if Shevanti had offered a true explanation of the real state of affairs as they happened, instead of suggesting the very improbable story that the whole case was a concoction, by going to the length of even denying her own pregnancy. But that could not lighten the burden of proof that lay heavily on the prosecution to prove her guilt.

The following observations of Tindal, C. J., in *Regina* v. *Frost* (1) quoted in *Amrita Lal Hazra* v. *Emperor* (2) show that the burden must lie entirely on the prosecution, and that the law does not cast on the accused any burden of proving his innocence:

> On the part of the prisoner, the learned counsel who appear for him state, and I think they are justified in so stating, that he is not bound to show what was the object or purpose or intent of the acts that were undoubtedly done by the prisoner at the Bar. His counsel say the offence charged against him must be proved by those who made the charge, that he stands only to hear the evidence that is given against him, and therefore he is not bound to show at all or in any way whatever what his real object or design was. Undoubtedly the proof of the case against the prisoner must depend for its support not upon the absence or want of any

(1) 9 C. & P. 129.
(2) [1915] 42 Cal. 957=21 C. L. J. 331=29 I. C. 513=19 C. W. N. 676.

explanation on the part of the prisoner himself, but upon the positive affirmative evidence of his guilt that is given by the Crown. It is not, however, an unreasonable thing, and it daily occurs in investigations both civil and criminal that if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon, for his own sake and his own safety, to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence.

In this particular case as shown above the case against the appellant must depend for its support not upon the absence or want of any explanation on her part but upon the positive affirmative evidence of her gullt that is given by the Crown. The denial of guilt by the appellant and absence of any true explanation by her did not in any way lessen the burden which lay on the prosecution of proving her guilt. In para. 20 of the judgment under appeal the learned Sessions Judge very candidly remarks

as to the details of what happened, we cannot say clearly from the record.

In this state of things it was wrong to infer that Shevanti must have been a consenting party to the disposal of her new-born child. The Sessions Judge also observed:

It is of course quite possible physically that Shevanti might have performed the journey to the river. But it is more probable that the child was taken there and thrown in by one of her brothers.

I think that in the case of a recently confined woman and that too of a first delivery it would practically be an impossible feat for the woman to perform of going herself to the river to throw away the child with a view to get rid of it. It was, therefore, right for the Sessions Judge to have held that Shevanti herself did not take the child and dispose of it. He was also right in holding that she was not liable to be convicted of the murder of the child. Similarly, the charge for an offence under S. 318 or for abetment thereof could not hold good in her case. He, however, thought that he could convict her of an offence of abetment of murder and abetment of exposure and abandonment of the child. But admittedly she was not charged with abetment of murder and the assessors have not been questioned on that point. On the whole the learned Sessions Judge very rightly gave her the benefit of doubt based on the possibility that she did not contemplate that the child should be killed.

This narrowed the compass of her so-called guilt and the Sessions Judge addressed himself in para. 22 of his judgment to consider the question as to whether the appellant was guilty of an offence of abandonment or of its abetment. In this connexion the Sessions Judge had candidly remarked:

The principal offence seems to have been committed by some one who had assumed the care of the child for the time being. The child was exposed and left in the river with the intention of wholly abandoning it.

Here the Sessions Judge proceeds on the assumption that the child whose dead body was found was of the accused, but as pointed out above such proof is wanting. Moreover, the investigation has not, as remarked by the Sessions Judge, disclosed particular person or persons connected with the commission of the offence under S. 317, I.P. C., but thinking that the conviction of the principal was not a necessary condition to the punishment of an abettor, the Sessions Judge proceeded to discuss the question whether Shevanti abetted the offence of abandonment. He drew the inference that she must have conspired with her relatives in arranging the removal of the child and that she must have, at least, known that they were thinking to get rid of the child somehow, and actually convicted her under Ss. 317-109, I. P. C.

It is contended before me that this conviction is bad as it is of the essence of offence under S. 317-109 that the intention of wholly abandoning such child must be proved. Proof of such intention is, it is said, wholly wanting. On the facts proved in this case it is difficult to concur with the Sessions Judge's conclusions in this respect, as it is not clearly established that, between the delivery and the disappearance of the child from her, the appellant was in a condition to know what was being done with it, so as to justify the imputation to her of an intention of wholly abandoning it; if there was any omission on her part I am not prepared to hold that it was an illegal omission. The Sessions Judge's remarks that she was bound for the protection of her child to resist its being taken away and to give the alarm and to disclose the facts as soon as she could, and that all this she failed to do, proceed on the assumption that she was in full possession of her senses at the time the child was taken away. If the

appellant was in a temporary swoon, as is very likely, she could have neither handed over the child nor protested against its removal by any person interested in getting rid of it. The conviction must, therefore, fail on this ground.

The Sessions Judge, while adding the alternative charge under S. 317, I P. C., made it sufficiently comprehensive so as to include even the abetment thereof. The provisions of law having been complied with, it was open to him to convict the appellant for abetment of the offence under S. 317, though not of the substantive offence itself, if the evidence on record was sufficient to warrant such conviction. A person abets by aiding when by any act done either prior to or at the time of the commission of an act he intends to facilitate and does in fact facilitate the commission thereof. The intention should be to aid the commission of a crime. A mere giving of an aid will not make the act an abetment of an offence if the person who gave the aid did not know that an offence was being committed or contemplated. The intention should thus be to aid an offence or to facilitate the commission of an offence. But if the person who lends his support does not know or has no reason to believe that the act which he is aiding or supporting was in itself a criminal act it cannot be said that he intentionally aids or facilitates the doing of the offence: per Mukerjee, J., in *Emperor* v. *Ram Nath* (3). In order to convict a person of abetment by legal omission it is necessary to show that the accused intentionally aided the commission of the offence by his non-interference, *Khajah Noorul Hossein* v. *C. Fabre-Tonnerre* (4), and that the omission involved a breach of a legal obligation. Abetment by omission would only be punishable if the omission were an illegal omission: *Emperor* v. *Cooverji* (5). In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal: *The Queen* v. *Nim Chand Mookerjee* (6). In this case there is no evidence or material on record tending to show that the appellant was in a mental as also physical condition to abet either by act or by illegal omission the commission of the offence under S. 317, I. P. C.

The mere circumstance that, after the commission of the offence by some one else, she did not bewail the loss or bestir herself to report the offence is not inconsistent with her innocence. It may be due to her physical inability or mental incapacity to interfere at the time of the removal of the child from her custody or even want of inclination on her part to do anything, for suffering as she must have then been from the after-effects of a painful first delivery. Her subsequent failure to do any of these things does not aid the commission of the offence, though it might aid the concealment of an offence already perpetrated.

But a further objection is taken before me that the Sessions Judge convicted the appellant of the abetment of the offence under S. 317, I. P. C., without taking the opinion of the assessors on the point This is not permissible in view of the clear provisions of S. 309, Criminal P. C., which makes it obligatory on the Session Judge to require each of the assessors to state his opinion orally on all the charges on which the accused has been tried and record such opinion. The words "on all the charges" have been interpreted to mean that distinct opinion on each charge must be taken and recorded: cf *The Queen* v. *Matam Mal* (7). There is no doubt an omission to do so in this case. But in the view I take, it is unnecessary to quash the conviction merely on this one ground.

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The proof of guilt must displace all reasonable doubt. Such proof of the appellant's guilt as regards the abetment of the offence under Ss. 317-109, I P. C., by her, being lacking, the interests of justice require that I should quash the conviction and set the appellant at liberty. I accordingly do so and cancel her bail bond.

R.K. *Conviction quashed*

(3) A. I. R. 1925 All. 230=47 All. 268 (275).
(4) 24 W. R. Cr. 26.
(5) [1907] 9 Bom. L. R. 159 (160-1).
(6) 20 W. R. Cr. 41.
(7) 22 W. R. Cr. 31.

A. I. R. 1928 Nagpur 262

KINKHEDE, A. J. C.

Maroti Suryabhan and *others*—Plaintiffs—Appellants.

v.

Raiwant Rao and *others*—Defendants—Respondents.

Second Appeal No. 58-B of 1927, Decided on 18th November 1927, against decree of 1st Addl. District Judge, Akola, D/- 18th October 1926, in Civil Appeal No. 140 of 1926.

(a) *Transfer of Property Act, S. 6—Hindu reversioner's right is a mere spes successionis and cannot be bargained with—Hindu law—Reversioner.*

The interest of a Hindu reversioner expectant upon the death of a Hindu female is no more than a spes successionis which is neither property nor clothed with the alienability incident thereto. It is not, therefore, open to him or to his guardian, if he is a minor, to bargain with it. [P 263 C 1]

(b) *Transfer of Property Act, S. 43—S. 43 is inapplicable in case of sale of reversioner's right.*

Section 43 is inapplicable in a case of a Hindu reversioner's right as the Transfer of Property Act does not regard spes successionis as "property" for purposes of transfer. [P 263 C 2]

(c) *Limitation Act, Art. 44—Sale void, Art. 44 is inapplicable—Suit can be brought within 12 years.*

Where a sale is void Art. 44 is inapplicable and a suit can be brought by a minor to recover possession within a period of 12 years. [P 264 C 1]

(d) *Limitation Act, S. 1—Remedy barred—Defence of invalidity of transfer is not necessarily barred.*

Even though the remedy of a suit may be barred the defence of the invalidity of transfer is not necessarily barred. [P 265 C 1]

(e) *Evidence Act, S. 115—Estoppel.*

Transfer which is void cannot be validated by recourse to ordinary doctrine of estoppel. [P 263 C 1]

G. P. Dick—for Appellant.

M. B. Niyogi—for Respondents.

Judgment.—The plaintiffs are the appellants in this case. They base their title on a sale-deed executed on 11th January 1915 by one Bablaji, the husband of Mt. Jani, defendant 6, who was then a minor. The plaintiffs' case is that thay were put in possession of the property purchased by them in November 1919, but were unlawfully dispossessed by the defendants in July 1920. Hence this suit was instituted on 28th June 1924 for recovery of possession of the property from the defendants. Plaint is silent as to how the property became the property of Mt. Jani.

Defendant 1 contended that the property in suit was originally the property of Ganpat who died in 1911, leaving widow Mt. Soni, mother Gopi and sister Jani. On his death his widow Soni inherited it; that as she was alive and Jani had only a contingent reversionary interest at the date of sale there could be no transfer in view of S. 6, T. P. Act, in plaintiffs' favour; and that plaintiffs acquired no title under the sale-deed. Defendants 1 and 2 purchased one-fourth share of the field in suit from Ganpat's widow Soni and she gifted another one-fourth share to Maroti's temple, defendant 4, the same day and the remaining half-share was sold by her to defendant 3 on 14th April 1919; and that ever since their purchase defendants 1 to 4 had been in peaceful and uninterrupted possession of their respective shares. On 17th April 1924, defendant 1 sold 8 acres of the land purchased by him and his brother, defendant 2, to Jani, defendant 6, and that ever since she had been in possession thereof, defendant 5 had purchased one-eighth share in the field in suit under a sale-deed dated 11th February 1915 from defendant 1.

There were several oral pleadings, the gist whereof is that the property in suit originally belonged to one Baliram, that on his death it came to Ganpat who died in 1911, and that on his death without issue his widow Soni inherited it, but that she re-married in 1919 and and that Jani, the sister of Ganpat, had, therefore, only spes successionis in 1915, when the property was sold by her guardian. Defendants denied that plaintiffs had ever any possession over the property and that they were dispossessed. Defendants also pleaded an oral will in favour of Ganpat. The plaintiffs denied the alleged will in favour of Ganpat; but asserted that according to the oral will of Baliram the property had become the property of Gopi. On behalf of Jani, who was joined as a party, a defence was raised that the transaction of sale in favour of plaintiffs was not real or for consideration and was not binding on her in the absence of any legal necessity or benefit. To this the plaintiffs replied that this defence of Jani was barred inasmuch as she did not sue to set aside the sale within three years of her attaining majority. There

were several other pleadings, but with them I am not concerned for the purposes of second appeal. The pleadings reproduced above sufficiently cover the points actually argued before me.

As regards the question of oral will of Baliram being in favour of Ganpat or Gopi the Courts below have come to the conclusion that Baliram willed away the fields in suit to Ganpat and not to Gopi. It may here be mentioned that Gopi admittedly died in 1913 when Soni, the widow of Ganpat, had not remarried. If the alleged will in favour of Gopi had been proved then Gopi would have been fresh stock of descent and her daughter Jani would have succeeded on her death in 1913 to the field as her stridhan. But in view of the finding that Baliram's oral will was in favour of Ganpat and that he died in 1911, Ganpat was the last male owner and as such succession had to be traced to him, and, Jani being only his sister his widow Soni had a more preferential claim to the property which devolved on her in preference to Ganpat's mother Gopi or sister Jani; Soni thus continued to be the owner of the property so long as she had not either sold it away or got herself re-married. As Ganpat's mother died before Soni's re-marriage, succession could open out in favour of Jani in case she chanced to be alive at Soni's civil death which she brought about in 1919. So the position is clear that at no time prior to 1919, much less on 11th January 1915, when her guardian sold the property on her behalf, Jani had any transferable interest in the property in suit.

The Courts below have held, and I think rightly, that the interest of Jani was of Hindu reversioner expectant upon the death of a Hindu female and could not be validly transferred by her. It is no more than a mere spes successionis which is neither property nor clothed with the attribute of alienability incident thereto. It was not, therefore, open to her or her guardian, when she was a minor, to bargain with it or bind herself by an agreement in respect thereto. Such a dealing with estate was void and not binding on her even by estoppel or otherwise when the succession opened out to her on her (Soni's) remarriage in 1919. The transfer being void, it could not be validated by recourse to the ordinary doctrine of estoppel. This position is established beyond doubt by the series of decisions of their Lordships of the Privy Council : *Sham Sundar Lal* v. *Achhan Kunwar* (1), *Janaki Ammal* v. *Narayanasami Aiyar* (2), *Harnath Kuar* v. *Indar Bahadur Singh* (3), *Ananda Mohan Roy* v. *Gour Mohan Mullick* (4), *Amrit Narayan Singh* v. *Gaya Singh* (5) and *Gur Narayan* v. *Sheo Lal Singh* (6).

It is contended on behalf of the appellants that Jani's guardian erroneously represented that Jani was authorized to transfer the property in suit in 1915 and that as Jani acquired interest in 1919, she is, under the provisions of S. 43, T. P. Act, bound to make good the transfer out of her subsequently acquired interest, to which the respondents reply, and I think rightly, that S. 43 has no application, for the simple reason that the Transfer of Property Act does not regard spes successionis as "property" for purposes of transfer. I therefore uphold the decision of the lower appellate Court that the sale by Jani's guardian was void and inoperative, and gave no title to the property in suit to plaintiffs. The necessary consequence of this is that plaintiffs had no right to sue and, therefore, their present suit was rightly dismissed.

The next point which the plaintiffs urged was that the defence as to the invalidity of the sale, dated 11th January 1915, was not open to Jani, as she had not sued within three years of her attaining majority to set aside the sale made by her husband, who was her lawful guardian. I think that the finding that at the date of the sale (viz., 11th January 1915) the property in suit was not the property of Jani is fatal to this contention. Art. 44, Lim. Act, applies to a suit by a ward to set aside a transfer of property by his guardian; this must necessarily relate to property in which the minor is interested or of which the minor is the owner. The sale being

(1) [1899] 21 All. 71=25 I. A. 183=7 Sar. 417 (P. C.).
(2) A. I. R. 1916 P. C. 117=39 Mad. 634=43 I. A. 207 (P. C.).
(3) A. I. R. 1922 P. C. 403=45 All. 179=50 I. A. 69=26 O.C. 223 (P. C.)
(4) A. I. R. 1923 P. C. 189=50 Cal. 929=50 I. A. 239 (P. C.).
(5) A. I. R. 1917 P. C. 95=45 Cal. 590=45 I. A. 35 (P. C.).
(6) A. I. R. 1918 P. C. 140=46 Cal. 566=46 I. A. 1 (P. C.).

void, Art. 44 was inapplicable and a suit could be brought by the minor to recover possession from the plaintiffs within a period of 12 years. It may be observed that, even though the remedy of a suit may be barred, the defence of invalidity of the transfer is not necessarily barred: cf. *Lakshmi Doss* v. *Roop Laul* (7), *Ramaswami Chettiar* v. *Mallappa Reddiar* (8), *Rangnath Sakharam* v. *Govind Narasiya* (9) and *Minalal Shadiram* v. *Kharsetji Jivaji* (10).

Here defendants 1 to 5 are claiming under transfers by Mt. Soni; and Jani herself, as stated above, claims to possess 8 acres under a title derived from Soni's alienee. Thus none of the defendants including Jani can be said to be precluded from urging his or her defence merely because Jani may have failed to set aside the so-called transfer effected by her husband in 1915, during her minority, of property which was not then hers, but which was yet to come to her and actually devolved on her in 1912.

The appeal fails and is dismissed with costs.

A.L./R K. *Appeal dismissed.*

(7) [1907] 30 Mad. 169=17 M. L. J. 19 (F. B.)
(8) [1920] 43 Mad. 760=39 M.L.J. 350=(1920) M. W. N. 572=59 I. C. 947=12 M. L. W. 475 (F. B.).
(9) [1904] 28 Bom. 639=6 Bom. L. R. 592.
(10) [1906] 30 Bom. 395=8 Bom. L. R. 296.

A. I. R. 1928 Nagpur 264

FINDLAY, J. C.

Himalaya Assurance Co. of Calcutta—Plaintiff—Appellant.

v.

G. I. P. Ry. Co.—Defendant—Respondent.

Second Appeal No. 34 of 1925, Decided on 30th January 1928, from decree of Dist. Judge, Nagpur, dated 5th Oct. 1925, in Civil Appeal No. 95 of 1925.

Railways Act, S. 72 (2)—Governor-General can prescribe form of risk-note only within limits of Cl. (a)—Provision for the signature of sender only is not valid.

The Governor-General in Council in prescribing the form has no power to limit or alter the application of Cl. (a), sub-S. (2), which implies that either the sender or the deliverer to the railway administration of the goods can sign such a risk-note. The Governor-General in Council has power to draw up a from within those limits which will be valid. A risk-note form making provision for the signature of the sender only is not valid.

S. B. Gokhale—for Appellant.

P. Lobo—for Respondent.

Judgment.—In the present case the Himalaya Assurance Co. of Calcutta sued the G. I. P. Ry. through the Secretary of State for Rs. 3,500 being the amount paid by them to one Haji Dada Haji Suleiman on account of damage done to a waggon-load of cocoanuts and copra which were dispatched from Rajmahundry railway station to Itwari station on the B. N. Ry. Both the lower Courts have dismissed the plaintiff's suit on grounds which are sufficiently clear from their judgment.

In this Court only two positions have been taken up in the course of argument by the counsel for the appellant. I will deal first with the argument advanced in connexion with the signature on the on the risk-note (D-2). That risk-note was signed by K. Ramamurty on behalf of L. Narayan Swyanwyana, who were admittedly employed as the forwarding agents by the consignor Rambhatta Rambrahma. In this connexion the counsel for the appellant has drawn my attention to the form of the risk-note (D-2) as approved by the Governor-General in Council. In that risk-note provision is made for signature of sender only. I have been referred in this connexion to S. 72, sub-S. (2), Railways Act. Cl. (a) thereunder provides that any such agreement limiting the railway company's responsibility shall be void unless it "is in writing signed by or on behalf of the person sending or delivering" the goods. Cl. (b) provides that the agreement must also be "otherwise in a form approved by the Governor-General in Council." The argument for the plaintiff-appellant is that, as this form was not signed by the actual consignor or sender, the whole agreement is void and the railway company cannot claim that its liability was limited as shown in the risk-note.

On the pleadings and evidence in the present case it seems to me to be absolutely indubitable that Ramamurty, who signed the risk-note in question, must be deemed to have had due authority from the consignor so to do. He acted on tehalf of the forwarding agents and the forwarding agent admittedly acted under instructions from the consignor. In these circumstances, therefore, I am of opinion that, from this point of view, the risk-note was undoubtedly valid. The interpretation I am asked

to put on the present form of the risk-note, as approved by the Governor-General in Council, would amount to an admission of the fact that the Governor-General in Council, in prescribing the form, had power to limit and alter the application of Cl. (a), sub-S. (2) quoted above. That clause implies that either the sender or the deliverer to the railway administration of the goods can sign such a risk-note. The Governor-General in Council has only power to draw up a form within those limits which will be valid, and the word "otherwise" in Cl. (b) of the sub-section in question, in reality, disposes of this contention urged on behalf of the plaintiff-appellant.

The next contention, which has been put forward on behalf of the Himalaya Assurance Company, is that, having regard to the principle laid down by Hallifax, A. J. C., in *Hanumant Ram* v. *G. I. P. Ry. Co.* (1), the railway company, in the present case, has failed to prove that some portion of the consignment has been lost. It is suggested that no enquiry has been made as to what happened to the rest of the consignment and that the fact that the so-called "damaged," e g., wholly or largely burnt, goods were valued at Rs. 250 and the so-called "undamaged" goods which, in reality, apparently meant goods, some of which were slightly burnt or damaged, were valued at Rs. 2,250, still leaves it an open question as to whether another part of the consignment had not been lost by theft or otherwise, or is still in the railway company's possession. It is true that the plaintiff, in his written statement of 6th July 1923, made an allegation that some of the goods might have been stolen or removed, but, so far as I can follow the pleadings of the parties in this case, there was no suggestion on either side that the whole consignment had not either been burnt or delivered at Itwari, or that any remaining portion remained in the possession of the railway company or had been lost by them. In those circumstances it seems to me that the attempt, which is now being made on second appeal to suggest that it was for the railway company to prove the loss of any part of the consignment, is an entirely new one which cannot possibly now be allowed. In this connexion I am referred to para. 6 of the plaintiff's rejoinder, dated 6th July 1923, which speaks for itself. The position now taken up was obviously never taken up in either of the Courts below and is indeed inconsistent with what might be called the common platform which has existed between the parties throughout the trial of the case in both the lower Courts. The present case is not, therefore, one in which there is any room for the application of the principle laid down in 19 *N. L. R.* 56 quoted above.

These findings govern the appeal which is dismissed. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

R.K. *Appeal dismissed.*

(1) A. I. R. 1923 Nag. 223=19 N. L. R. 56.

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* * A. I. R. 1928 Nagpur 265
Full Bench

FINDLAY, J. C., AND KINKHEDE AND PRIDEAUX, A. J. CS.

Shankar and *another* — Judgment-debtor and Decree-holder — Applicants.

v.

Jawaharlal — Auction-purchaser — Non-applicant.

Civil Revn. No. 94 of 1925, Decided on 30th April 1928, from order of Dist. Judge, Saugor, D/- 15th January 1925, in Misc. Appeal No. 9 of 1924.

* * *Execution sale—Private satisfaction of decree after sale but before confirmation—Court cannot confirm sale where purchaser is decree-holder, but it can confirm where purchaser is a third party—Civil P. C., O. 21, R. 92.*

A private satisfaction of a decree certified in Court after the sale of immovable property has been held and before the confirmation of the sale is ordered, does extinguish the decree and prevent the Court from confirming the sale in favour of the auction-purchaser, if he be the decree-holder himself; but it does not extinguish the decree and prevent the Court from confirming the sale, where a third person has purchased the property bona fide at the auction-sale: 10 *All.* 166 *P. C, Appl.*: *A. I. R.* 1928 *Nag.* 43, *not Appr.*: 10 *All.* 83; 35 *Bom.* 516, *Dist.*: *A. I. R.* 1926 *Nag.* 298; *Nag. C. R.* 201 *of* 1925 and *A. I. R.* 1928 *Nag.* 136 (2), *Appr.*: *Nag. S. A.* 405 and 406 *of* 1923, *Diss. from.*: *A. I. R.* 1922 *Nag.* 248, *held too widely enunciated.* [P 272 C 2]

G. L. Subhedar—for Applicants.
W. R. Puranik—for Non-applicant.

Order of Reference.

Prideaux, A. J. C.—This is another case now pending before me in which the

question arises whether the decision of Kotval, A.J.C., in *Nilkanth* v. *Yeshwant* (1) is not incorrect. There has been considerable discussion as to the correctness of that ruling, and it seems to me that the question should be finally decided by a Full Bench.

In *Maroti* v. *Vithoba* (2) the Judicial Commissioner and myself refused to consider whether the ruling in the above case had been too widely expressed; but we held that if the judgment-debtor and the decree-holder came to a settlement before the sale had been confirmed, there is no decree left capable of execution and the executing Court was functus officio.

In *Kabiruddin* v. *Krishnarao* (3) Hallifax and Kotval, A. J. C., disagreed, and Macnair, A. J. C., supported the former, holding that after the trial Judge had been informed that the decree had been satisfied and had been asked by the decree-holder and the judgment-debtor to take no further steps, he had still power to confirm or set aside the sale.

In *Ramchandra* v. *Lakshman* (4) Hallifax, A. J. C., held:

> A sale in execution to a person not a party to the decree cannot be set aside only because the decree is afterwards set aside in appeal, and still less only because it is satisfied, but it must be set aside for either of those reasons if the purchaser is the decree-holder himself,

In *Seth Nanhelal* v. *Umrao Singh* (5) Mitchell, A. J. C., referred the question I am now dealing with to a Bench. Kotval, A. J. C., held that the Bench decision in *Maroti* v. *Vithoba* (2) was against the appellants and dismissed the application.

Please also see *Ramchandra* v. *Sadashiv* (6) disposed of in the same judgment on 30th August 1924 by Baker, J. C.

I would submit the following question for decision by a Full Bench:

Does the private satisfaction of a decree, certified in Court after sale of immovable property has been held and before confirmation of the sale is ordered, extinguish the decree and prevent the Court from confirming the sale; and does it make any difference whether the auction-purchaser is or is not the decree-holder?

(1) A. I. R. 1922 Nag. 248=18 N. L. R. 134.
(2) A. I. R. 1928 Nag. 43.
(3) A. I. R. 1928 Nag. 136 (2).
(4) A. I. R. 1926 Nag. 298.
(5) Civil Revn. No. 201 of 1925.
(6) Second Appeal No. 405 and 406 of 1923.

Opinion.

Kinkhede, A. J. C.—The following important question of law has been referred to the Full Bench for opinion by Prideaux, A. J. C.:

> Does the private satisfaction of a decree certified in Court after sale of immovable property has been held and before confirmation of the sale is ordered extinguish the decree and prevent the Court from confirming the sale; and does it make any difference whether the auction-purchaser is or is not the decree-holder?

The necessity for this reference arose out of the circumstances that the correctness of Kotval, A. J. C.'s reported decision of *Nilkanth* v. *Yeshwant* (1) has since been doubted by the other Judges of this Court. As the question is of general importance it is absolutely necessary that the conflict of decisions which exists in this Court should be set at rest once for all.

Without narrating in detail, in this opinion, the facts of the two cases which gave rise to this reference I think I may simply state them in a few words. In both the cases referred to this Bench, the private satisfaction or adjustment of the decree was effected between the decree-holder and judgment-debtor behind the back of the auction-purchaser. No provision for depositing in Court within 30 days, the commission of 5 per cent. payable to the purchaser when the sale is sought to be set aside by an application under R 89, O. 21, Civil P. C., was made in either. In one the satisfaction having been brought to the knowledge of the Court after the order confirming the sale was passed the Court revoked the confirmation; in the other, the confirmation was refused from the outset in view of the satisfaction. In both, the sales which were in favour of third persons, were set aside without the prescribed deposits in Court or any application, purporting to be made by any person entitled to make it, either under R. 89 or R. 90, O. 21, Civil P. C, being made. In short, in neither of them was there any compliance with the requirements of the aforesaid rules, and still the imperative provisions of R. 92 of the said order were not obeyed by the first Court; whereas the same were given effect to in appeal by the District Judge who ordered the sales to be confirmed.

The decree-holder in one case, and the judgment-debtor and decree-holder in the

other have preferred revisions to this Court, which have given rise to this reference. The question is whether the District Judge was right in confirming the sales even after the decree-holders admitted private satisfaction of their decrees and in thus ignoring the aforesaid decision of this Court which lays down the following proposition:

Where a decree is admitted by the decree-holder to be satisfied it ceases to exist as a decree capable of execution. The very foundation of the powers of a Court to execute a decree, namely, the existence of a decree capable of execution having disappeared, the Court's powers in execution also cease, and confirmation of the sale which is a proceeding in execution cannot be ordered: vide *Khushalchand Premraj* v. *Nandram Sahebram* (7) and *Mul Chand* v. *Mukta Prasad* (8).

I will first examine the facts of *Nilkanth* v. *Yeshwant* (1). There, within 30 days, i. e., while the sale was still unconfirmed, the decree-holder deposited 5 per cent. of the purchase money for payment to the auction-purchaser and applied for dismissal of his execution application, as he had received a part of the decretal amount and had allowed two months time from the date to the judgment-debtor to satisfy the balance. The application came on for hearing after the expiry of 30 days from the date of sale in connexion with the confirmation proceedings. The decree-holder then informed the Court that the decree was fully satisfied on a date within 30 days of the sale, and prayed that the sale be set aside. The first Court granting the application refused to confirm the sale. But the Additional District Judge in appeal reversed the first Court's order and confirmed the sale. The reasoning adopted by the Additional District Judge was that the Civil Procedure Code gave no option to the decree-holder or the judgment-debtor to defeat the rights of an auction-purchaser by any settlement between themselves; and that under R. 89, O. 21 of the Code, although the payment to the decree-holder may be treated as a deposit in Court, yet, as the application to set aside the sale and the deposit of the 5 per cent of the purchase money were not made by a person who had an interest in the judgment-debtor's property, that rule had no application and the sale had to be confirmed under R. 92, O. 21. Kotval, A J. C., while inclined to support the view of the Additional District Judge, as "perhaps technically correct," did not express any definite opinion on the point and leaving that question aside proceeded to hold that the decree, having been admitted to be satisfied before confirmation the Court's power to confirm the sale, was at an end, and quoted the Bombay and the Allahabad cases already referred to in support of his decision.

I think the reasoning of the learned Additional District Judge was perfectly sound and in accordance with law and his order based on it deserved to be allowed to stand unreversed. As a matter of fact, on the day the sale was held, the decree was not satisfied; it was satisfied subsequently, but within 30 days of the auction sale. Although the private satisfaction of the decree dispensed with the necessity on the part of the decree-holder to seek the Court's aid to apply the sale-proceeds realized from the auction-purchaser towards the satisfaction of the decree, I think it did not put and end to the right of the auction-purchaser to urge that the sale be made absolute in his favour in terms of R. 92, O. 21, Civil P. C., in the absence of any application under Rr. 89 or 90 of the said order, and the sale-proceeds be ordered to be paid to the judgment-debtor instead of to the decree-holder. The provisions of R 92 are imperative, and the Court cannot refuse to confirm the sale unless the requirements of Rr. 89 and 90 are strictly complied with. The deposit must be full and must be made within 30 days prescribed for an application under that rule. The words

may apply to have the sale set aside on his depositing in Court, &c.,

show that not only the application but also the deposit must be made within 30 days. The Court has no power to extend this period of 30 days under S. 48, Civil P. C.: cf. *Rameshwar Misser* v. *Sureshwar Misser* (9).

In *Raoji* v. *Bansilal Narayan* (10) it was held that the mere depositing of money into Court within time was not enough, and that an application to set aside the sale ought to have been made within the time prescribed by Art. 166, Lim. Act. The first Court's order con-

(7) [1911] 35 Bom. 516=12 I. C. 572=13 Bom. L. R. 977.
(8) [1887] 10 All. 83=(1887) A. W. N. 257.
(9) [1917] 2 Pat. L. J. 164=39 I. C 664.
(10) [1919] 43 Bom. 735 = 53 I. C. 135=21 Bom. L. R. 835.

firming the sale for want of such an application was upheld by the District Judge on appeal, and the High Court declined to interfere with that order in revision. The deposit of 5 per cent.. required by R. 89 (1) (a), to be made in Court, is payable to the purchaser as a solatium or compensation for his trouble and disappointment for the loss of the bargain: *Chandi Charan* v. *Banke Behary Lal* (11) and *Tirumal Rao* v. *Dastaghiri Miyah* (12); as such it cannot be dispensed with. In addition to it the amount specified in the proclamation as that for the recovery of which the sale was ordered, less any amount which may since the date of such proclamation of sale have been received by the decree-holder, has also to be deposited in Court.

The provisions of sub-R. (1), R. 92, O. 21, Civil P. C., also are peremptory. They cast an imperative duty on the executing Court to make an order confirming the sale unless the conditions specified in Rr. 89, 90 or 91 were fulfilled: cf. observations of Findlay, J. C., in *Sitaram* v. *Kaniram* (13). Sub-R. (2) lays down the conditions under which alone the Court is permitted to make an order setting aside the sale. The proviso to that sub-rule makes notice of the application to be given to all persons affected thereby. Sub-R. (3) bars a civil suit for setting aside an order made under R. 92. Taking these special provisions and restrictions into consideration, I must say that in the case of *Nilkanth* v. *Yeshwant* (1), in which neither the deposit nor the application to set aside the sale as required by law was made by the person entitled to make it within the time prescribed, the sale was bound to be confirmed under the mandatory provisions of R. 92, O. 21, Civil P. C.

With these remarks I proceed to consider the further question whether, as held by Kotval, A. J. C., a mere intimation by the decree-holder before confirmation that his decree is satisfied relieves the Court of its imperative duty to confirm the sale in the interests of the auction-purchaser. I can very well understand that if the decree-holder is himself the auction-purchaser and the intimation affects none else except himself, and if, as the result of his declaration, he releases in favour of the judgment-debtor whatever right he acquired by the auction, the Court may be justified in acting on the declaration and setting aside the sale, unless the benefit of the assets realized by the auction has already been claimed by other decree-holders under S. 73, Civil P. C. But, if an outsider has purchased at the auction, his rights cannot be lightly ignored, simply because the decree-holder so intimates, and even the judgment-debtor joins in intimating, that the decree being otherwise satisfied the execution should cease from that moment. If such an intimation were acted upon, very serious consequences would enure to a third party, auction-purchaser. Not only this, but the Court would be acting in violation of the duty cast on it by R. 92 (1), O. 21, Civil P. C.: cf. observations of Macnair, A. J. C., in *Kabiruddin* v. *Krishnarao* (3).

As pointed out by Mitchell, A. J. C., in his order of reference in *Seth Nanhelal* v. *Umraosingh* (5) I may say with due respect that the view of Kotval, A. J. C, though it proceeds upon the fundamental provision of law governing the satisfaction of a decree as contained in Rr. 1 and 2, O. 21, Civil P. C., overrides the special rules of procedure which the legislature has laid down regarding satisfaction of decrees in particular cases, the particular case relevant here being the one in question, namely, where a sale of immovable property has been held, in spite of it the decree-holder or judgment-debtor or both plead complete satisfaction of the decree before confirmation.

If the scheme of O. 21 of the Code be carefully examined, it will be seen that during the initial stage of execution the matter of satisfaction of the decree lies entirely between the decree-holder and the judgment-debtor with the Court as "umpire and recording agency." If any adjustment or satisfaction is effected as between them in that initial stage, it is not the concern of anybody else; and the Court's duty is to record it, if it be certified within the time prescribed by law, and is either admitted or proved.

If, however, the execution proceedings proceed further and steps are taken to levy attachment of immovable property, the legislature imposes further safeguards

(11) [1899] 26 Cal. 449.
(12) [1899] 22 Mad. 286.
(13) A. I. R. 1926 Nag. 193=21 N. L. R. 157.

in the interest of the decree-holder as also of the other persons having claims enforceable under the attachment, by prohibiting private alienations under S. 64, Civil P. C. This, in the long run, enures for the benefit of the purchaser at the auction sale, if any held on the basis of the attachment, as R. 95 gives him a right to obtain possession even against a transferee after attachment. If the attachment has injuriously affected the prior, superior or equal titles or lien of any persons other than the judgment-debtor, the law gives them also an opportunity to intervene and obtain orders for their protection. If, after all these preliminaries are satisfied, the Court decides to pass an order for sale, under R. 64, a situation is created by which advantage of the order can be claimed by a limited number of decree-holders, so that, if they want to share the sale proceeds, they may resort to the prescribed procedure to become entitled to rateable distribution under S. 73, Civil P. C.

When the execution proceedings pass beyond the stage of the order for sale and the proclamation for sale is issued, the law holds out an opportunity to the judgment-debtor to raise the amount under R. 83 by private treaty subject to certain conditions as to payment of the amount into Court, and gives the Court power even to postpone the sale to enable the judgment-debtor to achieve that end. R. 69 (3) even contemplates the stopping of the sale by the officer conducting the sale, if, before the lot is knocked down, the amount to be realized is actually tendered to him or proof is given to his satisfaction that the amount has been paid into Court which ordered the sale. A very elaborate procedure is laid down even as regards the proclamation of the sale and the manner of holding the sale, with a view to avoid disappointment to the bidders at the auction, as far as possible. The solicitude of the legislature, to procure the full price for the judgment-debtor's property sold at the compulsory sale, is so great that, in order to keep off unwholesome competition or to prevent underhand dealings on the part of the decree-holder or the officers of Court, it precludes them from bidding, although, in the case of a decree-holder wishing to compete at the auction, it makes the obtaining of an express permission to bid obligatory under R 72, and entitles the judgment-debtor and other interested persons to have the sale set aside for any contravention of the rule if he so desires.

As soon as the sale is held and the officer conducting the sale accepts the bid and declares the highest bidder to be the purchaser, the law fastens upon the person so declared the obligatory duty of complying with the imperative provisions of Rr. 84 and 85 of punctually paying the purchase-money, on pain of forfeiting the 25 per cent or even all claim to the property or to any part of the sum for which it may be subsequently sold under R 86. R. 84 renders him liable to be proceeded against on the execution side itself, for making good the deficiency, if any, in case of resale occasioned by reason of his default in making punctual payment. The auction-purchaser thus subjects himself to great risks, and, therefore, his rights, after he has fulfilled the condition of punctual payment of the price, cannot be lightly ignored. The law holds out under R. 92 a definite assurance to him that the sale shall be confirmed in his favour, unless the judgment-debtor or any other persons entitled to apply under R. 89, or the decree-holder or any other persons entitled to apply under R. 90, or he himself under R. 92, exercises the right conferred on him to apply to have it set aside after satisfying the conditions mentioned in the rule respectively applicable to each applicant.

If the legislature had desired to refuse confirmation and veto the purchaser's rights, on any grounds other than those mentioned in Rr. 89, 90 or 91 of the order, there was nothing to prevent it from providing for such a contingency in the Code. If it had intended to leave him to the mercy of the decree-holder and judgment-debtor by enabling them to defeat his rights and even to oust the Court's jurisdiction by a private pact of their own, formed behind the purchaser's back, the Code would have expressly provided for the exercises of such a right. In my opinion the very absence of any such provision in the Code for vetoing or negativing the purchaser's rights under the Court sale itself constitutes the strongest proof of the absence of any such intention. Lastly, in enacting S. 65, Civil P. C., the legislature has expressly laid down that, on the Court sale being absolute under R. 92, the pur-

chaser's title to the property shall date back to the date of the sale and not merely from the date of confirmation as was the case under S. 316, old Civil P. C.: cf. *Shiam Lal* v. *Nathe Lal* (14). I need not discuss the scheme of O. 21 any further. I think it is enough to remark that the object of the summary procedure prescribed by Rr. 95, 96 and 97 to 103 is to help the auction-purchaser to secure undisturbed possession of the property purchased by him as speedily as possible in the course of the very execution proceedings in which he became the purchaser.

It will thus be seen that the scope of the fundamental provision of law governing the satisfaction of a decree as contained in Rr. 1 and 2 of O. 21, Civil P. C, is very much circumvented by the special rules of procedure prescribed in the latter part of that order in the interests of purchasers at auction sales.

If the intention of the legislature had been to make the acquisition of title by the auction purchaser, contingent upon the decree being a subsisting decree at the date of the confirmation, there was no point in deleting the words to that effect from S. 316 of the old Civil P. C., when S. 65 of the new Code was, in its stead, enacted. All that appears to be necessary under the Code from the point of view of third party purchasers is that, to give them a good title at the date when the sale is held, the decree must be a subsisting decree. If that decree ceased to exist at the date of the sale there is no debt to recover and, therefore, the Court loses its jurisdiction to sell the judgment-debtor's property, and consequently every sale held under such circumstances must be treated as a nullity. The underlying principle seems to be that where the very foundation of the Court's power to bring the judgment-debtor's property to sale disappears, the Court must ipso facto cease to exercise its jurisdiction in the matter. If this disappearance of the foundation of the Court's power is brought about by the satisfaction of the decree or by a variation in appeal, and is of a date prior to the sale, as was the case in *Ram Prasad* v. *Mahesh Kant* (15), there is no difficulty. But if the disappearance of the legal basis for the sale is brought about by events happening subsequent to the date of the sale being held and confirmed, as for example, by the decree being reversed in appeal, and if rights have in the meantime sprung into existence in favour of third persons, who are not parties to the decree, i. e, of third party bona fide auction-purchasers, as was the case in *Zain-ul-Abdin Khan* v. *Muhammad Ashgar Ali Khan* (16), justice, equity and good conscience demands that their rights should remain unaffected by such disappearance. They must get the property purchased by them in lieu of the money bona fide paid by them on the faith of the auction sale.

This position is easily understandable on the principle laid dawn by their Lordships of the Privy Council in *Zain-ul-Abdin Khan* v. *Muhammad Ashgar Ali Khan* (16). That principle takes place after the sale but before its confirmation, where the decree was necessarily subsisting at the date when the sale was held. If then the extinction of the decree by its being set aside in appeal cannot be allowed to interfere with a sale held in favour of third parties, I cannot understand on which principle its satisfaction by payment, after valid existence, can do so.

If, however, under similar conditions, the purchaser at the auction was the decree-holder himself, no considerations based on justice, equity and good conscience can arise at all, because he cannot be allowed to say that, although the very decretal debt in lieu whereof he purchased the judgment-debtor's property has ceased to exist, his title under the sale which has either been confirmed or awaits confirmation in his favour should stand.

In *Mul Chand* v. *Mukta Prasad* (8) which was followed by Kotval, A. J. C., it was the decree-holder who had purchased the property at the auction and, therefore, the decision arrived at in that case, that the very foundation of the executing Court's jurisdiction ceasing the power of that Court to confirm the sale must in equity also cease, was perfectly correct, but that principle could not be extended to the prejudice of the third party auction-purchasers, as in *Nilkanth* v. *Yeshwant* (1) or in the present cases. The case in *Mul Chand* v. *Mukta Prasad* (8)

(14) [1911] 33 All. 63=7 I. C. 65.
(15) A. I. R. 1922 Pat. 525=1 Pat. 232.
(16) [1888] 10 All. 166=15 I. A. 12=5 Sar. 129 (P. C.).

is thus distinguishable and its scope must, in view of *Zain-ul-Abdin Khan* v. *Md. Ashgar Ali Khan* (16), be deemed to be limited to decree-holder purchasers merely.

The other case relied on by Kotval, A. J. C., is *Khushalchand Premraj* v. *Nandram Sahebram* (7). This case has been also reported in 35 *Bom.* 516. I am constrained to say with due respect that it is no authority for the view in support of which it is cited. That case as pointed out by Hallifax, A. J. C., in *Ramchandra* v. *Lakshman* (4)

was concerned with the proceedings of a Collector in execution and a sale of the property in his hands by the judgment-debtor. The statement of the proposition under discussion here was obiter and the basis of the decision was the view that the retransfer of the case to the civil Court by the Collector must relate back to the date on which satisfaction of the decree was certified to him, because on certification he could do nothing else but retransfer the case. * * * the decision has no bearing on the present case.

In short, no question of the Court's authority to confirm the sale was raised and decided in that case. I, therefore, venture to suggest that the two cases, of *Mul Chand* v. *Mukta Prasad* (8) and *Khushal Chand Premchand* v. *Nandram Sahebram* (7), relied on by Kotval, A. J. C., cannot be treated as authorities for the proposition laid down in *Nilkanth* v. *Yeshwant* (1).

I need only cite with approval the case of *Ramchandra* v. *Lakshman* (4) decided by Hallifax, A. J. C., where it was held that

a sale in execution to a person not a party to the decree cannot be set aside only because the decree is afterwards set aside in appeal and still less only because it is satisfied, but it must be set aside for either of those reasons if the purchaser is the decree-holder himself.

Similarly I have no hesitation in expressing my concurrence in the view of law taken by Mitchell, A. J. C., in *Seth Nanhelal* v' *Umrao Singh* (5) in this order of reference, and by Macnair, A. J. C., in the opinion recorded by him as a third referee Judge in *Kabiruddin* v. *Krishnarao* (3).

As regards the cases of *Ramchandra* v. *Sadashiv* (6), decided by Baker, J. C., it is sufficient to point out that in those cases, after the expiry of 30 days from the date of the auction sale but before the confirmation of the sale in favour of the third party purchaser, the decree-holder intimated full satisfaction of the decree out of Court and applied to set aside the sale, and the judgment-debtor deposited 5 per cent. of the purchase money for payment to the auction-purchaser and asked that the sale should be set aside. The executing Court ordered the purchase money deposited by the auction-purchaser to be refunded. After this was passed, the auction-purchaser made an application for confirmation of the sale on the ground that the requirements of O. 21, Rr. 89 and 92, Civil P. C, were not complied with, and that the judgment-debtor's application was barred by Art. 166, Lim. Act. This application was rejected by the first Court, but the Judge of the first appellate Court was prepared to entertain it

having regard to S. 65, Civil P. C., O. 21, R. 89 and R. 92 (2) and Art. 166, of the Limitation Schedule

as he thought that

the auction purchaser is quite within his rights to ask for a confirmation of (the) sale in his favour, notwithstanding the previous satisfaction of the decree when the judgment-debtor has not applied and deposited 5 per cent of the purchase money within 30 days from the date of the sale.

I think this reasoning was quite correct and would surely have been given effect to had it not come into conflict with the ruling in *Nilkanth* v. *Yeshwant* (1). The lower appellate Court, therefore, following that case, as it was bound to do, dismissed the appeal of the auction purchaser.

In second appeal Baker, J. C., took the view which may be best expressed in his own words as follows :

* * While the Civil Procedure Code makes provision for an application by the judgment-debtor to set aside the sale, it does not seem to provide for an application of the kind with which we are concerned in the present appeal. This being so, I am not impressed by the argument that the effect of the ruling in *Nilkanth* v. *Yeshwant* (1) is to make O. 21, R. 92, Civil P. C., of no effect or to nullify Art. 166, Lim. Act. I, therefore, think that the present case is governed by the ruling in *Nilkanth* v. *Yeshwant* (1) with which I see no sufficient reason to disagree. * * * The interests of the auction purchaser are sufficiently protected by the payment of 5 per cent. of the purchase money to him.

With all deference to the view thus expressed I must say that it does not commend itself to me, especially as it violates the provisions of R. 92, O. 21, Civil P. C., and Art. 166, Lim. Act, and leads to what I may venture to describe as an anomalous result, viz., that

a sale may or rather must be set aside on payment of the decretal amount at any time before it is confirmed, even after the expiry of the period of thirty days,

to use the words of Hallifax, A. J. C., in *Kabiruddin* v. *Krishnarao* (3). I, therefore, express my respectful dissent from the view taken by Baker, J. C.,

A Bench of this Court which had occasion to decide the case of *Maroti* v. *Vithoba* (2) had expressly refrained from considering the question whether the rule laid down by Kotval, A. J. C., in *Nilkanth* v. *Yeshwant* (1), is too widely expressed or not. The Judges of the Bench, however, purported to rest their decision principally on the so-called inherent power of the parties to the decree to settle the matter between themselves in view of the fact that the sale had not been confirmed. With due respect I venture to think that, just as in face of an express provision of the statute law there is no scope for the exercise of its inherent jurisdiction under S. 151, Civil P. C., by a Court, similarly, there ought to be little or no scope for the parties to exercise their inherent right to settle their disputes, if its effect is to violate the express provisions of a statute which creates or recognizes the claims or rights of bona fide purchasers not parties to the decree. I am fortified in this view by the decision in *Joshi Shib Prakash* v. *Jhinguria* (17), *Tota Ram* v. *Panna Lal* (18) and *Anant Potdar* v. *Mangal Potdar* (19). which recognize the principle that S. 151, Civil P. C., cannot be applied where the rule of procedure is already laid down: cf. also *Tota Ram* v. *Panna Lal* (18), [22 *A. L. J.* 533] where it is laid down that S. 151 is not intended to override express provisions of law, but is intended for cases for which the strict letter of the law provides no remedy. There are observations to the same effect also in the judgment of their Lordships of the Privy Council in *Sabitri Thakurain* v. *Savi* (20). A view to the same effect has also been taken by Findlay, J. C., in *Nizamuddin* v. *Jumma* (21), to which a reference was made at the bar.

For these reasons I am of opinion that a mere intimation to the executing Court, that the decree in execution whereof the sale is held has since been satisfied, does not relieve it of its obligatory duty to confirm the sale under R 92 (1), O. 21, Civil P. C., in the interest of third party auction-purchasers.

Applying to the facts of the present cases the principle laid down in *Zain-ul-Abdin Khan* v. *Muhammad Ashgar Ali Khan* (16), which was stated in *Shivlal Bhagvan* v. *Shambhuprasad* (22), as having been repeatedly applied in India to sales in execution of money decrees, and also followed in *Indar Sain* v *Prabhu Lal* (23) and *Agha Husain* v. *Qasim Ali* (24), I record the following as my opinion on the point referred to the Bench :

That a private satisfaction of a decree certified in Court after the sale of immovable property has been held and before the confirmation of the sale is ordered, does extinguish the decree and prevent the Court from confirming the sale in favour of the auction purchaser, if he be the decree-holder himself, but it does not extinguish the decree and prevent the Court from confirming the sale where a third person has purchased the property bona fide at the auction sale.

Findlay, J. C.—I have had the advantage of perusing the opinion of Kinkhede, A. J. C., in this case, and am in full agreement therewith. It seems to me that the principle laid down by Kotwal, A. J. C., in *Nilkanth* v. *Yeshwant* (1) was too widely enunciated, and that the proposition can only hold good where the auction purchaser and the decree-holder are one and the same being. The two decisions relied on by Kotwal, A. J. C., for his decision were not, in reality, any sufficient basis therefor, even assuming them to be correct. I would answer this reference, therefore, as laid down by my learned brother, Kinkhede, A. J. C.

Prideaux, A. J. C.—I concur with Kinkhede, A. J. C.

Order (30th April 1928)

Prideaux, A. J. C.—In view of the opinion come to by the Full Bench, the revision fails and is dismissed with costs. I fix Rs. 15 as pleader's fees.

D.D. *Revision dismissed.*

(17) A.I.R. 1924 All. 446=46 All. 144.
(18) A.I.R. 1924 All. 668=46 All. 691.
(19) A.I.R. 1926 Pat. 27=4 Pat. 704.
(20) A.I.R. 1921 P.C. 80=48 Cal. 481=48 I.A. 76 (P.C.).
(21) A.I.R. 1926 Nag. 17.
(22) [1905] 29 Bom. 435=7 Bom.L.R. 585 (F.B.).
(23) A.I.R. 1922 Lah. 277=3 Lah. 88.
(24) A.I.R. 1926 All. 35=48 All. 94.

* A. I. R. 1928 Nagpur 273

KINKHEDE, A. J. C.

Gopal Rao and *others*—Defendants—Appellants.

v.

Babu and *another*—Plaintiffs — Respondents.

First Appeal No. 24 of 1927, Decided on 28th October 1927, from decision of 1st Class Sub-Judge, Khandwa, D/- 22nd November 1926, in Civil Suit No. 33 of 1925.

(a) *Practice—New plea.*

A new plea of a question of fact cannot be raised for the first time in appeal. [P 273 C 2]

(b) *Hindu Law—Alienation of self-acquisition—Question of necessity does not arise.*

Where the property mortgaged forms the separate or self-acquisition of the mortgagor no question of benefit or legal necessity strictly arises. [P 274 C 1]

(c) *Evidence Act, S. 101—Party alleging must prove circumstances invalidating the contract.*

If a contracting party alleges that an agreement is opposed to public policy, it is for him to set out and prove those special circumstances which will invalidate the contract : 1 *C. L. J.* 261 and 8 *N. L. R.* 182, *Foll.* [P 274 C 1, 2]

* (d) *Contract Act, S. 23—Rules against legal practitioner carrying on money-lending business—Mortgage in contravention of the Rules is valid and enforceable.*

In the absence of any statutory bar positively prohibiting a legal practitioner from being engaged in trade or business, a mortgage by a legal practitioner is valid and enforceable. [P 275 C 1]

* (e) *Legal Practitioner—Rule 16 framed by Judicial Commissioner, Nagpur, do not apply to pleader enrolled before the framing of the rule.*

The rule 16 framed by the Judicial Commissioner against a legal practitioner carrying on money-lending business speaks of the state of things obtaining at the date of the application for admission as a pleader and is not made applicable to the pleaders enrolled prior to that date, as it casts on the applicant for enrolment the duty of stating the fact of his carrying on any trade or other business in his application. [P 275 C 1]

D. W. Kathalay—for Appellants.

J. Sen—for Respondents.

Judgment. — The plaintiffs-respondents instituted the suit out of which this appeal arises on the basis of a registered mortgage-deed dated 6th January 1914 executed in the name of plaintiff 2 by Govindrao Reshimwale, the deceased father of appellants 2 and 3 and cousin (by adoption) of appellant 1 in consideration of Rs. 5000 advanced by the late Mr. Payarelal Gangoli, Pleader of Khandwa, on the security of Govindrao's eight annas share of certain property mentioned in the deed, with a condition of sale thereof in case of non-payment. The mortgage contains a stipulation for payment of simple interest annually and for compounding the interest in case of default. The principal sum was to fall due on the expiry of ten years from the date of the mortgage. The first Court overruled the several defences taken and decreed the full claim except as to a small portion which was disallowed on the ground of mistakes in the calculation of interest.

The defendants are the appellants before me. Their main contention is that the mortgage is void and against public policy on the ground that the late Mr. Pyarelal, pleader, was the real mortgagee, but that he could not carry on money-lending under rules framed by the High Court under the Legal Practitioners Act. They also urged absence of legal necessity or benefit and took up a new plea in the shape of an additional ground that the plaintiffs-respondents were not entitled to compound interest under the terms of the mortgage on the principal sum of Rs. 5000 before it fell due.

As to the additional ground of appeal I think the plaintiffs have expressly alleged in the plaint that they were entitled to charge compound interest on the whole debt and also framed their account on that basis. The only defence the defendants took as to this claim for interest was that there were mistakes in the calculation. They never challenged the operation of the stipulations as to payment of interest and compound interest. I do not think I can entertain this plea for the first time here as the question of how the stipulation as to compound interest was to work is a question of fact and the defendants were bound to take it as a specific plea in answer to the claim as laid. I therefore disallow the plea raised in the additional ground.

The plea of legal necessity or benefit would have been material had the property mortgaged been the joint property of defendants and the mortgagor. It is conceded before me that the finding of the lower Court that the eight annas share

mortgaged formed the separate and self acquisition of Govindrao, the mortgagor; no question of benefit or legal necessity, therefore, strictly arises in the case. Even assuming that the property was treated by Govindrao as joint property of himself and his sons which, however, is not a fact, the mortgagee is sufficiently protected by the representations made and the reasonable enquiry by which the mortgagee had satisfied himself as to the need for the transaction of the mortgage in suit.

The lower Court has held that the mortgage was operative only against Govindrao's eight annas share, and also observed that the remaining eight annas share owned by appellant 1 remained unaffected by the mortgage; the learned advocate for the appellants, therefore, did not press the question of the mortgage not being binding against appellant 1.

Having disposed of minor points raised in this appeal, I now turn to the main defence repeated in the appeal, viz., of the mortgage being void and against public policy. The learned advocate for the appellant was asked whether he would point out the particular rules by which he thought the mortgage transaction was governed as different rules were framed by this Court from time to time. In short he was asked to argue the case with reference to the specific rules applicable, as there was material difference in the rules in force at the date of the mortgage and the earlier rules. There is nothing on record to show when the enrolment of Mr. Pyarelal Gangoli as a pleader of this Court took place and whether any rules were then framed prohibiting legal practitioners from having any concern with money-lending business. The defendants have not at all framed their pleadings with reference to any particular rules framed by this Court. The result was that the learned advocate found it difficult to bring the case under the rules now in force, or even under those in force at the date of the mortgage, as they would not apply to a practitioner already enrolled prior to the date of their publication in the local official Gazette which gave them the force of law.

If a contracting party alleges that an agreement is opposed to public policy, it is for him to set out and prove those special circumstances which will invalidate the contract: *Bakshi Das* v. *Nadu Das* (1) cf. *Sonba* v. *Ganesha* (2), where this Court laid down that the burden of proving that, at the date of the transfer challenged as invalid under S. 325-A, Civil P. C., 1882 (R. 11, Sch. 3, Civil P. C., 1908), the Collector was exercising any of the powers conferred on him by the statute, was on the party challenging. Similarly here it was the defendants' duty to set out and prove the invalidating circumstances, which rendered the mortgage void on the ground of public policy. They have laid no proper basis in their pleadings for the defence of public policy and cannot catch at random at this or that rule of the rules framed by this Court to justify the stand taken up by them. I am, therefore, of opinion that there is no allegation, much less is there any proof, before me in this case on which a finding that the mortgage in question was void and opposed to public policy could be based. I do not, therefore, feel myself called upon to decide the point sought to be argued in appeal for want of proper material.

The respondents were, however, asked whether they could state the approximate year of the enrolment of their father as a pleader of this Court. They gave out that it was sometime about 1879. The appellants thereupon argued the case as if the rules published in 1880 were applicable to Mr. Gangoli. Reliance is placed on R. 16 of the rules. Suffice it to say that that rule speaks of the state of things obtaining at the date of the application for admission as a pleader, and is not made applicable to the pleaders enrolled prior to that date, as it casts on the applicant for enrolment the duty of stating, the fact of his carrying on any trade or other business in his application, and it also provides for the giving of a notice to the Judicial Commissioner if he subsequently enters into any trade or other business, and gives power to the Judicial Commissioner to pass such orders as he shall think fit. That rule nowhere lays down what the consequences of the failure to give notice shall be, and whether that will entail forfeiture of the right to enforce the

(1) [1905] 1 C. L. J. 261.
(2) [1912] 8 N. L. R. 182=17 I. C. 687.

transfer or mortgage or to realize the debt from the debtor.

The said pleader having died the files relating to his enrolment etc., have been eliminated and there is, therefore, no means of knowing anything one way or the other as to any compliance or failure of compliance on his part with the requirements of the said rule. Even assuming that the rules of 1880 applied to this case there is nothing to show that the pleader concerned did not comply with the requirements of the rules.

Without expressing any opinion as to the rules framed by this Court, it is sufficient for the purposes of this appeal to say that in the absence of any statutory bar positively prohibiting a legal practitioner from being engaged in trade or business, the mortgage in suit is valid and enforceable and the plaintiffs' claim was rightly decreed. The appeal fails and is dismissed with costs.

R.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 275 (1)

PRIDEAUX, A. J. C.

Baburao—Defendant—Appellant.

v.

Ramkrishna—Plaintiff—Respondent.

Second Appeal No. 491 of 1926, Decided on 3rd October 1927, from decree of 2nd Addl. Dist.-Judge, Wardha, D/- 16th August 1926, in Civil Appeal No. 15 of 1926.

C. P. Tenancy Act (1 *of* 1920), *S.* 2 (7)—*Co-lambardars—Powers of co sharers.*

One out of two lambardars can bring a suit to recover a village site, when he is not acting adversely to the interests of the other lambardar: 12 *N. L. R.* 24, *Dist.* [P 275 C 1]

R. B. Gadgil—for Appellant.
V. R. Dhoke—Respondent.

Judgment.—The facts of this case are sufficiently given in the judgment of the lower appellate Court. There is no force in this appeal. Both the lower Courts find that one out of two lambardars can bring a suit of this nature to recover a village site, and I agree with them. *Ganpatsao* v. *Pandurang* (1) has been quoted, but that case refers to a case of one of two lambardars acting adversely to the interests of the other lambardar. I think in the present case the plaintiff could bring the suit. It is then contended that Govinda, the other lambardar, gave his consent to the auction-purchase by the present appellant. Both the lower Courts find that he did not. That is a finding of fact and there is nothing to vitiate it. Then, as to the question of the plaintiff standing by and acquiescing in the defendant's building, there is a finding of fact that the defendant did not build any chapri or wall as alleged. That being so, there could be no standing by or acquiescence. These are the only points argued. They fail and this appeal is dismissed with costs. Appellant will pay the respondent's costs.

N.K. *Appeal dismissed.*

(1) [1916) 12 N. L. R. 24=33 I. C. 758.

A. I. R. 1928 Nagpur 275 (2)

FINDLAY, J. C.

Mayadad Khan and *others*—Defendants—Appellants.

v.

Hazarilal—Plaintiff—Respondent.

First Appeal No. 78 of 1926, Decided on 22nd Nov. 1927, against decree of Dist. Judge, Chhindwara, D/- 25th March 1926 in Civil Suit No. 17 of 1924.

(a) *Mahomedan Law—Oral gift by a Mahomedan is valid—Wife's desiring mutation of her property in her husband's name is not sufficient proof of deliberate transfer by the wife in her husband's favour.*

An oral gift by a Mahomedan may be a valid one, but the mere fact that the wife wanted mutation of her property in her husband's name is not sufficient proof of deliberate surrender or transfer by the wife in her husband's favour. In such a case the question of adverse possession between husband and wife does not arise : 24 *W. R.* 274 ; 11 *N. L. R.* 164 ; 3 *All.* 266; and 30 *Mad.* 305; *Ref.* [P 276 C 2]

(b) *Mahomaden Law—Property owned by sons—Father can not obtain adverse possession of sons' property because of their joint living—Adverse possession.*

When the father is the natural guardian of his sons and maintains them out of the common fund, and all dine together in the same house, there will, in those circumstances, normally be no question of rendering accounts and thus the father cannot acquire a title by adverse possession, as against his sons, of the property owned by the latter. [P 277 C 1]

D. T. Mangalmoorti—for Appellants.
V. R. Dhoke—for Respondent.

Facts.—There were two mortgages in the suit. The first one, dated 8th

July 1912, was executed by Mangal Khan and his five sons : Miyadad Khan, Sakhidad Khan, Baldar Khan, Ismail Khan and Ahmad Khan. The second mortgage, dated 2nd September 1912, was for Rs. 600 and the executants were the same, save that Ahmad Khan was omitted. In the first mortgage, a four-anna proprietary share of mouza Khairi Khurd (Seoni), certain absolute occupancy fields in that village and certain houses and moveable property were included ; the subjects mortgaged were the same in the second deed save that it also covered a further 8-pies share in the same village. Mangal Khan, Ismail Khan and Ahmad Khan were dead. The first three defendants, Miyadad Khan, Sakhidad Khan and Baldar Khan were the sons of Mangal Khan ; defendant 4, Walidad Khan, was the minor son of Ismail Khan, deceased ; defendant 5 Amidad Khan, was similarly the minor son of Ahmad Khan ; and defendants 6 and 7, Khatoonbi and Mt. Khunnabi, were the widow and daughter respectively of Ahmad Khan, deceased.

The plaintiff alleged that Rs. 200 had been paid towards the first mortgage and Rs. 600 towards the second one. The amount claimed in suit was Rs. 8,141-12 0 on the first mortgage and Rs. 1,25 -4-0 on the second one. A great variety of pleas were offered on behalf of the first two defendants in particular and, on the issues which arose on the pleadings of the parties, the learned District Judge passed a preliminary decree for foreclosure after finding Rs. 10,993-12 0 due to the plaintiff covering all the property mortgaged.

Judgment.—(After stating facts as above the judgment proceeded). It is asserted that when Amir Khan died, Mangal Khan had a two annas share as well as 1/4th share of the other two annas share, viz., 6 pies, or 2 annas 6 pies in all. Shahnurbi died in 1909 and then Maugal Khan thus further obtained a quarter-of-an-anna share, i. e., 3 pies. Thus the appellants so far admit that Mangal Khan was owner of a 2 annas 9 pies share on the date of the mortgage, and the dispute is in reality only about the remaining 1 anna 3 pies share to which, on the appellants' case, Mangal Khan had no title.

I now turn to the lower Court's finding on issue 10, wherein the District Judge holds that Mt. Shahnurbi transferred her share to Mangal Khan. The oral evidence ofiered by the defendants was held by the District Judge to be unsatisfactory on the point and apparently the documents (D. 1, D. 2 and D. 3) were so solely relied on for the said finding. The District Judge apparently assumes that the mere fact that Mt. Shahnurbi asked that her share should be recorded in Mangal Khan's name was equivalent to an out and out transfer by her to Mangal Khan. I do not think that D. 1, D. 2 and D. 3, when read in the light of the circumstances prevailing at the time, can properly bear this construction. Mangal Khan and Mt. Shahnurbi were then husband and wife. The former in his statement (D. 1) describes himself and Shahnurbi as in joint possession and asked for his name to be recorded on the ground that, after consulting his wife, she had agreed to this. The latter in her statement (D 2) made no specific statement that she was transferring her title in the property and merely said she wanted mutation in her husband's name.

I cannot find in this any sufficient proof of a deliberate surrender or transfer by Mt. Shahnurbi. Even Mangal Khan in his statement describes his wife as in joint possession. Nor in my opinion does any question of adverse possession either arise as between a husband and wife in the circumstances of this case : cf. *Sooda Ram Doss* v. *Joogul Kishore* (1) and *Dina* v. *Bishambhar Singh* (2). It is no doubt true that an oral gift by a Mahomedan may be a valid one : cf. *Kamar-un-nisa Bibi* v. *Hussaini Bibi* (3) and *Kandath Veettil Bava* v. *Musaliam Veettil Pakrukutti* (4), but the position in this case, in my opinion, is that these documents (D. 1 to D. 3) do not establish a gift and are quite consistent with the theory that as the husband and wife were in joint possession of property, the former's name only should be mutated—a convenient and usual expedient. On this point, therefore, I am unable to accept the lower Court's finding on its tenth issue and must hold that it has not been established that Mt. Shahnurbi gifted or transferred her share to Mangal

(1) 24 W. R. 274.
(2) [1915] 11 N. L. R. 164=31 I. C. 464.
(3) [1881] 3 All. 266 (P. C.).
(4) [1907] 30 Mad. 305=2 M. L. T. 180.

Khan, and, equally so, that he has not acquired a title thereto by adverse possession.

The lower Court's finding on issue 11, viz., that Mangal Khan had acquired a title as against his sons by adverse possession, also seems to be a faulty one. The father was the natural guardian of his sons and maintained them out of the common fund. All dined together in the same house. There would, in those circumstances, normally be no question of rendering accounts and thus, in my opinion, the District Judge, in finding that Mangal Khan had acquired a title by adverse possession as against his sons, has relied on criteria which would be applicable to strangers but were quite inapposite in the circumstances of this case. I hold, therefore, that Mangal Khan had not acquired a title by adverse possession.

I now pass to the question of whether Mt. Mulaimbi was also excluded by adverse possession. In defendants' oral statement of 13th July 1925 it was admitted that Amir Khan died before the 1894-95 settlement, leaving his widow Shahnurbi and his sister Mulaimbi. Here again Mulaimbi was married to Mangal Khan and was living with him. I have been referred to the oral evidence of witnesses Loke Nath (D. W. 3), Kanhaiya Lal (D. W. 5), Shaikh Chandu (D. W. 6), Bhura Khan (D. W. 7) and Shamsumian (D. W. 9) as proving Shahnurbi's exclusive possession, but that evidence seems to me inconclusive. Some of these witnesses do affirm that Shahnurbi was in exclusive possession. Much is made of the fact that Shahnurbi is said to have lived at Khairi and Mangal Khan at Kohdaduna, but it is clear that the latter had a house at Khairi also as well as occupancy land. Very naturally, therefore, Shahnurbi might be in immediate charge of affairs there and, on the whole, I do not think that any acquisition of a title by adverse possession has been made out in this connexion. As regards the contention that there has been insufficient proof of reasonable care or enquiry on the part of the mortgagee before entering into the transaction, I am unable to find that this has been made out The various sons, as detailed in para. 1 of this judgment, were joined in the two mortgages and, so far anyhow as the 2 annas 9 pies share was concerned, there was every reason to suppose Mangal Khan to be the owner. I further agree with the District Judge in his finding on issue 14 : there are good grounds for supposing the money borrowed under the two mortgages to have been used for the benefit of the defendants or for purposes binding on them.

On the above findings, therefore, the position is that 1 anna 3 pies out of 4 annas share of mouza Khair Khurd is entitled to be released from the mortgages and the decree will be modified accordingly. Cultivating rights in *sir* were excluded from the mortgage, but 5/16ths of the khudkasht and absolute occupancy land will also be released under the decree. Half of appellants' costs in this appeal will be borne by the respondent : remaining costs in this Court will be borne as incurred. Costs in the lower Court as already ordered.

N.K. *Decree modified.*

A. I. R. 1928 Nagpur 277

FINDLAY, J. C.

R. B. Indraj Singh—Defendant—Applicant.

v.

Komal Ram Singh and *another*—Plaintiffs—Non-Applicants.

Misc. Judicial Application No. 63 of 1927, Decided on 13th January 1928, for review of judgment of Findlay, J. C., and Macnair, A. J. C., D/- 14th September 1927, in Misc. Appeal No. 8 of 1926.

Civil P. C., O. 47, R. 1—Finding of fact of lower Court upheld by the Bench — Review was held to be not admissible in circumstances of the case.

Two Judges of the Judicial Commissioner's Court disagreed as to whether there was a final and enforceable agreement arrived at, as relied on by the plaintiff, non-applicant, in a certain case. One Judge was of opinion that the agreement in question had been established and another Judge took a reverse view and was further, in any event, of opinion that, even if it had been established, the case was one in which the lower Court was incorrect in exercising its discretion in favour of the plaintiff by way of giving a decree for specific performance. Both the Judges were, however, of opinion that the question as to whether there had been a final agreement or not between the parties, was a question of fact and that, therefore, the case fell under S. 98, sub-S. (2) Civil P. C., the result being that the finding of the lower Court on the point stood. The Judges were further of opinion that the lower Court had exercised a judicial discretion in granting

specific performance and that there could not in the circumstances be deemed to be a question of law. The defendant applied for review.

Held : that the case was not such that the interference by way of review was justifiable ; *A. I. R.* 1922 *P. C.* 112 and 21 *C. L. J.* 45 ; *Foll.* ; 34 *All.* 579 ; 20 *Cal.* 93 ; *A. I. R.* 1918 *P. C.* 92 ; and 44 *Cal.* 119 ; *Ref.* [P 279 C 1]

M. V. Abhyankar and *G. R. Bapat*—for Applicant.

B. K. Bose and *Y. V. Jakatdar*—for Non-Applicants.

Order.—This is an application for review of judgment delivered by Macnair, A. J. C., who has now proceeded on leave, and by myself in Miscellaneous Appeal No. 8 of 1926. The facts of the case are sufficiently clear from the opinions delivered by Macnair, A. J. C., and myself and by our final joint judgment.

The present applicant was the defendant-appellant in this Court. It will appear that Macnair, A. J. C., and myself disagreed as to whether there was a final and enforceable agreement arrived at as relied on by the plaintiff-non-applicants. Macnair, A. J. C., was of opinion that the agreement in question had been established, while I took a reverse view and was further, in any event, of opinion that, even if it had been established, the case was one in which the lower Court was incorrect in exercising its discretion in favour of the plaintiffs by way of giving a decree for specific performance. We were both, however, of opinion that the question as to whether there had been a final agreement or not between the parties, was a question of fact and that, therefore, the case fell under S. 98, sub-S. (2) Civil P. C., the result being that, as Macnair, A.J.C's. judgment prevailed, the finding of the lower Court on the point stood.

We were further of opinion that the lower Court had exercised a judicial discretion in granting specific performance and that there could not, in the circumstances, be deemed to be a question of law which it would have been our duty, under the proviso to S. 98, sub-S. (2) Civil P. C., to refer to a third Judge. As a result, the defendant has now applied for review of judgment.

Very wisely, the applicant's counsel did not argue grounds like the applicability of S. 10, Cl. (b) (2) of the Central Provinces Courts Act of 1917 in the present case. He confined his argument to two propositions. The whole matter at issue in the case was whether there had been a final agreement as evidenced or supported by the document (P. 1). The argument advanced before me has been that the construction of the terms of such a document is a question of law only : cf. *Fateh Chand* v. *Kishan Kunwar* (1), *Ramgopal* v. *Shamskhaton* (2), *Nafar Chandra Pal Chowdhury* v. *Shukur Sheikh* (3) and *Surendra Nath Roy* v. *Dwarka Nath Chakravarti* (4). The provisions laid down in these rulings are obviously true, but I desire to point out that, in the present instance, the question was not so much as to the nature of the agreement. If P. 1 evidenced a final agreement, the terms of it were sufficiently clear therefrom. The real question at issue was a pure one of fact as to whether or not a final agreement of the kind had been arrived at. On behalf of the present defendant-applicant the position was that P. 1 was nothing more than a mere memorandum made in the course of transactions between the parties before any final agreement had been arrived at.

The proposition, therefore, that Macnair, A. J. C., and myself differed on a point of law in this connexion is, in my opinion, incorrect. Even, however, were it correct, and it was a point at issue, I am of opinion that, having regard to the provisions contained in O. 47, R. 1, Civil P. C., as expounded by their Lordships in *Chhajju Ram* v. *Neki* (5), the present case is not one in which, on the grounds alleged, review of judgment would be admissible. Even, therefore, if Macnair, A. J. C., and myself were wrong in thinking that a question of fact, and not one of law, was involved here, that would, in turn, have been on our part a mistake on a question of law, and it was, moreover, rightly or wrongly, a deliberate decision arrived at by us after considering the merits of the question involved : cf. *Raja Makund Deb* v. *Gopi Nath Sahu* (6).

(1) [1912] 34 All. 579 = 16 I. C. 67 = 39 I. A. 247 (P. C.).
(2) [1893] 20 Cal. 93=19 I. A. 228 (P. C.).
(3) A. I. R. 1918 P. C. 92 = 46 Cal. 189 = 45 I. A. 183 (P. C.).
(4) [1917] 44 Cal. 119 = 24 C. L. J. 350 = 35 I. C. 605=21 C. W. N. 530.
(5) A. I. R. 1922 P. C. 112 = 3 Lah. 127 = 49 I. A. 144 (P. C.).
(6) [1914] 21 C. L. J. 45=25 I. C. 286.

The second point urged on behalf of the applicant seems to me equally ineffective on precisely analogous grounds. His position is that, as the agreement was to have effect for four years, specific performance thereof was specifically forbidden under Cl. (g), S. 21, Specific Relief Act. It has been suggested, therefore, that this Court had no jurisdiction to decide the case in the way it did, viz., by confirming the decree of specific performance granted in the lower Court. The decision in *Ramprosad Pramanik* v. *Sricharan Mandal* (7), which has been quoted in this connexion, seems to me to have little or no appositeness in the present case. Rightly or wrongly, Macnair, A. J. C., was of opinion that the case was one in which specific performance should be granted. He and I were also agreed that the lower Court had exercised a due discretion in the matter and we were of opinion that the question as to the exercise of its discretion by the lower Court could not be said, in the circumstances of the case, to be a question of law which it would be our duty under S. 98, sub-S. (2), Civil P. C., to refer to a third Judge. Even, however, if the Bench in question were wrong in not specifically considering whether Cl. (g), S. 21, Specific Relief Act was applicable to the case, it is patent on the face of it that this could not be said, by any stretch of language, to be an error apparent on the face of the record. On the contrary, assuming for a moment that S. 21, Cl. (g), would have applied even as regards specific performance in the present case, in which only a small portion of the total time of four years has still to run, again here there would only be a mistake of law which, for the reasons I have given earlier in this order, would not, in my opinion, justify interference by way of review.

For these reasons, therefore, the present application fails and is dismissed. The applicant must bear the non-applicants' costs. I fix Rs. 50 as counsel's fees.

N.K. *Application dismissed.*

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(7) [1917] 21 C. W. N. 1109=41 I. C. 276=27 C. L. J. 594.

* A. I. R. 1928 Nagpur 279

KINKHEDE, A. J. C.

Lalchand—Plaintiff—Applicant.

v.

Imdad Ali— Defendant — Non-Applicant.

Civil Revn. No. 52 of 1927, Decided on 17th November 1927, from order of 2nd Class Sub-Judge, Burhanpur, D/- 4th December 1926, in Misc. Case No. 65 of 1926.

* *Civil P. C., O. 47, Rr. 1 and 4—The word "evidence" includes oral evidence also — The Court should hold inquiry for deciding whether or not the applicant could not with due diligence have discovered the evidence at the stage of the original trial—Failure to make such enquiry justifies revision.*

The word "evidence" as used in O. 47, R. 1 is not confined only to "documentary" evidence but includes "oral" evidence. Whether or not the applicant could not with due diligence have discovered the evidence at the stage of the original trial must depend upon facts to be proved and the Court should hold an enquiry into the facts relevant to the recovery. Failure to make such an enquiry amounts to a material irregularity justifying interference in revision. [P 279 C 2]

S A. Ghadge—for Applicant.

Order.—This revision petition must succeed. The Court below appears to have put a very narrow construction on the word "evidence" as used in O. 47, R. 1 Civil P. C. The Court could not confine it only to "documentary" evidence and exclude "oral" evidence. Whether or not the applicant could not with due diligence have discovered the evidence at the stage of the original trial must depend upon facts to be proved. But the Court below declined to hold any enquiry into the facts relevant to the discovery.

Rule 4 is clear on this point. I think the Court below acted with material irregularity in the exercise of its jurisdiction and, therefore, I must interfere in revision under S. 115 (c), Civil P. C., I, therefore, remand the case for proper enquiry and disposal of the application for review on its merits.

As the record of the review proceedings is missing and the Court-reader's explanation has not been recorded I direct that he be examined in the enquiry proceedings taken in connexion with the missing records, and if found negligent this matter must be reported to the District Judge for orders.

I may also point out that it was necessary for the enquiring officer to order the parties to file before him true copies of their respective application and pleadings

written or oral as the case may be, and after having thus supplemented the record the Court ought to address itself to the decision of the question as to whether the grounds set forth for granting review were true and valid or not.

The application is allowed with costs. Pleader's fees Rs. 15.

N.K. *Application allowed.*

A. I. R. 1928 Nagpur 280

FINDLAY, J. C.

Kapoor and *others*—Defendants 2 and 4—Appellants.

v.

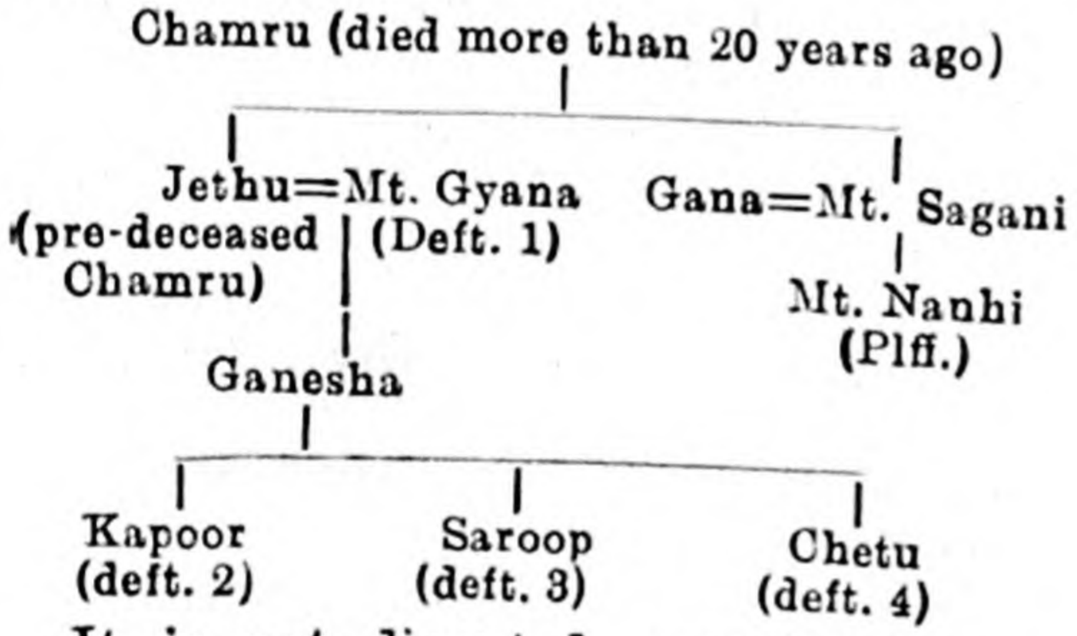
Nanhi and *another*—Plaintiff and Defendant 1—Respondents.

Second Appeal No. 6 of 1927, Decided on 24th August 1927, from decree of Addl. Dist. Judge, Seoni, D/- 28th September 1926, in Civil Appeal No. 33 of 1926.

Adverse Possession—Party who is out of possession for 12 years cannot be remitted to his old title by entering into possession.

If a party, who has been 12 years out of possession and whose suit is, therefore, barred, should again get into possession, he is not remitted to his old title: 11 *B. L. R.* 237 and 1 *Boulnois* 70, *Rel. on.*: *A. I. R.* 1926 *Nag.* 99, *Dist.* [P 280 C 2]

Judgment. — Plaintiff-respondent 1 brought the present suit for possession of occupancy field No. 18/2 in mauza Parasiya (Seoni) under the following circumstances: The family tree is as follows:



It is not disputed now that Chamru was the ordinary tenant of the field. His son Jethu pre-deceased him, while Chamru himself died 20 years ago. There are findings of fact by both the lower Courts, which I see no reason or room for disturbing, that Ganesha, grandson of Chamru, and Gana, Chamru's son, held the field jointly. Apparently, the Subordinate Judge came to the conclusion that, after Gana's death, the field became the sole property of Ganesha and his sons. It is difficult to understand how he arrived at this conclusion, and the Additional District Judge, who tried the appeal, was undoubtedly correct in rejecting it. What is absolutely clear, however, is that after Gana's death, Mt. Sagani held charge of the field and dealt with it as her own tenancy. She made a registered gift thereof in favour of the present plaintiff (respondent 1) and for some four years the landlord recognized the latter as tenant and accepted rent from her and she was admittedly alone in possession thereof. The view taken by the Judge of the first Court as to what subsequently occurred was obviously wrong. He admitted that the present defendants-appellants could not recover their share in the tenancy by a suit under the Tenancy Act, as that was barred; but as they took forcible possession in Kuar 1924, he held that the position was saved in their favour. This is needless to say an entirely wrong view of the law. As Mr. Justice Markby pointed out in *Brindabun Chunder Roy* v. *Tarachand Bundopadhya* (1) it is an accepted doctrine in our Courts that, if a party who has been 12 years out of possession, and whose suit is, therefore, barred, should again get into possession, he is not (to use an English phrase) remitted to his old title; our Courts adopting, as pointed out by Sir Lawrence Peel in *Sibchunder Doss* v. *Sibkissen Bonnerjee* (2), the English rule that there is no remitter to a right for which the party had no remedy by action at all.

I do not find it necessary to discuss the question decided by Kinkhede, A. J. C., in *Banan* v. *Ranjit Singh* (3), decided on 19th July 1924; for the present plaintiff Mt. Nanhi cannot, by any stretch of the imagination, be described as a trespasser, and, in any event, it seems to me that the principle enunciated in the Bengal Law Report decision quoted above effectually controverts the view taken by Kinkhede, A. J. C., in the said case. It seems to me, therefore, that whatever rights the defendant-appellants may originally have had in the tenancy and, at the most, they would only have been entitled to joint possession with Mt. Sagani or Mt. Nanhi these rights have effectually disappeared under the bar of limitation, and their retaking forcible possession in Kuar 1924 obviously cannot

(1) 20 W. R. 114=11 B. L. R. 237.
(2) 1 Boulnois 70.
(3) A. I. R. 1926 Nag. 99.

re-create any tenancy rights in their favour.

I fully agree with the judgment and decree of the Additional District Judge and dismiss the appeal accordingly. The appellants must bear the respondents' costs. Costs in the lower Courts as already ordered.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 281 (1)

FINDLAY, J. C.

Dadoo and *others*—Plaintiffs—Appellants.

v.

Sukha—Defendant—Respondent.

Second Appeal No. 562 of 1926, Decided on 29th September 1927, from decree of Dist. Judge, Chhindwara, D/- 4th October 1926, in Civil Appeal No. 27 of 1926.

C. P. Tenancy Act (1920), *S.* 104 (4) — *Tenancy right is extinguished with the loss of the remedial right to recover possession—Limitation Act S.* 28.

Section 28, Limitation Act, does apply in view of the provision contained in S. 104, sub-S. (4), C. P. Tenancy Act, to a case where the remedy by way of suit by the tenants is lost, having regard to Art. 1, Sch. 2, Tenancy Act, and the tenancy right is extinguished with the loss of the remedial right to recover possession : 21 *All.* 204 *and A. I. R.* 1928 *Nag.* 280, *Relied on* ; *A. I. R.* 1926 *Nag.* 99, *Dist.*

[P 281 C 1, 2]

V. R. Dhoke—for Appellants.

A. V. Vazalwar—for Respondent.

Judgment.—The first point raised on behalf of the plaintiffs appellants is that, although the remedy by way of suit by them is lost having regard to Art. 1, Sch. 2, Tenancy Act, there was no forfeiture or extinction of the tenant's right incurred by them. For this view, authority has been quoted in the shape of the judgment of Kinkhede, A. J. C., in *Banan* v. *Ranjit Singh* (1). I have already, in my judgment in *Kapoor* v. *Nanhi* (2), seen reason to disagree from that decision. I may further point out that, as regards the present case, S. 28, Lim. Act, does apply in view of the provision contained in S. 104, sub-S. (4), Tenancy Act of 1920. I am in full agreement with the decision in *Dalip Rai* v. *Deoki Rai* (3), that the tenancy right was extinguished with the loss of the remedial right to recover possession.

A further suggestion has been made that the land should have been held to be in possession of the plaintiff-appellants from 1922 to 1926. I am wholly unable to find any sound basis for this contention. The perfectly proper finding of fact arrived at by the lower appellate Court is that the original tenants have not been in possession since at least 1921-22 and it irrevocably follows therefrom that S. 104, Tenancy Act, combined with Art. 1, Sch. 2, thereto is a bar to the present suit. In any event, the lower appellate Court, after a careful consideration of the evidence, has held that the defendant-respondent was in possession from 1922 onwards, and it has further held that the plaintiffs' allegation that they were dispossessed on 30th August 1925 was incorrect.

In those circumstances I cannot see the slightest ground for disturbing the judgment and decree of the lower appellate Court that the present suit was clearly barred. The appeal is dismissed. The appellants must bear the respondent's costs. Costs in the lower Courts as already ordered.

N.K. *Appeal dismissed.*

(1) A. I. R. 1926 Nag. 99.
(2) A. I. R. 1928 Nag. 280.
(3) [1899] 21 All. 204=(1899) A. W. N. 36.

A. I. R. 1928 Nagpur 281 (2)

HALLIFAX AND MOHIUDDIN, A. J. Cs.

Ripusudan Pershad—Judgment-debtor 1—Appellant.

v.

Nanku Pershad and *others*—Judgment-debtor 2 and Decree-holder-purchaser—Respondents.

First Appeal No. 29 of 1927, Decided on 20th January 1928, from order of First Class Second Sub-Judge, Raipur, D/- 19th February 1927, in execution arising out of Civil Suit No. 7 of 1924, D/- 30th September 1924.

(*a*) *Civil P. C., O.* 21, *R.* 66 (2) (*e*)—*Estimate of the value of property not entered—Effect.*

Failure to enter an estimate of the value of the property in the proclamation is not material irregularity. [P 282 C 1]

(*b*) *Civil P. C., O.* 21, *R.* 66 (2) (*e*)—*Court should ascertain all the details necessary to be filled up in the proclamation and judgment-debtor should state them.*

It is the duty of the Court to ascertain all the details mentioned in O. 21 R. 66 (2) Cl. 2 which it considers are necessary, and it is surely the judgment-debtor who is most

interested in stating them and best able to do so. [P 282 C 2]

W. Y. Deshmukh—for Appellant.

D. N. Choudhri and *S. K. Ghosh*—for Respondents.

Judgment.—Of the violation of the provisions of R. 1 (2), O. 41, Civil P C., which is of almost daily occurrence in this Court, it would be hard to find a worse instance than that afforded by the present petition of appeal. The one relevant contention in it can be unearthed only with great difficulty from the mass of irrelevant narrative and obviously unsound argument it contains.

That one contention is that there was a material irregularity in the proclamation of the sale of the appellant's property in execution of the decree against him which caused him substantial injury. The irregularity is said to be the failure to enter an estimate of the value of the property in the proclamation. That is nowhere prescribed, nor is it in the least necessary. It is certainly done usually, probably with some idea behind it of Cl. (e), R. 66 (2), O. 21, but it is hard to see how the Court's estimate of the value could even help an intending purchaser to judge of it. Indeed the estimate of the value always entered, (which the learned Judge thought ought to have been entered in this case, though the omission made no difference) is not the Court's estimate at all, but the decree-holder's.

The substantial injury alleged is in the fact that the highest bid was Rs. 26,000 though the property is worth Rs 40,000. None of the evidence recorded as to the value of the property is admissible, being nothing beyond statements of the opinions of witnesses on the point, and anyhow it would prove that the property was worth no more than Rs. 26,000. Neither irregularity nor injury of any sort has been proved, but even if the matters alleged could be regarded as a material irregularity and a substantial injury, there is obviously no connexion between the two.

The order of the lower Court contains the statement that it is the duty of the decree-holder to furnish the Court with all the details mentioned in Cl. (2), R. 66 (2), O. 21, though they do not necessarily include the value of the property. As has been said, there is hardly a case in which it is even worthwhile to mention that detail, but it is both obvious and also stated in R. 66 (4) that it is the duty of the Court to ascertain all the details which it considers are necessary, and it is surely the judgment-debtor who is most interested in stating them and best able to do so.

Every execution case seems to proceed as this did, on the inverted idea that it is neither the duty of the judgment-debtor, nor to his interest, to see that his property fetches as high a price as possible when it is sold. That is left to the decree-holder, whose business is only to get as much for the property as will satisfy his decree. To look after the interests of the judgment-debtor is the business of the Court, and still more of the judgment-debtor himself.

But all the judgment-debtor does is to stand aside and look for flaws in the proceedings ; if he can discover one he carefully refrains from remedying it himself and saves it up till after the sale is over to be used as a basis for a demand for a re-sale. Any injury that may be caused to him in these circumstances, which occur in almost nearly every case, is due to his own intentional and practically admitted negligence, amounting almost to fraud, if a man can be said to defraud himself.

Further the prayer to set aside a sale on the ground of the inadequacy of the price obtained is hardly ever accompanied by an allegation, and in most cases it is obviously without even a hope, that a higher bid will be made next time. It is never pretended that the object of such an application is anything but to delay the proceedings, without any benefit to anybody except the delay, which is not a benefit. The obvious damage to the judgment-debtor in the extra expense, among other things, is left out of sight.

There is no substance whatever in the appeal, which will be dismissed. The appellant will be ordered to pay all the costs of the opposite party in both Courts. The costs in this Court will include a pleader's fee of Rs. 125 for Nanku Prasad and one of Rs. 15 for Madan Lal.

N.K. *Appeal dismissed.*

* A. I. R. 1928 Nagpur 283

HALLIFAX AND MOHIUDDIN, A. J. Cs.

Mt. Chhitia Bai— Plaintiff — Appellant.

v.

Rajkumar and *others* — Defendants— Respondents.

First Appeal No. 28 of 1926, Decided on 29th February 1928, from decree of Dist. Judge, Chhindwara, D/- 23rd February 1926, in Civil Suit No. 4 of 1925.

* (a) *Registration Act, S. 87 — Mistake in following the procedure laid down in C. P. Tenancy Act, S. 49 (2) does not invalidate registration—C. P. Tenancy Act, (1920), S. 49 (2).*

Section 49 (2), Tenancy Act, lays down the way in which a registering officer must satisfy himself that proper sanction has been given to the transfer of the right to occupy *sir* land before registering a document purporting to transfer that right, that is, it regulates the procedure and nothing else. If, therefore, a registering officer commits a mistake in following the procedure, the registration is not invalidated thereby ; 1 *N. L. R.* 112 and 8 *N. L. R.* 22, *Dist.* [P 283 C 2]

* (b) *Contract Act, S 23— Part of transaction requiring sanction before registration— Part not requiring sanction can be validly registered but transaction as a whole would be invalid.*

Where there is a registered transaction of property, part of which requires sanction of certain authority and part of which does not require sanction and sanction has not been obtained, the registration, so far as the part not requiring registration is concerned, is valid but the transaction is invalid in itself as the object of the agreement would be "of such a nature that, if permitted, it would defeat the provisions" of law within S. 23. [P 283 C 2]

* (c) *Legal Practitioners—Fees.*

The pleaders' fees to be allowed to a party is what is actually paid or what might reasonably have been paid, whichever is less. [P 284 C 1]

S. B. Gokhale, W. R. Puranik and *V. R. Dhoke*—for Appellant.

N. G. Bose, D. T. Mangalmurti, G. L. Subhedar and *G. R. Trivedi* — for Respondents.

Judgment.—Everybody concerned in this case forgot the existence of S. 87, Registration Act, till they were reminded of it by the Court during the argument of the appeal. That was due to the fact that in 1914 a Judge of this Court, who is one of us, forgot it in deciding an appeal against the third defendant in this case in a judgment of which a copy has been filed. The section does, however, exist, and entirely meets the objection to the validity of the registration of the mortgage bond on which the plaintiffs sue.

If further authority than the plain words of the section were required for this view it could be found in the judgment of the Privy Council in *Muhammad Ewaz* v. *Birj Lal* (1). S 45 (2) of the Tenancy Act, 1898, which appears unchanged as S. 49 (2), Tenancy Act 1920, lays down the way in which a registering officer must statisfy himself that proper sanction has been given to the transfer of the right to occupy *sir* land before registering a document purporting to transfer that right, that is to say it regulates his procedure and nothing else.

It is urged for the respondent Hazarimal that the contrary view was taken by this Court in the published cases of *Daji Vithal Dhok* v. *Moreshwar* (2) and *Ganeshdas* v. *Shankar* (3), but in each case what invalidated the registration was a defect in the transaction itself, not one in the procedure of the registering officer. Here there was nothing wrong about the sanction ; what was wrong was the way in which, that is to say the procedure by which, the registering officer satisfied himself on that point.

In this view, the other matters in the case do not require much discussion. except the order of the lower Court in respect of costs. The learned District Judge would be right in holding that Hazarimal was not estopped from contesting the validity of the mortgage by his statement recorded in Ex. P. 9, if he were correct in saying that he only agreed that the property should be subject to any claim that could be established on the mortgage. But the dccument shows that he not only admitted that a sum of Rs. 11,947-4-0 was then due on the mortgage but agreed to buy the property as liable for that amount.

An argument was put forward for the appellants that even if S. 87, Registration Act, did not apply, the registration would be valid for the property other than the occupancy right in the *sir* land, the transaction being treated as if there had been no sanction at all. That might validate the registration but it would invalidate the transaction itself, as the object of the agreement would be "of such a nature that, if permitted, it would defeat the provisions" of S. 45, Tenancy Act 1898.

(1) [1876] 1 All. 465=4 I. A. 166=3 Sar. 735 (P. C.).
(2) [1905] 1 N. L. R. 112.
(3) [1912] 8 N. L. R. 22=13 I. C. 909.

The question of a decree for money against the mortgagor on his personal covenant to pay in the mortgage deed does not arise, because the suit was filed only two days short of four years after the date on which he promised to pay. If the registration is invalid the plaintiffs can not get such a decree because the claim is time barred, and if it is valid they do not want it because they can get a mortgage decree.

There remains the question of pleader's fees in the lower Court. The pleader's fee to be allowed to a party is what was actually paid or what might reasonably have been paid, whichever is less. That ought not to require stating. It has, however, become the almost invariable custom in these provinces for every Judge to state solemnly in his decree that the proper fee in his opinion is whatever sum his reader may work out according to the percentages given in the rules in that behalf. The result is often ridiculouly high or as ridiculously inadequate as something less than one rupee, and almost always a broken sum such as never was and never would be paid to a pleader, frequently ending with a number of pies that do not even make an integral number of pice.

In this case a sum of Rs. 675-10-0 has been awarded as pleader's fee to the second defendant, the same sum to the third defendant, and one third of it to each of three other defendant parties, the first, the thirteenth, and the rest together. Even in that there is an arithmetical error followed by a clerical error. One third of Rs. 675-10-0 is Rs. 225-3-4 but has been taken to be Rs. 225-3-6 and in the case of the first defendant this has been entered as Rs. 225-6-3.

The figures have no relation whatever to facts, which have been ascertained in this Court to be as follows: Defendant 2 paid Rs. 150 to his pleader and the third Rs. 400 to his. Defendant 1 apparently did not engage a pleader, and whatever was paid to a pleader who appeared for him with the remaining defendants was paid by some or all of those defendants. The plaintiffs engaged three different counsel at various stages of the case and paid each of them Rs. 300.

As the appeal succeeds and the defendants will have to pay their own costs, what they paid does not matter except as a help in fixing the proper pleader's fee to be paid by them to the plaintiffs. To engage three counsel was obviously unnecessary, at least so as to entitle them to recover Rs. 90 from the opposite party. But it is clear from what defendant 3 paid that a fee of Rs. 400 was not unreasonably high. That sum will, therefore, be allowed as the plaintiffs' pleader's fee in the lower Court.

The decree of the lower Court will be set aside and in its place a decree will issue ordering foreclosure in default of the payment on or before 15th August 1928 by any of the defendants of Rs. 36,668 and all the costs incurred by the plaintiffs in both Courts. The pleader's fee in this Court will be five hundred rupees.

A.L./R.K. *Appeal allowed.*

A. I. R. 1928 Nagpur 284

KOLHATKAR, A. J. C.

Shriram

v.

Samirmal

Criminal Revn. No. 107-B of 1928, Decided on 21st May 1928, reported by Sess-Judge, Amraoti.

(a) *Criminal P. C., S.* 145, *Cl.* (4)—*Magistrate must confine himself to actual possession only.*

Magistrate is incompetent to base final order on the merits of the claims of parties to a right to possess, but should confine himself to the question of actual possession even if the possession is that of a trespasser, provided it is peaceable. [P 285 C 2]

(b) *Criminal P. C., S.* 145—*Scope.*

Decision of a civil Court as to proprietorship does not bar Magistrate from deciding question of possession: 2 *A.L.J.* 274, *Foll.* [P 285 C 2]

(c) *Criminal P. C., S.* 145—*Possession.*

Neither proof of title nor an adjudication on the question of title constitutes proof of actual possession. [P 286 C 1]

(d) *Contract Act, S.* 201 — *Dismissed agent's possession is not permissive.*

Where a dismissed agent continues to be in possession of his principal's house his possession cannot be said to be that of an agent and consequently is not of a permissive character: *A. I. R.* 1926 *Nag.* 286, *Dist.* [P 286 C 2]

(e) *Criminal P. C., S.* 145—*Possession.*

Even a trespasser is entitled to have his actual possession maintained if it is peaceful. [P 287 C 1]

W. A. Forbes—for Applicant.

W. R. Puranik—for Non-Applicant.

Judgment.—This case has been reported to this Court by the Sessions Judge of Amraoti under S. 438, Criminal P. C., with a recommendation that the

order passed under S. 145, Criminal P.C., in favour of party No. 2, Samirmal, by the Magistrate who dealt with it under the said section, should be set aside, and that party No. 1, Shriram, should be placed in possession of the house in question, in his capacity as the present agent of one Kisanchandra. It is an undisputed fact that the property to which the order passed under S. 145 relates, consists of the entire house No. 3078, situated in the town of Amraoti. Kisanchandra has some property, including house property, in the town of Amraoti. Party No. 2, Samirmal, was his agent till the year 1921, in which year he was dismissed from service by Kisanchandra. Since the year 1922 party No. 1, Shriram, is Kisanchandra's agent. Each of the two contending parties claims ownership of the house and to hold possession thereof as such. Party No. 1, Shriram, claims ownership on behalf of his master Kisanchandra. The house is a double storeyed one. The upper storey was let out to one Hiralal. In the year 1925, Kisanchandra instituted a suit against Hiralal and Samirmal. Therein he claimed arrears of rent fram Hiralal and in the alternative damages from Samirmal for use and occupation of the house. The amount claimed by the plaintiff was Rs. 80. The trial Court decreed the whole claim against both the defendants. The first appellate Court dismissed the plaintiff's suit with costs on the ground that it was not maintainable, the plaintiff not being full owner of the house in dispute, and there being no privity of contract between the plaintiff and the defendants. The second appellate Court set aside the decree of the first appellate Court, and in its stead made a decree ordering the defendants to pay full 'claim to the plaintiff as the representative of all the co-owners of the house The decree of the second appellate Court was made sometime after the order under S. 145, Criminal P. C., was passed in favour of party No. 2, Samirmal, and sometime before the submission of the report under S. 438, Criminal P. C., by the Sessions Judge.

It has been urged on behalf of party No. 2, Samirmal, in support of the order sought to be revised that the only question which should be gone into in proceedings under S. 145 is one of possession and that as Samirmal was in actual possession of the house in dispute, the order passed by the Magistrate under S. 145, Criminal P. C., is correct and should not be interfered with. It seems to me that this contention is well founded and must prevail. It it quite clear from Cl. (4), S. 145, that the Magistrate is not competent to base his final order on the merits of the claims of contending parties to a right to possess the subject of dispute, but that he should, in dealing with cases under the said section, confine himself to the question of actual possession of the property which is and should be the only subject for enquiry in such cases. The whole scheme of Ch. 12, contemplates an enquiry solely with reference to the fact of actual possession irrespective of title. The mere fact that Samirmal's title has been disproved and that Kisanchandra's title, as one of the co-owners of the house, has been incidentally held to be established in a suit for damages against the former will be of no avail to party No. 1, Shriram, in the proceeding under S. 145, Criminal P. C. It is to be borne in mind in this connexion that the decree obtained by Kisanchandra against Samirmal is one for payment of damages and not for possession of the house. In order that the decree of a civil Court may be binding on a Magistrate as conclusive evidence of possession it has to be established that the decree is one for possession of the property in suit, and that the decree-holder obtained possession through Court in execution of such a decree. It is an order for delivery of possession contained in such a decree that the Magistrate is bound to maintain. It is an admitted fact in the present case that Kisanchandra has not as yet obtained a decree for delivery of possession against party No. 2 Samirmal. In the absence of such a decree the mere fact of an incidental adjudication upon the question of ownership in a suit for damages will be of very little avail to party No. 1, Shriram. Where a civil Court deals only with the question of proprietorship of land its decree will not bar a Magistrate from deciding a question of possession under S. 145, Criminal P. C.: vide *Baldeo Baksh Singh* v. *Raj Ballam Singh* (1).

In the suit for damages the determination of the question of title was only incidentally necessary, and the suit was

(1) [1905] 2 A. L. J. 274.

not one for possession. The decree passed in such a suit cannot have any bearing on the question of actual possession. It is no doubt open to the Magistrate to take and consider the evidence of title to enable him to adjudicate upon the question of actual possession, but neither proof of title nor an adjudicatjon on the question of title in favour of a party constitutes proof of actual possession. Unless Kisanchandra obtains a decree for delivery of possession against Samirmal the former cannot forcibly oust the latter from the house in dispute by taking the law into his own hands, if the latter be found to be in actual and peaceable possession of the house in question. What the Magistrate has to determine in proceedings under S. 145, Criminal P. C., is which of the two contending parties was in peaceable possession of the property in dispute at the date of the preliminary order. It is quite immaterial whether such possession is lawful or unlawful. The section is concerned solely with the fact of actual possession irrespective of its lawful or unlawful character. For the foregoing reasons I find myself unable to accept the view of the learned Sessions Judge, to the effect that Shriram was under the circumstances entitled to take possession from Samirmal without filing a civil suit.

Then as regards the question of actual possession it is quite plain from whatever evidence has been adduced by the parties that Samirmal has been in possession of the entire house in dispute. The house is a double-storeyed one and only the upper storey was let out to the tenant Hiralal. In the two statements, dated 24th April 1927, submitted by Kisanchandra to the City Superintendent of Police, the former has admitted in clear terms that Samirmal occupied the ground floor of the house, when the latter's agent took forcible possession thereof, and that the tenant Hiralal vacated the upper storey during the pendency of the suit for recovery of rent instituted against him. Further it seems from the evidence of Samirmal as his witness 1 that he has been in possession of the whole house for the last one and a half years since the upper storey was vacated by Hiralal, tenant, and that Samirmal's property was lying inside the house when Shriram broke open the locks of the house. Party No. 1, Shriram, has also admitted, in the witness-box that Hiralal, tenant occupied only a portion of house viz., the upper storey, and that on enquiries he found that Samirmal was in possession of the house, No. 3078, as ex-agent, and was collecting rents. Further on he admits that he had never been in actual possession of the house and that the day on which he broke the locks of the house was the very first day of his entering it. His statement at the end of his examination-in-chief, to the effect that he wanted to take possession and that he did not know in whose possession the house was at the time he attempted to take forcible possession, involves a clear implication that neither he nor his master Kisanchandra was in actual possession of the house or any part of it prior to Shriram's forcible entry. Now as Samirmal was dismissed from service by Kisanchandra so far back as the year 1921 the former's possession subsequent to that year cannot be treated as possession of his quondam master. Samirmal's agency terminated as soon as he was dismissed from service, and his possession of the house subsequent to his dismissal must be deemed to be on his own account. Samirmal has stated in his written statement, as well as in the witness-box that he claimed to hold possession on his own account not only after his dismissal in the year 1921, but also prior to his dismissal. As Samirmal ceased to be Kisanchandra's agent in the year 1921 the former's possession for six years following his dismissal cannot be said to be that of an agent, and consequently of a permissive character. The case *Bajirao* v. *Mt. Dadibai*, *A I. R.* 1926 *Nag.* 286, relied on by the learned counsel of party No. 1, Shriram, which deals with the possession of an agent or servant, has consequently no application to the facts of the present case. The observation of the learned Sessions Judge to the effect that :

> It was simply mischievous on the part of Samirmal to take possession of the house on the tenant vacating it, and then to dishonestly set up his own title.

involves the erroneous assumption that Hiralal, tenant, was in possession of the entire house in dispute ; while from the brief analysis of the case given in the report of the Sessions Judge it would appear that, according to his view, Samirmal did nothing more than merely locking the house when it was vacated

by the tenant Hiralal. But the evidence of Samirmal as his witness 1 clearly shows that he was all along in actual possession of the ground floor of the house on his own account, at any rate, since the year 1921, and that he held actual possession of the first floor for about one and a half years after it was vacated by Hiralal. Proof of his possession stands unrebutted. This evidence leaves no doubt that Samirmal was in actual and peaceable possession when Shriram attempted to take forcible possession. It may be that his possession is unlawful and that of a trespasser. But even a trespasser is entitled to have his actual possession maintained under S. 145, Criminal P. C., provided it is peaceful. It is open to the lawful owner to seek redress in a civil Court and obtain a decree for possession against the trespasser. As already observed what is to be maintained under S. 145 is actual possession irrespective of the question of title. For the foregoing reasons I am unable to accept the recommendation of the learned Sessions Judge. The order of the Magistrate passed under S. 145, Criminal P. C. in favour of Samirmal is maintained.

D.R./R.K. *Reference not accepted.*

A. I. R. 1928 Nagpur 287

HALLIFAX, A. J. C.

Laxmanji and *others*—Appellants.

v.

Mt. Guta and *others*—Respondents.

First Appeal No. 36-B of 1927, Decided on 5th January 1928.

Contract Act, S. 73—Voluntary cancellation of a deed—Measure of damages indicated.

Where a lease is voluntarily cancelled by both the parties, the measure of damages is the money paid by the lessee to the lessor, the money spent by the lessee over the property, and interest on the whole from the dates on which the payment and expenditure were made. [P 287 C 2]

M. R. Bobde—for Appellants.

M. B Niyogi—for Respondents.

Judgment.—The plaintiffs' case was that on 29th April 1923, they took a lease of 201·90 acres of land for a year from the defendants for Rs. 2,500 which they paid: they began ploughing the fields but after a short time, not more than a month, the defendants turned them out and two or three days later agreed to pay them damages for having cancelled the lease. The time spent over discovering what was the actual outturn of the fields would therefore have been wasted even if the absurd condition in the deed of lease about the measure of damages had been enforceable, according to the plaintiffs themselves, the contract of lease was rescinded by both parties and there was a new contract that the defendants should compensate them for having broken it, which of course they could have been compelled to do without any agreement. But in any case the measure of dnmages would be the same, the money paid by the plaintiffs to the defendants, the money spent by the plaintiffs in ploughing the fields, and interest on the whole from the dates on which the payment and expenditure were made, which in this case would be practically the same.

The case is obviously false from beginning to end, as was held in the lower Court. That finding could be based on the almost ludicrously impossible account given by plaintiff 2, Walaji (P. W. 1) of the inspection of land he had never seen before on which he asks the Court to believe that he made up his mind to take a one-year lease for Rs. 2,500 of eleven fields in five different villages with an area of 200 acres and situated 42 miles from his home, he says it was all done within four hours. But even if the case be treated as in the main true, the claim for damages must still be dismissed because the plaintiffs have failed to prove that they suffered any. All they can have suffered can be measured by the money they paid for the lease and the money spent in ploughing the fields.

All the evidence in respect of the ploughing of the fields by the plaintiffs and all the direct evidence of the payment of the Rs. 2,500 to Namdeo is too obviously contradictory and untrue to require discussion. It is admitted that the only evidence to prove the payment is the evidence that the ladies owed Rs. 8,000 at the time to Narayan Jaikrishna Brahmin (P. W. 4), who appears to be commonly known as Nanaji, and that Namdeo paid him the Rs. 2,500 in part satisfaction of that debt.

The direct evidence of the existence of this debt is of the same kind as the rest of the evidence for the plaintiffs and the indirect evidence disproves it. There is a mistake in the sale-deed of 23rd May

1923 executed by Namdeo in favour of Nanaji. The difference between 8,000 and 2,500 is 5,500, and the amount paid in cash would have been Rs. 5,650, if there was ever any payment at all. But the amount paid in cash is shown as Rs. 5,500 and the balance of the debts as Rs 5,650. The mistake is itself a strong indication that the recitals in the deed a·e of fictions not of facts.

But the two documents executed on 21st September 1923 by the ladies and hy Namdeo show that the amount that then paid to Nanaji in full satisfaction of all his claims was the amount shown in the sale-deed as paid in cash, and that the amount shown as the balance of the old debt was not paid. It is admitted that no payment on this account has since been made nor has any suit been filed by Nanaji, and his claim, if it ever existed, is now long time barred. It is clear then that no such debt ever existed. and, therefore, that no payment of Rs. 2,500 was ever made by Namdeo to Nanaji. On that alone the finding would be inevitable that no payment of Rs. 2,500 was ever made by the plaintiffs to Namdeo, though there is much other convincing evidence to the same effect.

The appeal will be dismissed, and the appellants will be ordered to pay the whole of the costs of all the respondents except Namdeo in both Courts. Namdeo will pay his own costs all through. The pleader's fee in this Court will be three hundred rupees.

N.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 288

FINDLAY, J. C.

Jago Kunbi—Defendant—Applicant.

v.

Bajirao and *others*—Non-Applicants.

Civil Revn. No. 316 of 1927, Decided on 8th December 1927.

(*a*) *Jurisdiction—Question of jurisdiction must be prima facie determined from the plaint.*

It is on the plaint that the question of jurisdiction must be prima facie determined, and not by the nature of the defence or the actual evidence eventually given in the case. [P 288 C 2]

(*b*) *Small Cause Courts Act, Sch. 2, Arts. 41 and 35 (2)—Suit to recover properties or its value forcibly removed—Small Cause Court cannot entertain.*

Where the plaintiff sued the defendants for the recovery of certain property or its price on the allegation that the same was forcibly removed by the defendants from the cart in which it was being conveyed.

Held: the allegations amounted to a criminal offence and the suit was not triable by Small Cause Court. [P 288 C 2]

R. N. Padhye—for Applicant.

R. W. Fulay—for Non-Applicant.

Order.—The present suit was brought by the plaintiff non-applicants for recovery of certain property or of its value which they alleged the defendants had forcibly removed from the cart in which the property was being conveyed from one place to another. On the allegations made in the plaint, the acts of the defendants would certainly have amounted to an offence under Chap. 17, I. P. C. The defence—vide para. 6 of defendant 1's written statement filed on 15th February 1927—was that the goods in question were his own property and that he was entitled to remove them. It seems to me that clearly this suit was one which the Small Cause Court could not entertain having regard to Art. 43 read with Art. 35 (2), Sch. 2, Provincial Small Cause Courts Act. The pleader for the plaintiff non-applicants has referred me to the decision in *Shiv Gir* v. *Khazan Gir* (1) as well as to a similar decision in a non-official publication, but, in both these cases, the finding was that there was, in reality no allegation of a criminal offence.

It is hardly necessary to add that it is on the plaint that the question of jurisdiction must be prima facie determined, and not by the nature of the defence or the actual evidence eventually given in the case. From this point of view, therefore, the jurisdiction of the Small Cause Court was, in my opinion, clearly barred, and the plaintiffs' suit must necessarily fail. It seems to me that as the plaintiffs brought their suit in a wrong Court and as the Court failed to notice the fact that it had no jurisdiction, it was the duty of the present defendant-applicant to have raised an objection in the lower Court. This he did not do, and the suit thus fails on a purely technical ground in spite of the plaintiffs having made out, on the evidence on record, a strong prima facie case for the relief they claimed. In those circumstances, I direct that the parties should bear their own costs in both Courts. The judgment and decree, of which revision is sought, are reversed and instead a decree will issue dismissing the plaintiffs' suit.

N.K. *Application allowed.*

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(1) A. I. R. 1922 Lah. 451=3 Lah. 339.

A. I. R. 1928 Nagpur 289

KOLHATKAR, A. J. C.

Krishnaji Kunbi — Plaintiff — Appellant.

v.

Tukaram Kunbi—Defendant—Respondent.

Second Appeal No. 398-B of 1927, Decided on 16th June 1928, from decree of District Judge, Amraoti, D/- 25th August 1927, in Civil Appeal No. 66 of 1927.

(a) *Civil P. C., S.* 100—*Construction of document — Legal inference can be considered in second appeal.*

The question of a right construction of document and of legal inference to be drawn from a document are questions of law and can be considered in second appeal : 34 *All.* 579 (*P. C.*) ; 42 *Bom.* 344 and *A. I. R.* 1919 *P. C.* 60, *Ref.*

[P 289 C 2]

(b) *Contract Act, S.* 62 — *Money due on a bond — Subsequent agreement for sale of property—Isara chithi executed and earnest money paid—Money on bond to be deducted from purchase price—Contract falling through — There is no novation of contract and suit on bond is maintainable.*

A borrowed money from *B* on a bond and a pro-note. Later on *A* agreed to sell to *B* his land, received a certain sum as earnest money and *Isar* chithi was executed, and money on bond and pro note was to be deducted from the purchase money. Contract was not carried out. *B* sued for recovery of money on his bond and pro-note.

Held : that in order to operate as a novation under S. 62 the new contract must involve present supersession or extinguishment of the liability arising under the old contract. A mere agreement between the parties to effect such a supersession or extinguishment at a future date cannot constitute novation : 8 *N. L. R.* 7 and *A. I. R.* 1921 *Lah.* 80, *Rel. on.*

[P 289 C 2 ; P 290 C 1]

M. R. Bobde—for Appellant.

P. C. Dutt—for Respondent.

Judgment.—This is a second appeal arising out of a suit for recovery of money due on a bond and a pro-note executed by the defendant in the plaintiff's favour in the year 1925. On 10th March 1926 the defendant agreed to sell to the plaintiff some land for Rs. 2,400. An isar chithi (Ex. P. 3) was then executed by the defendant in the plaintiff's favour, and Rs. 100 were paid to the former as earnest-money. Under the agreement of sale the amounts due under the bond and the pro-note were to be deducted from the purchase money. These facts are undisputed. It is not denied by either party that the contract of sale of the land was not carried out. It seems that each party blames the other for non-performance of the contract. In December 1926 the plaintiff instituted a suit for recovery of the amount due under the bond and the pro-note. The only defence was that there was novation of the contract sued on, and consequently the suit was not maintainable. This plea did not find favour with the Court of first instance, which decreed the plaintiff's claim in full. On an appeal being preferred from the decree by the defendant the lower appellate Court held that a new contract was substituted for the old one, and that the suit was not in consequence maintainable. In this view it allowed the appeal and dismissed the plaintiff's suit.

The plaintiff now comes up in second appeal, and it is urged on his behalf that there was no novation. The only question arising for decision in this appeal is therefore whether the contracts evidenced by the bond and the pro-note were substituted by the contract for sale, and whether the plaintiff's present suit is consequently untenable ? A preliminary objection is taken by the respondent's learned counsel to the effect that the finding of the lower appellate Court concerning novation is one of fact, and consequently is binding on this Court. On the other hand it is argued that the question raised in this appeal involves the construction of the isar chithi (Ex. P. 3) and the construction of a document is a question of law which can be considered in second appeal. Now it admits of no doubt that the question of novation mainly rests on a proper construction of the isar chithi (Ex. P. 3), and the question of a right construction of document, and of a legal inference to be drawn from a document, have been held to be questions of law which may very well be considered in second appeal ; vide *Fateh Chand* v. *Kishan Kunwar* (1), *Vithoba Madhav* v. *Madhav Damodar* (2) and *Satgur Prasad* v. *Kishorelal* (3).

The appellant's contention that there was no novation in the present case appears to me to be well founded and must, I think, prevail. In order to operate as a novation under S. 62, Contract Act, the new contract must involve present super-

(1) [1912] 34 All. 579=16 I.C. 67=39 I.A. 247 (P.C.).

(2) [1918] 42 Bom. 344=46 I.C. 734=20 Bom. L.R. 654.

(3) A.I.R. 1919 P.C. 60=42 All. 152=46 I.A. 197 (P.C.).

session or extinguishment of the liability arising under the old contract. A mere agreement between the parties to effect such a supersession or extinguishment at a future date cannot constitute novation. The contract for sale between the parties amounts to such an agreement. It provides for the payment of the debt due to the plaintiff under the bond and the pro-note sued on and the consequent extinguishment of the liability arising under the contracts evidenced by the said two documents at a future date when a registered sale-deed would be executed and the amount of the debt due from the defendant would be actually set off towards the purchase money payable to him. Till such a set off was actually granted by the defendant there would be no supersession nor extinguishment of the liability under the old contract. Under the terms of the contract for sale (vide Ex.P-3) a registered sale-deed was to be executed by the defendant 15 days after the date of the isar chithi. It is quite clear from the contents of the document that it was at the time of the execution of such a sale-deed that the amount of debt was to be set off towards the purchase money. The purchase money was to be paid at the time of the execution of the sale-deed and not earlier. It was at the time of the payment of purchase money that the set-off was thus to be synchronous with the payment of the purchase money which was to be made 15 days after the date on which the contract for sale was entered into. All these facts leave no doubt that the executory contract for sale was not to supersede or extinguish the liability arising out of the old contracts and that it was only when the contract for sale was executed by the execution of the registered sale-deed that the liability arising under the old contracts was to be deemed to be superseded or extinguished. It is an admitted fact that the contract for sale has not yet been executed. It is immaterial for the purposes of the present suit, who broke the said contract and was responsible for its breach. Whoever broke the contract the fact remains that the set-off contemplated by the parties has not yet been made, and that consequently the liability under the old contract has not been superseded or extinguished.

There is not the least doubt that the agreement for sale did not involve present payment of the debt. Had the debt been treated as paid on the very date of the agreement for sale there would have been no necessity of paying Rs. 100 as earnest money. The very fact of payment of Rs. 100 as earnest money on the date of the agreement thus precluded the possibility of the debt being actually paid off on that date. Further the fact of no account of the debt being made and of its exact amount being left unmentioned at the time of the agreement tends to negative such a payment.

The case also admits of being looked at from another point of view. The agreement embodied in the isar chithi (Ex. P-3) provided that in the case of non-performance of the contract by plaintiff the defendant vendor was to retain the earnest of Rs. 100 and in the case of breach by the defendant the plaintiff was to receive Rs. 500 as damages from the defendant and was to refund Rs. 100 earnest to the latter. It contains, however, no provision in regard to recovery of the debt sued for. Had the amount of debt been treated as actually paid off by the defendant on the date of the agreement the document would not have failed to make some reference to the debt and to mention that in the event of non-performance of the contract the debt would be treated as unpaid. But no such reference nor mention finds a place in the isar chithi. This negative fact affords a very clear indication of the fact that the debt was not to be treated as actually paid off on the date of the agreement for sale. It is quite clear therefore that it was the executed contract for sale in the tangible shape of a registered sale-deed and not the executory contract of sale providing for payment of the debt at a future date which was to operate as a novation in so far as the liability arising under the bond and the pro-note sued upon was concerned. Even if the contract for sale be regarded as involving a temporary supersession, as in the case of a hundi : vide *Nathusa* v. *Fulchandra* (4), and thus temporarily suspending the original remedy, such supersession and suspension would cease immediately on breach of the contract as in the case of a hundi which is dishonoured or which is subsequently found to be not only stamped and the original liability under the bond and the pro-note would remain unaffected. The present case has some resemblance to *Najab*

(4) [1912] 8 N.L.R. 7=14 I.C. 399.

Shah v. *Rangu Ram* (5) in that in both the cases the scheme for payment of the debt made by the parties fell through and the plaintiff was subsequently entitled to sue under the old contract. The observations at the end of p. 9 and the top of p. 10 in *Nathusa* v. *Fulchandra* (4) relied on by the respondent's learned counsel, do not seem to me to be helpful to the defendant in resisting the plaintiff's present claim. For the reasons stated above the question as to who broke the contract for sale does not seem to be material for the purposes of the present suit. There being no novation the plaintiff's claim based on the bond and the pro-note sued on is quite competent.

In view of the reasons given above, the appeal is affirmed, the decree of the lower appellate Court is reversed, and that of the trial Court is restored. The costs in all the Courts will be borne by the defendant.

A.L./R.K. *Appeal affirmed.*

(5) A.I.R. 1921 Lah. 80=2 Lah. 323.

A. I. R. 1928 Nagpur 291

GHULAM MOHIUDDIN, A. J. C.

Mt. Jamnabai—Appellant.

v.

Gopal Das and *others*—Respondents.

Misc. Appeal No. 25 of 1927, Decided on 28th February 1928, from order of Dist. Judge, Saugor, D/- 17th March 1927, in Misc. Judicial Case No. 61 of 1919.

Guardians and Wards Act, S. 48—Court fixing marriage expenses at a certain amount—No revision lies.

A Court has jurisdiction to fix the amount of marriage expenses of a ward, and since the question is one of fact being purely a question of amount, no revision lies under S. 48: *A. I. R. 1926 All. 301, Foll.* [P 291 C 2]

A. V. Khare—for Appellant.

M. B. Niyogi—for Respondents.

Judgment.—This is an appeal filed on behalf of Mt. Jamna Bai, a minor, against the order, dated 17th March 1927, passed by the District Judge, Saugor, sanctioning expenditure of Rs. 15,000, for the marriage of Kaushalya Bai. It is argued on behalf of Mt. Jamna Bai that this appeal is under S. 47 (1), Guardians and Wards Act, and it is prayed that if it is decided that no appeal lies, in that case, this application may be treated as an application for revision under S. 48, Guardians and Wards Act.

The appeal which concludes with the prayer that

> the sanction of the expenditure of Rs. 15,000 be set aside as vindictive, unnecessary and uncalled for

does not relate to any of those matters which are mentioned in S. 47 (1), Guardians and Wards Act, and, therefore, it is clear that no appeal lies under S. 47 (1), Act 8, 1890.

An application for revision under S. 48 can only be considered if the subordinate Court appears to have exercised a jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested or to have acted in the exercise of its jurisdiction illegally or with material irregularity.

The District Judge certainly had power to decide the question of the marriage expenses of Mt. Kaushalya Bai and he fixed the amount at Rs. 15,000. This appeal was filed on 16th June 1927, and as the marriage was performed in the first week of June the amount was already spent before the appeal was filed. In a similar case, where an application was made in the Allahabad High Court Walsh and Kanhaiya Lal, JJ., held as follows:

> We are asked to interfere under S. 48 which is equivalent to S. 115, Civil P. C. We are of opinion that revision does not lie in a matter which is purely a question of amount, and a question of discretion in the Court. : *In the matter of Durga Bai* (1).

I, therefore, hold that the question of amount to be spent on the marriage of Mt. Kaushalya Bai, being a question of fact, cannot be considered by this Court.

The latter part of the prayer in this application runs as follows:

> At least the sum of Rs. 6,400 (Rs. 15,000—Rs. 8,600) be ordered to be spent from the share of Kaushalya Bai.

This is a matter about which no application was made to the District Judge and has been put forward for the first time in this Court. This cannot be considered and decided here.

The application is, therefore, rejected. It was unnecessary to make Seth Gopal Das a party to this application. Seth Gokul Chand, who has filed this application on behalf of the minor Jamna Bai, will pay the costs of this application incurred by the non-applicant Seth Gopal Das and Seth Amar Chand. I fix pleader's fee at Rs. 25.

D.B./R.K. *Application rejected.*

(1) A. I. R. 1926 All. 301=48 All. 300.

A. I. R. 1928 Nagpur 292 (1)

FINDLAY, J. C.

Bajirao Mahar—Plaintiff—Appellant.

v.

Ramrao and *others*—Defendants—Respondents.

Second Appeal No. 402 of 1926, Decided on 31st January 1928, from decree of Dist. Judge, Nagpur, D/- 7th April 1926, in Civil Appeal No. 269 of 1926.

Gurdian and Ward — Guardian borrowing money in his own name without reference to the minor but for minor's benefit—Minor is bound.

A minor is bound by the act of his guardian done bonafide for his benefit in the management of the estate, even though his name does not appear in the connected transaction: 35 *Cal.* 320, *Dist.*: 1 *N. L. R.* 66; *A. I. R.* 1922 *Nag.* 104; and 20 *Bom.* 286; *Rel. on.* [P 292 C 1]

M. B. Bobde—for Appellant.

S. R. Mangrulkar—for Respondents.

Judgment. — The bond in suit was executed by the second respondent Mt. Bahina in her own name. The recital therein is to the effect that the money was borrowed for the purposes of cultivation. The bond did not in terms purport to be executed by Mt. Bahina on behalf of the minor Bajirao, although it is admitted that it is only his estate which could possibly be referred to in the bond. The learned District Judge on the strength of the decision in *Bhawal Sahu* v. *Baijnath Pertab Narain Singh* (1) has held that the minor's estate could not be bound except upon a document expressly purporting to bind it. I do not think, however, that in the circumstances of the present case the learned District Judge's view in this connexion is correct. As was laid down in *Seth Ghasiram* v. *Binia* (2) and in *Mangallal* v. *Nanhi* (3) a minor is bound by the act of his guardian done bona fide for his benefit in the management of the estate, even though his name does not appear in the connected transaction. A similar view was taken in *Murari* v *Tayana* (4). The question, therefore which the lower appellate Court has, first of all, to determine is whether it was the intention of the mother to deal with the minor's estate and for his benefit when she executed the bond in suit. It is from this point of view that the present case has to be approached. A perusal of the facts of the case in *Bhawal Sahu* v. *Baijnath Partab Narain Singh* (1) will show that the circumstances of that case were wholly different from those of the present one. Here the money was borrowed expressly for cultivation and apparently it could only have been the fields of the minor ward which were referred to in this connexion. The lower appellate Court must, therefore, consider the question of the liability of the estate of the minor ward from the point of view stated above.

As regards the question of legal necessity, that also will have to be re-considered in view of the wrong angle from which the learned District Judge approached the case. This question was only considered after the finding in para. 2 adverse to the case of the plaintiff-appellant was arrived at, and was purely considered from the point of view of whether the money was borrowed to meet the necessities of the minor and the like.

For the above reasons the judgment and decree of the lower appellate Court are set aside and the case is remanded to that Court for disposal of Appeal No. 269 of 1925. On the merits, with advertence to the above remarks, costs incurred in this Court will follow the event.

A.L./R.K. *Case remanded.*

(1) [1908] 35 Cal. 320=12 C. W. N. 256.
(2) [1905] 1 N. L. R. 66.
(3) A. I. R. 1922 Nag. 104=19 N. L. R. 131.
(4) [1896] 20 Bom. 286.

A. I. R. 1928 Nagpur 292 (2)

FINDLAY, J. C., AND PRIDEAUX, A. J. C.

Indraj Singh—Defendant—Applicant.

v.

Komal Raj Singh and *another*—Plaintiffs—Non-applicants.

Misc. Appln. No. 57 of 1927, Decided on 17th March 1928, from decision of Findlay, J. C., and Macnair, A. J. C., D/- 14th September 1927, in Misc. Appeal No. 8 of 1926.

Civil P. C., S. 110—Exercise of reasonable discretion under S. 21 (g), Specific Relief Act is a question of law.

Whether the first Court exercised a reasonable discretion in granting the decree for specific performance having regard to the terms of S. 21 (g), and whether any discretion was left

to grant such a decree involves a substantial question of law and satisfies the requirements of S. 110, Civil P. C. [P 293 C 2]

M. V. Abhyankar and *G. R. Bapat*—for Applicant.

B. K. Bose, *V. Bose* and *Y. V. Jakatdar*—for Non-applicants.

Order.—This is an application for leave to appeal to their Lordships of the Privy Council against the decision of the Bench of this Court consisting of Findlay, J. C,, and Macnair, A. J. C., dated 14th September 1927, in Misc. Appeal No. 8 of 1926. That decision dismissed the appeal of the present applicant, defendant R. B. Indraj Singh, and confirmed the decree of the District Judge, by which the alleged compromise evidenced by P. 1 was enforced as between the parties to the suit.

As is apparent from the record in Misc. Appeal .No. 8 of 1926, the two Judges, who constituted the Bench, differed as to whether the argument evidenced by P. 1 represented a final contract or not. The Judges, however, held that as they differed in the matter, the question involved was, in reality, a question of law and, therefore, the finding of the first Court on this point was confirmed. The Judges are further of opinion that, assuming the agreement to be a binding one, the lower Court had exercised a due discretion in the matter and that it became unnecessary to refer the case to a third Judge under S. 98, sub-S. (2), Civil P. C.

On the present application for leave to appeal to the Privy Council coming on for hearing only two points were pressed. The first was that the construction of the document (P. 1) involved a substantial question of law and, in this connexion, reliance has been placed on decisions like those in *Nafar Chandra Pal* v. *Shukur Sheikh* (1), *Fateh Chand* v. *Kishan Kumar* (2) and *Parthasarathi Appa Rao* v. *Venkata Narasayya* (3), where it has been pointed out that the construction of a document, or even the inferences to be drawn from proved facts, may amount to a question of law. We do not think, however, that, in the circumstances of the present case, any question of law can be said to arise in this connexion. The real question between the parties as regards P. 1 was as to whether it represented a final agreement of the kind alleged by the plaintiffs, or whether it was a mere memorandum denoting how far the negotiations between the parties had gone at the time it was arrived at. The Bench of this Court were not, in reality, concerned with the construction of the terms of the document, which are prima facie clear, but with, so to speak, the preliminary facts as to whether the document was intended to represent the terms of a final agreement or was a mere memorandum of the lines on which the parties were negotiating with a view to arriving at a final agreement. We do not think, therefore, that any substantial question of law can be said to arise in this connexion.

On the second point urged on behalf of the applicant, however, we are of opinion that a substantial question of law does arise— question which has not been considered by the Bench of this Court. That question is whether, having regard to the terms of S. 21 (g), Specific Relief Act, any discretion was left in the first Court to grant a decree for specific performance. It is obvious that this question entirely escapel the notice of the first Court, but, nevertheless, it seems to us to be one which necessarily arises on the facts of the case.

The learned counsel for the non-applicants has urged that his clients are already in possession of certain villages and that all that the decree does is to make slight variations in the actual villages held by them and the like. The fact, however, remains as is clear from Cl. (8) of the decree of the first Court, that specific performance of the compromise is to remain in force for a period of more than three years, e. g, for four years, and, in our opinion, therefore, it must be conceded that a substantial question of law is involved in the case as it now stands, e. g., as to whether or not the Court has any discretion, in the circumstances, to grant a decree for specific performance.

We are no longer now concerned with the question of whether the first Court exercised a reasonable discretion in granting the decree it did, but rather with the question of whether it had any discretion at all which it could exercise. We are of opinion, therefore, that on this

(1) A. I. R. 1918 P. C. 92=46 Cal. 189=45 I. A. 183 (P. C.).
(2) [1912] 34 All. 579=16 I. C. 67=39 I. A. 247 (P. C.).
(3) [1910] 33 Mad. 177=6 I. C. 988=37 I. A. 110 (P. C.).

point, a substantial question of law is involved and that the case satisfies the requirements of S. 110, Civil P. C. A certificate for leave to appeal to their Lordships of the Privy Council will accordingly issue in favour of the applicant.

A.L./R.K. *Certificate to issue.*

A. I. R. 1928 Nagpur 294

GHULAM MOHIUDDIN, A. J. C.

Abdul Ali—Applicant.

v.

Mt. Manbi and *others*—Non-applicants.

Civil Revn. No. 40 of 1926, Decided on 5th January 1928, from an order of Addl. Dist. Judge, Jubbulpur, D/- 19th November 1925.

Civil P. C., S. 145—Surety for successor-in-interest of party to suit who remained to be brought on record comes under S. 145.

The requirement that in order that a surety may be regarded as one under S. 145, he must be a surety for a party to suit, includes surety for successor-in-interest of a party, who remained to be brought on record as a party along with the one to whose interest he succeeds. [P 294 C 2, P 295 C 1]

P. C. Dutt—for Applicant.

S. C. Dutta Chaudhary—for Non-applicants.

Order.—The facts of the case so far as they are relevant for the decision of this application for revision are these : Mt. Sugrabi filed Suit No. 184 of 1922 in the Court of Sub-Judge, Jubbulpore, for possession of her mother's half-share of a house against Wahiuddin and Mt. Piran, the brother and sister of her mother, and obtained a preliminary decree. Before the decree for partition was made final, she sold her interest in it to Mt. Bashiran Bi. It was found inconvenient to partition the house by metes and bounds and on the Commissioner's recommendation it was sold by public auction, the sale proceeds falling due to Mt. Sugrabi's share being Rs. 715 and costs. Mt. Bashiran Bi's name was brought on the record in place of Mt. Sugrabi and it was consequently in the former's name that the final decree was passed on 7th December 1923. Before the passing of this final decree, Mt. Hiran and six others brought Suit No. 396 of 1923 against Mt. Sugrabi for half the share of the latter's mother in the said house as heirs. On 21st December 1923 they moved this Court for attachment of the amount which had fallen to Mt. Sugrabi's share and this was allowed subject to the condition that in case Mt. Bashiran Bi desired to withdraw it, she could do so on furnishing solvent security. She furnished the security of her husband, the present appellant on 22nd December 1923 and ultimately withdrew the amount on 2nd January 1924. On 5th September 1924, the claim of all the plaintiffs in Suit No. 396 of 1923, except two, who were defendants in the former suit, was decreed for Rs. 255-5-6 and costs Rs. 43-12-0. The surety was then ordered to deposit the amount which he failed to do and the Court proceeded to enforce the terms of the security bond against him. His objections failed in the Courts below and he now files the present application for revision.

The first ground urged before me is that the applicant is not a surety within the meaning of S. 145, Civil P. C. It is contended that Mt. Bashiran Bi was not a party to Suit No. 396 of 1923 and, therefore, no security could be demanded from her under the section. It is true that Mt. Bashiran Bi's name was not brought on the record as a defendant in Suit No. 396 of 1923. On this ground, however, I am unable to accept the contention that the surety is not one within that section. The applicant stood surety for Mt. Bashiran Bi who is admittedly the successor-in-interest of Mt. Sugrabi in respect of the amount regarding which the prohibitory order was issued under R. 7, O. 38 read with R. 52, O. 21, Civil P. C. The interest which she purchased from Mt. Sugrabi was the subject-matter of dispute in the later suit brought by Mt. Manbi and others and it was in this suit that she made an application for permission to withdraw the amount attached and furnished security. She was, therefore, virtually a party to the suit. Neither the Court nor the plaintiffs, however, took care to see that she was formally added as a defendant in the suit. She too did not apply to be made a defendant. This omission, does not, in my opinion, affect the liability of the surety under S. 145, Civil P. C. The requirement that in order that a surety may be regarded as one under S. 145, Civil P. C., he must be a surety for a party to the suit, includes, in my opinion, a surety for a successor-in-interest of a party to the

suit who remained to be brought on the record as a party along with the one to whose interests he succeeds.

The second ground urged is that the security bond does not entitle the Court to proceed against the applicant. The surety bond dated 22nd December 1923, given by the applicant is clearly one of personal liability as regards the deposit of Rs. 357-8-0. The applicant was ordered to deposit a part of this amount in Court and on his failure to do so, the Court rightly proceeded to enforce its terms against him by attachment of his property.

The third ground taken before me was not taken in the lower Court and cannot, therefore, be allowed to be pressed here.

The applicant thus fails and his application is rejected with costs. He will pay the costs of the non-applicants. I allow Rs. 25 as pleader's fees.

D.B./R.K. *Application rejected.*

A. I. R. 1928 Nagpur 295

PRIDEAUX, A. J. C.

Premchand—Applicant.

v.

Hiralal—Non-applicant.

Civil Revn. No. 239 of 1927, Decided on 21st March 1928, from order of Addl. Dist. Judge, Jubbulpore, D/- 5th April 1927.

(a) *Civil P.C., S. 16—Partition suit—British Indian Court cannot entertain suit with regard to immovable property outside British India.*

Where in a suit for partition some of the immovable property was situated out of British India,

Held: that the Courts in British India cannot entertain a suit with respect to that property since their decree cannot be enforced there. [P 296 C 1]

(b) *Civil P. C., S. 20—Partition suit—Defendant living out of British India—No decree can be passed with regard to moveables with him.*

British Indian Courts cannot pass a partition decree with regard to the moveable property with a defendant living out of British India. [P 296 C 1]

S. B. Gokhale—for Applicant.

B. K. Bose and *N. G. Bose*—for Non-applicants.

Judgment.—This is a suit for partition filed in the Court of the Additional District Judge, Jubbulpore; the plaintiff contending that he is a member of the joint family claims a half-share in the family moveables and immovables. The immovable property includes houses situated in Shahdole in the Rewa State, and some of the moveable property is also in that State, and there is a money-lending business also there. The plaintiff's suit, he being a minor, is by his next friend; but before the hearing of the present application he came of age, and the next friend's name has been removed from the record.

Defendant 1, Singhai Hiralal, stated that the moveable and immovable property at Shahdole in the Rewa State belonged exclusively to him, and also denied the jurisdiction of the Court to make a partition of property situated outside British India. Among the preliminary issues framed was the following:

Whether the Shahdole property should be excluded from the joint property for purposes of partition, as it is not situate in British India.

It was contended for the plaintiff that though the Court may not have jurisdiction to deal with property, either moveable or immovable, in Shahdole, which is admittedly in the Rewa State and outside British India, in the sense of seizure or attachment thereof it ought to have jurisdiction to deal with it for adjusting the rights and equities between the parties; and that at such an adjustment the value of the plaintiff's share could be allotted to him from the property in British India, while that outside British India could go to defendant 1.

The lower Court has held that it has no jurisdiction over the moveable or immovable property at Shahdole. The plaintiff comes here in revision.

It seems to me very clear that the lower Court is right. The question is concluded by S. 16, Civil P. C, as regards immovable property. The explanation to that section states that the word "property" used therein means property situated in British India. It seems to me that in the present case if the immovable property in Shahdole was brought into hotchpot, the Court could not execute its decree with regard to it, and that a Court should not entertain a suit if it cannot enforce its own decree. Our Courts are governed by the Civil Procedure Code and take cognizance of suits under that Code, and they

cannot deal with immovable property situated where that Code does not run : see *Ramabhadra Raju Bahadur* v. *Maharaja of Jeypore* (1), and *Trimbak* v. *Lakshman* (2), a case in which a large number of rulings are cited.

As regards moveable property at Shahdole it seems to me that no decree against defendant 1 for the value of the joint family ornaments can be passed in the Jubbulpore Court for the simple reason that he lives in Rewa territory.

It is not as if the plaintiff has not a remedy ; he can sue for partition in the Jubbulpore Court for all the family property, moveable and immovable, situated within British India ; while he can bring a similar suit in the Rewa Court for his share of such property as may be situated within that State. The result is that this application fails and is dismissed with costs. Applicant will pay the non-applicants' costs. I fix pleader's fees at Rs. 25.

D.B./R.K. *Application dismissed.*

(1) A. I. R. 1919 P. C. 150=42 Mad. 813=46 I. A. 151 (P. C.).
(2) [1895] 20 Bom. 495.

A. I. R. 1928 Nagpur 296

FINDLAY, J. C.

Model Mills Limited, Nagpur—Defendant 1—Applicant.

v.

Kurban Hussain and *another*—Plaintiff and Defendant 2—Non-applicants.

Civil Revn. No. 2 of 1928, Decided on 13th March 1928, from order of 1st Cl. Sub-Judge, Nagpur, D/- 24th November 1927, in Civil Suit No. 9 of 1927.

Civil P. C., O. 33, Rr. 8, 9, and 11—Application for leave to sue as a pauper—Court-fees subsequently paid—Period spent in prosecuting the application cannot be deducted if application was mala fide.

Where a plaintiff sued as a pauper at first but subsequently paid the Court-fees, he is not entitled to deduct the period spent in prosecuting the pauper application, if, that pauper application is held to have been a mala fide or a fraudulent one, and it is essential that a finding should be given on the question of fact whether the original application to sue as a pauper was a fraudulent and mala fide or a bona fide one with a view to determine the question of limitation: 2 *All.* 241 (*P. C.*) and *A. I. R.* 1922 *Nag.* 160, *Dist.*; 15 *All.* 206 and 28 *Cal.* 427, *Ref.*

[P 296 C 2, P 297 C 1]

M. R. Bobde and *A. D. Mande*—for Applicant.

Order.—It is unnecessary here to repeat the facts of this case, which are sufficiently clear from the application in revision. Defendant 1-applicant, the Model Mills Limited, Nagpur, applies for revision of the order of the Subordinate Judge, dated 24th November 1927, by which it was held that the payment of Court-fees made on 7th November 1927 dates back in effect to 17th January 1926 when the application to sue as a pauper was originally filed. The Subordinate Judge was of opinion that it was immaterial for him to decide whether the application to sue as a pauper was originally a bona fide one or was a fraudulent one. In coming to this finding he relied on the decision in *Janakdhary Sukul* v. *Janki Koer* (1) and on the Privy Council decision in *Stuart Skinner* v. *William Orde* (2). The latter decision is no authority whatever for the broad proposition the Subordinate Judge attempts to lay down. In that case, there was admittedly no question of the pauper application having originally been filed in bad faith. Indeed, the Privy Council decision in question is direct authority for the opposite view, as is apparent from the remark of their Lordships made at p. 251:

> Supposing there had been any fraud found by the Judge, the consideration which would determine the judgment would then have been different.

In *Gopikishan* v. *Bulakhidas* (3) another case relied on by the Judge of the lower Court there was similarly no question of fraud.

It is not necessary for me at the present juncture to decide whether the rule has been laid down too widely in *Abbasi Begam* v. *Nanhi Begam* (4). If that decision bears the meaning, it would seem to do on the surface, then it would be, to all intents and purposes, opposed to the decision of their Lordships of the Privy Council in *Stuart Skinner* v. *William Orde* (2) quoted above, but there can, in my opinion, be no question that the plaintiff in a suit like the present, is not entitled to deduct the period spent in prosecuting the pauper application if, in

(1) [1901] 28 Cal. 427.
(2) [1879] 2 All. 241=6 I.A. 126=4 Sar. 31=3 Suther 627 (P. C.).
(3) A. I. R. 1922 Nag. 160=18 N. L. R. 44.
(4) [1896] 15 All. 206=(1896) A.W.N. 33.

a particular case, that pauper application is held to have been a mala fide or a fraudulent one. It is from this point of view that the lower Court must determine the question of limitation and it is essential that the finding should be given on the question of fact as to whether the original application to sue as a pauper was a fraudulent and mala fide or a bona fide one.

The lower Court must now re-consider the matter from this point of view. The order of 24th November 1927 is reversed and the case is remanded to the lower Court for re-trial on the merits with advertence to the above remarks. Costs incurred in this Court will follow the event. I fix Rs. 20 as pleader's fees.

A.L/R.K. *Case remanded.*

A. I. R. 1928 Nagpur 297 (1)

GHULAM MOHIUDDIN, A. J. C.

Mt. Anjani and *others*—Appellants.

v.

Vithu and *others*—Respondents.

Second Appeal No. 339-B of 1925, Decided on 28th February 1928, from decree of Addl. Dist. Judge, Amraoti, D/- 6th August 1925, in Civil Appeal No. 100 of 1925.

Civil P. C., S. 9—Suit for appointment of guardian does not lie—Guardians and Wards Act, S. 7.

The question of the appointment of a guardian for a minor's person and property is a matter specially within the provisions of the Guardians and Wards Act, and no suit can be brought for that purpose. [P 297 C 2]

S. A. Ghadgey—for Appellants.

W. R. Puranik—for Respondents.

Judgment.—This is a suit filed on behalf of the minors Mt. Anjani and Mt. Saru, by their next friend, Raghoji who is the father-in-law of Mt. Anjani and Chandrabhan who is brother of Mt. Saru's husband Ragho for possession of Survey No. 62/2 which is in the possession of their grand-mother Mt. Renuka.

The defendants did not claim any ownership in the field and alleged that they were in possession of the field on behalf of the minors. The trial Court passed a decree in favour of the plaintiffs for ⅓rds share in the field in dispute and the lower appellate Court, following the decision of this Court in *Mt. Bhagi* v. *Kashiram* (1), decided by Prideaux, A. J. C., allowed the appeal and dismissed the suit.

In appeal it is argued that in view of the provision contained in O. 32, R. 4, Civil P. C., Raghoji and Chandrabhan can act as next friends of the minors and the suit as filed is correct. There is no doubt that Raghoji and Chandrabhan can act as next friends of the minors, but the real question is as to who should be considered to be the guardian of the minors when two persons, admitting that the property belongs to the minor, claim guardianship of the minor. The question of the appointment of a guardian for a minor's person and property is a matter specially within the provisions of the Guardians and Wards Act, and no suit can be brought for that purpose.

It is brought to my notice by the respondents and the fact is admitted by the appellants that in Miscellaneous Judicial Case No. 8 of 1925, Mt. Renuka was appointed guardian of the property of the minors on 21st August 1925, by the District Judge, Amraoti. As the matter has already been decided in favour of the respondents by the Court which was competent to do so, no suit under the ordinary law can lie.

The appeal is, therefore, dismissed with costs. The appellants' next friends will pay the costs of the respondents in this Court and the Courts below. I fix Rs. 5 as pleader's fees in this Court.

R D. *Appeal dismissed.*

(1) A. I. R. 1925 Nag. 328=21 N. L. R. 75.

A. I. R. 1928 Nagpur 297 (2)

HALLIFAX, A. J. C.

Nanhelal and *others*—Defendants—Appellants.

v.

Jamnadas and *others*—Plaintiffs—Respondents.

Second Appeal No. 208 of 1927, Decided on 7th January 1928, from decree of Dist. Judge, Hoshangabad, D/- 5th January 1927, in Civil Appeal No. 178 of 1926.

Civil P. C., S. 68—Collector to whom decree has been transferred for execution under S. 68 and S. 9, C. P. Tenancy Act, has powers of execution only and not of deciding other matters.

A Collector, executing a decree under S. 9, C. P. Tenancy Act, and S. 68, Civil P. C., is a

Judge of a civil Court to which the decree has been transferred for execution, but his powers are limited to those which the Court from which the decree was transferred to him could exercise in the execution of the decree only. He has no power to enquire into objections to attachment or applications for rateable distribution or matters of that kind. [P 298 C 1]

J. Sen—for Appellants.

B. K. Bose—for Respondents.

Judgment.—The details of the execution case and "Collector's case" that led up to this suit are obscure, but both seem to have proceeded mainly on the common misunderstanding of the position of a Collector executing a decree under S. 9, Tenancy Act, and S. 68, Civil P. C. He is in those circumstances the Judge of a civil Court to which the decree has been transferred for execution, but his powers are limited to those which the Court from which the decree was transferred to him could exercise in the execution of the decree only. The Collector has no power to enquire into objections to attachment or applications for rateable distribution or matters of that kind.

One instance of the lack of clear thought that has led to the large number of irrelevant complications in the case is that the decree of the first Court orders that the money to be paid to the plaintiffs is to be a charge on a certain sum of Rs. 150 which has been paid to the defendants, this decree was confirmed in the Court of the District Judge on the finding that the defendants could not

claim exoneration of the charge from the purchase money received by them.

There is no such thing as a charge of that kind on a sum of money except when it is in the hands of a third person. The fact that there was a charge on the money before it reached the hands of the defendants would make them liable to pay a sum not exceeding that charged to the plaintiffs, but to order that they shall pay it out of that money is meaningless.

The facts are these: The appellants held a decree or decrees for the payment of about Rs. 300 against the respondent Imrat Jadam, in execution of which they brought his absolute occupancy holding in the village of Dhondhai to sale and bought it themselves for Rs. 80. The sale was confirmed on 5th January 1924. The respondents other than Imrat Jadam who are "the malguzar" of Dhondhai, then applied to a revenue officer for pre-emption under S. 9, Tenancy Act, and the price was fixed at Rs. 150 on 3rd August, 1925. Within 15 days thereafter the malguzar deposited that sum in the revenue Court.

What happened after that is somewhat obscure, but the money was at some time or other paid to the appellants. The malguzar had two decrees for rent against Imrat Jadam for Rs. 30 and Rs. 38 and a claim for Rs. 10-14-0 as arrears of rent for 1924-25, and in execution of one or both of the decrees the holding, which was then his own, was attached and ordered to be sold. The entire want of meaning and reality in this proceeding has never apparently occurred to anybody. If the malguzar wanted to sell the holding, whether by public auction or otherwise, there was nothing to prevent him doing so, and he could do what he liked with the money.

The execution case was, however, solemnly transferred to the civil Court of the Collector, who eventually returned it with the report that the holding could not be sold as it was already in the possession of the landlord. Several other points were considered with which the Collector had no concern, but they need not be discussed. The money seems to have been handed over to the appellants on or soon after 5th October 1925. This was under the orders of the Collector, who had no power to make any such order in the execution proceedings. He may have supposed he was acting as a revenue officer but even in that capacity he probably had no power to deal with the money, which apparently had been put under attachment by somebody or other.

On 11th January 1926, the malguzar filed the present suit against Imrat Jadam and the appellants claiming Rs. 78-14-0 out of the Rs. 150 in their hands. The absurdities about the payment being declared a charge on a particular sum of money out of all the money held by the defendants as their own do not appear in the plaint but were imported later. Imrat Jadam who was impleaded as defendant 1 was clearly not a necessary party to the suit at all, but he has not put in an appearance at any stage of it.

The case then was perfectly simple. Out of the Rs 150 paid as the price of the holding the malguzar was entitled, under S. 6 (5), Tenancy Act, to get Rs. 78-14-0, that sum being a charge on

the purchase money before it was paid to the defendants. It was, however, paid to the defendants along with the rest of the Rs. 150. This was done on or after 5th October 1925, and the present suit was filed on 11th January 1926. The defendants must, therefore, pay the money to the plaintiffs.

The decree of the lower appellate Court, which is that of the first Court, will be modified by the deletion of the declaration of the charge, so as to make it into a simple decree for the payment of money. The appellants will be ordered to pay the whole of the costs of the respondents in all three Courts. The pleader's fee in this Court will be fifty rupees.

A.L./R.K. *Decree modified.*

A. I. R. 1928 Nagpur 299

PRIDEAUX, A. J. C.

Pandurang and *others* — Plaintiffs—Appellants.

v.

Gunwant Rao and *others*—Defendants—Respondents.

First Appeal No. 96-B of 1925, Decided on 31st January 1928, from decree of 1st Addl. Dist. Judge, Akola, D/- 31st August 1925, in Civil Suit No. 3 of 1924.

Civil P. C., O. 20, R. 16—Suit under S. 92 for accounts — Decree passed after framing issues and taking evidence—Fact that preliminary decree under O. 20, R. 16 was not passed does not make the decree illegal if nobody is prejudiced by the procedure.

Where in a suit under S. 92, for accounts and dismissal of the trustee for mismanagement and for wrongfully disposing of property belonging to the trust the trial Court passes a decree after framing issues and taking evidence on the incomings and outgoings of the expenditure, the fact that a preliminary decree under O. 20, R. 16 was not passed does not make the decree illegal if nobody is prejudiced by the procedure adopted. [P 300 C 1]

G. G. Hatwalne—for Appellants.

W. B. Pendharkar—for Respondents.

Judgment.—This suit is under S. 92, Civil P. C., regarding a Trust called "Payoshni Mata Sansthan" situated at mauza Paradh in the Murtijapur taluq. The plaintiffs contend that the Trust is public charitable and religious, owning two fields, Survey No. 13 and Survey No. 16, pot hissa No. 1. The former field was gifted to the Trust by one Raoji Mali on 31st July 1912, and the latter purchased by the Trust in 1921. The plaintiffs charge the defendants with failing in the purpose of the Trust, with mismanagement and with wrongfully disposing of cattle belonging to the Trust. Defendant 1, Gunwant Rao, has been the principal manager and he is accused of misappropriating the funds during his management from 1905 to 1921. He has kept no accounts. He has purchased Survey No. 16, pot hissa No. 1, out of the rent of the other field received from 1915-16 to 1918-19, but has not accounted for the rest of the rent. It is also stated that he has to account for Rs. 600 received by him for the Trust from one Motisa on 25th May 1917. The plaintiff's case is that this defendant has received Rs. 6,500 and they ask him for an account of this and for his removal.

Defendant 1 contends that he managed the Sansthan from 1912-13 to 1918-19 with others and then left the management owing to his going to live in another village. He leased Survey No. 13 for 1912-13 and 1913-14 for Rs. 200 a year and in 1914-15 leased it for five years to Motisa, who paid only the first year's rent. He admits getting Rs. 600 from Motisa on 25th May 1917, a sum paid to remove kundha from the field. Rs. 300 of this he spent in removing kundha and the balance on Suit No. 420 of 1921 he filed against Motisa for recovery of the rent. Out of the other income he spent Rs. 125 for defending Suit No. 463 of 1912 in the Court of the Junior Sub-Judge, Akola, brought by the donor of Survey No. 13. He also paid the Government assessment of the land every year and spent Rs 500 for the feast of the Sansthan in Pus 1916. Thus he had spent all that he received. When he left, the management was taken over by one Baliram, since dead. Defendants 2 and 3 were proceeded against ex parte. Defendant 4 wanted to remain a trustee but had no objection to the removal of defendant 1 from the Trust. The plaintiffs denied that Rs. 500 had been spent on the Bhandara feast and said that defendant had recovered Rs. 250 a year as rent from one Gotya for 1919-20 and 1920-21. They denied the spending of Rs. 300 for the removal of the kundha and contended that there were 17 animals belonging to the Trust and that defendant 1 had sold 12 of these for Rs. 1,000 and had five worth some Rs. 350 with them. They denied that Baliram managed the

estate. (After narrating the issues, the judgment proceeded.) The findings of the Court below may be summarized as follows: That defendant 1 did not recover the rents for 1919 20 and 1920-21 as alleged. He was not the manager after 1919. Defendant 1 had no cattle belonging to the Trust and disposed of none. He spent Rs. 38 in C. S. No. 463 of 1912. He paid Rs. 39 per year as land revenue. In 1916 he spent Rs. 450 on the Bhandara, Rs. 300 on removing kundha, and Rs. 203-8-0 in Suit No. 42 of 1921. He was never asked to account and never refused to do so. He was not accountable for interest. The sanction to the suit is not defective. The Judge found that defendant 1 had received from the Trust Rs. 1,250 and he had spent : Rs. 38 on Suit No. 463 of 1912 ; Rs. 273 for land revenue ; Rs. 450 on the bhandara; Rs. 300 for eradicating kundha; and Rs. 203-8-0 on Suit No. 42 of 1921, thus spending Rs. 1,264-8-0 and now owes nothing to the estate. The Judge then proceeded to draw up a scheme of management which has not been objected to in this appeal. The costs of the suit were directed to be paid from the estate, defendant 1 paying his own costs.

The plaintiffs bring this appeal. The ground 1 in the memorandum deals with a pure technicality. It is said that O. 20, R. 16, Civil P. C., makes a preliminary decree mandatory. The procedure adopted may be wrong but no body has been prejudiced by it. Issues have been framed and evidence taken up on the incomings and outgoings and a decision arrived at. I reject this ground. As evidence has been taken on both sides, there is no force in the second ground of the memorandum of appeal. The third ground of appeal has been very fully argued. It is contended here that defendant 1 was in actual management of the Trust during 1919-1920 and said that the following circumstances point to this :

(a) The pere-patraks for these years show defendant 1 as the manager.

(b) The Suit No. 42 of 1921 against Kamtaji is filed by defendant 1 in which he describes himself as manager.

(c) The explanation of defendant 1 of handing over charge to Baliram is ridiculous. Balirsm is dead and defendant's witness Daulat does not support him.

(d) Gotya, the lessee for these years, has been found by the lower Court to be under the influence of defendant 1 and has been his constant witness.

(e) Defendant 1 paid the land revenue for these years.

(f) No lease deed or kabuliyat is forthcoming although Gotya says a lease for two years was written.

Defendant 1 had kept no accounts and this raises a presumption against him. He admitted in the enquiry before the Tahsildar that he and Baliram leased out S. No. 13 to Gotya Mahar for these two years for Rs. 250 a year, but the lease money was taken by Baliram. The leasing out of this field was a distinct act of management on behalf of the Sansthan, and it is difficult to understand, if defendant 1 had abandoned his position as manager, why he should have admittedly taken part in the leasing of the field. It is significant that no written lease is forthcoming. Gotya (D. W. 4) is defendant 1's creature. He is a kamdar mahar at the village where defendant 1 was patel and where his son is patel now. He also speaks to the removal of the kundha for Rs. 300, a statement I will presently show is absolutely false. The witness has given evidence before for defendant 1. It clearly lay on defendant 1 to show when he relinquished his trusteeship. His story is he left in 1918, but we find him dealing with the Trust property the next two years, and he must have been instrumental in bringing about the compromise in the suit filed against Kamalbai, the heir of Motisa in 1921, a suit which obtained S. No. 16, pot hissa 1, for the Trust. That suit, as will be shown later, was partly false. He states that Baliram compromised the suit and he consented to it. Why was his consent necessary unless he was still one of the Trustees ? It is admitted that though he states he handed over the management to Baliram he retained whatever Trust money he had with him.

Baliram's own brother Chandrabhan (D. W. 18) says Baliram did not manage the estate until 1921. Chabadaji, one of the panchas in the revenue enquiry, said speaking in 1924 that except the last three years Gunwantrao was manager. There is evidence, which is believable, on the part of the plaintiff to show that defendant 1 did not leave the village until 1921 or 1922. Though the *pere-patraks* do not carry much weight, yet the probabilities are in favour of the plaintiffs. I find that defendant 1 was manager when Gotya was tenant and that he is responsible for the two years rent namely Rs. 500. I have read and considered

the evidence on each side as to the bhandara held in 1916, and have come to the conclusion that it is so equally balanced that it is impossible to disturb the lower Court's finding as to this.

The evidence as to the cattle belonging to the Sansthan and to their being misappropriated by defendant 1 is so discrepant that it is impossible to come to any definite finding and I must agree with the lower Court that this portion of the plaintiffs' case has not been proved. As to the Rs. 600 said to have been received by defendant 1 as damages for not removing the kundha, I have no doubt that the story put forward is entirely false as is the tale that Rs. 300 were paid to Gotya to remove Kundha. The truth being that this sum was paid by Motisa towards his rent, this payment was not mentioned in the suit against Motisa's heir, and there is little doubt that defendant 1, who seems a dishonest person, meant to pocket it. That suit was compromised for a field and then the heir found a receipt passed by defendant 1 for this sum received as rent and started proceedings for defendant 1's prosecution, which proceedings terminated at her death. The payment of this Rs. 600 could not be denied ; hence the story that it was paid as damages. When kundha has to be removed by an incoming tenant, the lease states it, an the land has to be returned cleared of that weed, and damages are sought if this is not done. During a very lengthy experience of this matter I have never known of a case where damages have been paid during the pendency of a lease for this reason, and it is extraordinary that the Judge trying the case should have accepted this story so obviously false. I disbelieve all the evidence in support of it and also the tale told of Rs. 300 being paid over to Gotya to remove kundha. Defendant 1 is liable to account for the whole of this Rs. 600.

The result of the appeal is that defendant 1 is liable for Rs. 785-8-0. The defendant has received from the estate Rs. 1,750 and has proved an expenditure of :

Rs.	88-0-0	in the Suit No. 463 of 1912.
,,	273-0-0	for land revenue.
,,	450-0-0	for Bhandara, and
,,	203-8-0	for Suit No. 42 of 1921.
Rs.	961-8-0	

He thus owes the Sansthan Rs. 785-8-0 and will pay this to the new committee through the plaintiffs who will execute the decree. Expenses of the plaintiffs will be paid by defendant 1 who will also bear his own costs throughout. I fix pleader's fees at Rs. 30.

N.K. *Decree modified.*

A. I. R. 1928 Nagpur 301

GHULAM MOHIUDDIN, A. J. C.

Narayan Dhondopant — Defendant—Appellant.

v.

Sangidas Biharilal and *others*—Plaintiffs—Respondents.

Second Appeal No. 106-B of 1926, Decided on 11th February 1928, from decree of 2nd Addl. Dist. Judge, Amraoti, D/- 24th November 1925, in Transfer Civil Appeal No. 30 of 1925.

(a) *Civil P. C., O. 34, R. 3—Mortgagor can redeem by payment before day fixed in preliminary decree ; after that day he can only apply for extension and Court may upon good cause shown postpone day of payment.*

The mortgagor can, as of right, by payment into Court on or before the day fixed in the preliminary decree, redeem the property, but after that day has passed, he can only apply, under the proviso, for an extension of the time for payment and the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day for such payment. [P 302 C 2]

(b) *Civil P. C., O. 34, R. 3—Primary object of mortgage is to secure payment of debt and is not intended to work as forfeiture of estate—Mortgage—T. P. Act, S. 58.*

The primary object of a mortgage is to secure the payment of debt, usually much below the market value of the property mortgaged. It is not intended, at least by the mortgagor, and ostensibly also by the mortgagee, to work as a forfeiture of estate : 10 *N. L. R.* 150, *Foll.* [P 302 C 2]

(c) *Civil P. C., O. 34, R. 3, proviso—Inability to pay because of failure of crop and inability to raise necessary amount accompanied with an affidavit afford good cause for a first enlargement.*

The defendant must state some good reason for extension of time, and the words "good cause" will be liberally interpreted with leniency towards the debtor in the case of a first enlargement.

The mortgagor applied for extension, because, according to him there was a failure of crop, and because he could not raise the necessary amount in time. He filed an affidavit in support of his application and had on solemn affirmation repeated the facts in Court.

Held : that the facts would afford good cause for a first enlargement. [P 303 C 1]

M. B. Niyogi—for Appellant.
W. B. Pendharkar—for Respondents.

Judgment.—It is expedient to give a brief statement of the facts so far as they are material for the purposes of this appeal. The preliminary decree for foreclosure was made on 26th January 1924, in Civil Suit No. 314 of 1922 by the Subordinate Judge, Chandur, who ordered that the defendants can redeem the property by paying into Court Rs. 373-4-0 on or before 26th July 1924, and if they fail to make such payment on or before the said 26th July 1924, they shall be debarred from all right to redeem the property. No payment as ordered having been made, the mortgagee applied on 30th July 1924, for a final decree declaring that the defendants are debarred from all right to redeem the mortgaged property, and on this application, the Court ordered on 27th August 1924, that notices be issued to defendants to show cause against the application. Defendant, Narayan, appeared in Court on 8th November 1924, and expressed his willingness to pay the decretal amount just then, and also filed an application for extension of time up to 8th November 1924, agreeing to pay such interest as the Court orders. He stated in the application that he could not pay the amount on the due date, as the crop was not ready, and also because he could not borrow the required amount. This application was supported by an affidavit. The decree-holder refused to accept the amount, and objected to any extension of time. As another defendant was not served, the case was adjourned to 20th December 1924, on which date the pleader for the decree-holder, who already had six weeks to consider over the defendant's application, requested the Court to grant him time, to reply to the application, which was granted up to 17th January 1925. Narayan submitted an application on 13th November 1924, for being allowed to deposit Rs. 386-9-0 in Court to be paid to the decree-holder and the Court on the same date passed the following order :

> Filed by Mr. R. V. Chandorkar, pleader. N. N., to receive the amount of Rs. 386-9-0 for payment to plaintiff and pass a receipt.

and the amount was deposited on 20th November 1924. After framing issues and examining witnesses the Court ordered on 3rd April 1925, that, in its opinion, under the circumstances of the case the property should not be foreclosed and the period should be extended, and ordered payment of interest at Rs. 2 per cent. per mensem from the date fixed for payment up to 3rd April 1925, and allowed defendant to deposit the balance within 15 days, which was deposited on 14th April 1925, and passed a final decree on 18th April 1925, in favour of defendant 4, Narayan.

The decree-holder appealed against the said decree and the learned Second Additional District Judge, Amraoti, has allowed the appeal and has passed a final decree for foreclosure in favour of the decree-holder. Against the above decree Narayan has filed this appeal, and it is urged on his behalf that the lower appellate Court ought not to have interfered with the judicial discretion exercised by the trial Court in granting extension to Narayan.

The defendant can as of right, by payment into Court on or before the day fixed in the preliminary decree, redeem the property, but after that day has passed, he can only apply under the proviso for an extension of the time for payment and the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day for such payment. The date fixed for payment in this case was 26th July 1924, and on 8th November 1924, the defendant was ready and willing to pay the whole amount, with such interest as the Court ordered, and stated the reasons as to why he could not pay the amount in time, and on 20th November 1924, with the permission of the Court, deposited the amount. The question to be decided now is as to whether the trial Court was right in extending the time by about four months, and in allowing Narayan to pay the amount.

As observed by Stanyon, A. J. C., in *Balkishan* v. *Atmaram* (1) :

> the primary object of a mortgage is to secure the payment of debt, usually much below the market value of the property mortgaged. It is not intended, at least by the mortgagor, and ostensibly also by the mortgagee, to work as a forfeiture of estate. Therefore, a mortgagee who gets back his money, with compensation for any delay which the mortgagor could not reasonably avoid, suffers no hardship.

In this case it is perfectly clear that the mortgagee suffers no hardship what-

(1) [1914] 10 N. L. R. 150 (154)=26 I. C. 701.

soever and gets back his money with interest at 2 per cent. per mensem from the date of payment up to the date of order. The defendant must state some good reason for extension of time, and the words "good cause" will be liberally interpreted with leniency towards the debtor in the case of a first enlargement. The defendant applied for extension, because according to him, there was a failure of crop, and because he could not raise the necessary amount in time. He filed an affidavit in support of his application and has on solemn affirmation repeated the facts in Court. The plaintiffs filed an application on 17th January 1925, i. e, two months after the defendant had filed his application, and after taking one adjournment to reply to the facts contained in defendant's application. No affidavit was filed by the plaintiffs in support of their application. The facts alleged by the defendant for non-payment by the due date seem to be true and the trial Court has rightly extended the time for payment. In my opinion the facts as pointed out above afford good cause for a first enlargement. Narayan has already paid the whole amount as ordered by the first Court, and, therefore, the decree, dated 18th April 1925, passed in his favour by the Sub-Judge, Chandur, is restored and the decree passed by the Second Additional District Judge, Amraoti, is set aside. The respondents will pay the costs of the appellant in this Court and the Courts below. I fix Rs. 20 as pleader's fees in this Court.

D.B./R.K. *Decree set aside.*

A. I. R. 1928 Nagpur 303

FINDLAY, J. C.

Maroti Rao—Plaintiff—Appellant.

v.

Tulsa Bai—Defendant—Respondent.

Second Appeal No. 588 of 1925, Decided on 22nd February 1928, from decree of Dist. Judge, Nagpur, D/- 19th December 1925, in Civil Appeal No. 161 of 1925.

(a) *Landlord and Tenant—Assessment of khudkasht field does not represent profits.*

In the case of a khudkasht field, the assessment, for practical purposes, rarely represents anything like the profits which can be secured therefrom. [P 303 C 2]

(b) *Landlord and Tenant—Lease by mortgagor—Test to determine whether it was intended to diminish security laid down.*

The test to determine whether lease granted by a mortgagor malguzar is a transaction in the ordinary course of management or intended to diminish the security of the mortgagee, is whether he would have granted the lease himself if he had known that he was to continue indefinitely as a full owner of the property: *A. I. R.* 1924 *Nag.* 226, *Rel. on.* [P 304 C 2]

M. R. Bobde—for Appellants.

M. R. Indurkar—for Respondents.

Judgment.—This case was, by my order of 1st April 1927, * remanded to the lower appellate Court for a finding as to whether the lease evidenced by P.14 was a prudent transaction carried through by the mortgagor-malguzar in the ordinary course of management, or was a transaction intended to diminish the security of the mortgagee. The Judge of the first Court and the Judge of the appellate Court have both come to a finding contrary to the contentions of the appellant, and in this Court a long argument has been addressed to me why these findings should not be accepted. Much has been made of the fact that, under the lease, the rent has been raised from Rs. 23 to Rs. 40, but I am in full agreement with the learned District Judge that, in the case of a khudkasht field, the assessment, for practical purposes, rarely represents anything like the profits which can be secured from a khudkasht field. No doubt, for the purpose of the Settlement Code, the rent assessed on a khudkasht field represents a proportion of the assessment plus a theoretical profit or rent, but for a 30-acre field like the present one the Rs. 40 rent probably represents only a fraction of its yearly value whoever holds it. The very best proof of it is that the mortgagor took also a premium of no loss than Rs. 1,600 which represents nearly 70 years purchase at the assessed rent of Rs. 23. In any event the fact of the payment of this large premium to the mortgagor, at a time when he was endeavouring to stave off final decree being passed, is of itself an obvious indication of the nature of the transaction so far as the mortgagor was concerned. He was obviously out dishonestly to make what profit he could make out of the property and all the facts suggest his mala fides. I assume here that the Rs 1,600 was paid, which

* [vide A. I. R. 1927 Nag. 299.]

is, on appellant's case, so far favourable to him, but I agree with the Judge of the first Court that considerable doubt exists as to whether the money ever did pass.

As regards the lessor and lessee being relations, it may be that they are only distantly connected by marriage, but the point is that the appellant has other lands in this village and was a man likely to be in touch with the lambardar.

The obvious result of the case was to deprive the decree-holder of a large and substantial portion of the property likely to be foreclosed in his favour. It is true he would receive Rs. 40 enhanced rent settled under the lease, but that would be a very inadequate return in view of the obvious potential value of this land on which the premium of Rs. 1,600 was paid, of which the mortgagee-decree-holder receives nothing at all.

Some argument has been addressed to me that, even if Ganpatrao's action was mala fide, there is nothing to show that the present appellant was also involved in the fraud on the decree-holder. My attention in this connexion has been directed to the Registrar's endorsement on the back of the deed, in which the executant alleged that he did not receive the full consideration and that he had only intended to transfer 20 acres and not 30 acres. This only goes to suggest that Ganpatrao was a thoroughly unreliable man, but at the same time the circumstances of this case make it, in my opinion, impossible to hold, on any reasonable hypothesis, that the lessee was not aware of the impending final decree and must indeed have known well that the whole lease transaction was a mala fide one on the part of Ganpatrao who intended to profit his own pocket at the expense of the plaintiff (mortgagee).

Decisions like those in *Ishan Chunder* v. *Bishu Sirdar* (1) and *Hakim Lal* v. *Mooshohar Sahu* (2) can have no application whatever in the obvious facts of this case. My attention has been directed to the decision of Hallifax, A. J. C., in *Karu* v. *Pandia* (3), a decision with which I am in full agreement. If we apply the test therein laid down to the present case, e g., is it likely that the lessor would have granted this lease himself, if he had known that he was to continue indefinitely as the full owner of the property? I am of opinion that, on the proved facts of the present case, there can be only one answer to this question and that is a negative one.

The whole case, in short, is one which cannot admit of the slightest doubt that the lease was not only one which obviously was not granted in the ordinary course of management, but, for the reasons given by both the lower Courts, was clearly a mala fide one, and there is every reason to suppose that the lessee being already a tenant in the village and being already a connexion by marriage with, and acquaintance of, the lessor, must have been well aware of these facts. It may or may not be that the lessor and lessee subsequently fell out over details of the transaction, but that is a natural and common occurrence in the case of persons prepared to enter into such shady bargains. The obvious result of the transaction was to deprive the decree-holder of the valuable portion of the property eventually foreclosed in his favour. The terms of the transaction, the time when it took place, and the relationship between the lessor and lessee, all go to suggest the mala fide nature of the transaction, and, even apart from this, there cannot be the slightest doubt but that, on the facts proved, the present lease could not for one moment be supposed to have been an ordinary one carried through by the lambardar in the course of his normal management of the village.

I am in full agreement with the finding of the learned District Judge and I am of opinion, therefore, that the plaintiff, on the said finding and on the findings given in my judgment of 1st April 1927, cannot possibly succeed in the present suit. The appeal is accordingly dismissed. The appellant must bear the respondent's costs in all three Courts.

A.L./R.K. *Appeal dismissed.*

(1) [1897] 24 Cal. 825=1 C. W. N. 665.
(2) [1907] 34 Cal. 995=11 C. W. N. 889=6 C. L. J. 410.
(3) A. I. R. 1924 Nag. 226.

A. I. R. 1928 Nagpur 305 (1)

KINKHEDE, A. J. C.

Harakchand—Plaintiff—Applicant.

v.

Secretary of State for India—Defendant—Respondent.

Civil Revn No. 107-B of 1927, Decided on 28th February 1928, from decree of S. C. C J. Akola, D/- 22nd February 1927.

Railways Act, S. 72 — Plaintiff suing for damages due to non-delivery of goods and not admitting loss of goods—Initial burden lies on Railway Company to prove loss—On proof of loss burden shifts to plaintiff of proving wilful neglect.

Where a Railway Company was sued for damages for loss caused by non-delivery of plaintiff's goods and plaintiff did not admit that the goods were lost to the Railway Company:

Held : that the initial burden lay on the Railway Company to show that it had earned the protection of the risk-notes, by proving loss of goods to it (*A. I. R.* 1928 *Cal.* 65, *Foll.*) and that on proof of loss by the Company the burden would shift on to plaintiff to show wilful neglect on the part of the Company.[P 305 C 1,2]

G. G. Hatvalne—for Applicant.

W. B. Pendharkar—for Non-Applicant.

Judgment.—Out of a consignment of sugar booked from Wadi Bunder on 1st April 1925, consisting of 40 bags, plaintiff got 33 bags only on 9th April 1925. The rest were not delivered. Hence he sued defendant Company for damages caused for non-delivery of his goods. The defence was that the Company was not liable because of the Risk Forms A and B and that the seven bags were lost in transit. Neither party adduced any oral evidence.

A perusal of the lower Court's decision, para. 2, will clearly show that the Court below has proceeded on an erroneous view as to the burden of proof in such a case. What the plaintiff alleged was a loss to himself caused by the non-delivery. He did not admit that the goods were lost to the Railway Administration. That was a matter within the special knowledge of the Railway Company and the latter had the burden of proving facts which would show that it had earned the protection of the risk-notes. The law on the point is very clearly set forth in the latest case of the defendant Company reported in *G. I. P. Ry. Co.* v. *Jes Raj Patwari* (1). Rankin, C. J., observes at p. 139 [of 55 *Cal.*]

> It is however, necessary for the Railway Company to get the benefit of this warranty, to show that the goods are lost, at least to show in the first instance that the goods are not then and there in the control of the Railway Administration, so that they might have been delivered to the proper consignee. In my judgment, therefore, on both propositions the necessity of showing that there has been a loss and that the initial burden of proof is on the Railway Company, the cases (referred to by him) have to be followed.

As further observed at p. 140:

> The Railway Company seeking the advantage of the guarantee that they will be held harmless for certain things must have the duty in the first instance of bringing themselves within the language of that guarantee.

I do not think I need multiply any authorities.

It is very likely that the Railway Company may have no difficulty in showing that at the time these seven bags should have been delivered they were lost to the Railway Administration. The correspondence which the Company is presumed to have made, if produced, would have thrown a flood of light on this question. But there appears to have existed some mispprehension in the minds of all concerned in this case as to the necessity of proving loss to the Railway Administration and the party on whom the initial burden lay. I therefore set aside the decision and remand the case for a fresh decision on the merits after giving the parties full opprtunities to allege and prove facts relevant to the two propositions which are necessary to be established in this case. It is hardly necessary to point out that it is only after the loss is proved by the defendant Company that the burden of proving "wilful neglect" as defined by their Lordships of the Privy Council in the case of *A. B. Tambole* v. *G. I. P. Ry. A. I. R.* 1928 *P.C.* 24, will be shifted to the plaintiff. The revision, therefore, succeeds.

The costs of this revision will be paid by the defendant Company. The costs in the Court below shall abide the result.

D.B./R.K. *Case remanded.*

(1) A. I. R. 1928 Cal. 65=55 Cal. 132.

A. I. R. 1928 Nagpur 305 (2)

FINDLAY, J. C.

British Equitable Assurance Co., Ltd.—Defendant—Applicant.

v.

Rajaram—Plaintiff—Non-Applicant

Misc Appln. No. 66 of 1927, Decided on 8th March 1928, for review of order of Findlay, J. C., in Civil Revision No. 295 of 1927

(a) *Civil P. C., O. 47, R. 1 — Apposite law not applied—Review lies.*

Where the question involved is not that the Court had taken a wrong view of or had misinterpreted the law, but the apposite law had not been applied at all, an application for review does prima facie lie : *A. I. R.* 1922 *P. C.* 122 and *A. I. R.* 1925 *Nag.* 266, *Ref.* [P 306 C 2]

(b) *Civil P. C., S. 20 (c) — Suit on fire insurance—Part of cause of action arises when fire occurs.*

For a suit on a fire insurance a part of the cause of action arises where the fire occurs and under S. 20, Cl. (c) the suit is maintainable at that place : *Read* v. *Brown*, (1889) 22 *Q. B. D.* 128 and *Galliand* v. *Champian*, (1797) 7 *T. R.* 205, *Rel. on.* [P 306 C 2]

P. C. Dutta and *S. C. Hosali*—for Applicant.

D. T. Mangalmoorti and *V. R. Dhoke*—for Non-Applicant.

Order.—This is an application for review of my order in Civil Revision No. 295 of 1927. In my order of 15th December 1927 I held that the only matter on which notice should issue to the non-applicant was with regard to the question of where cause of action arose : vide grounds 1 and 2 of the application for review.

On the present application coming on for hearing the non-applicant raised a preliminary objection, on the strength of the decision of their Lordships of the Privy Council in *Chhajju Ram* v. *Neki Ram* (1), cf. also *Ramchandra* v. *Govindrao* (2), that the present application for review did not lie. I do not think, however, that the question here in the present review, on the applicant's case, is so much of the Court having taken a wrong view, of, or having misinterpreted the law, as of its not having applied the apposite law at all, and, in those circumstances, I think the application for review prima facie lies.

Coming to the merits of the case, my attention has been invited to Expln. 2 attached to S. 20, Civil P. C., and I have been asked to hold that, as the acceptance by the company of the proposal was made in Bombay and as further under the terms of the policy the money thereunder was to be paid in Bombay, the cause of action must be held to have arisen entirely in Bombay ; and, if this were so, it is urged that the present suit was barred from the jurisdiction of the Nagpur Court. In this connexion, I have been referred to the decision of the *Jupiter General Insurance Co., Ltd.* v. *Abdul Aziz* (3), which decision is so far in favour of the contention of the applicant. For my own part, I am, however, with all deference unable to accept the said decision as a correct exposition of the law with reference to an insurance suit like the present. Undoubtedly in my opinion, the fire having occurred in the Nagpur District, at least part of the cause of action arose therein and, therefore, under Cl. (c), S. 20, Civil P. C. the suit is, in my opinion, maintainable by the Nagpur Courts. It is impossible in my opinion to hold that the mere acceptance of the proposal by the Company in Bombay and the mere fact that the money is payable in Bombay constitute the whole cause of action. The fire, which occurred in the Nagpur District, was a necessary ingredient therein before the completed cause of action arose. This view is in accordance with the definition of " cause of action " propounded in *Read* v. *Brown* (4) and it finds further support in the case of *Galiand* v. *Champion* (5).

I am of opinion, therefore, that the suit is entertainable in the Nagpur Courts and the present application for review fails and is dismissed. The applicant must bear the non-applicant's costs. I fix Rs. 25 as pleader's fees.

A.L./R.K. *Application dismissed.*

(1) A. I. R. 1922 P. C. 112=3 Lah. 127=49 I. A. 144 (P. C.).
(2) A. I. R. 1925 Nag. 266=23 N. L. R. 53.
(3) A. I. R. 1923 Rang. 185=1 Rang. 226.
(4) [1889] 22 Q. B. D. 128=58 L. J. Q. B. 120=60 L. T. 250=37 W. R. 131.
(5) [1797] 7 T. R. 205.

A. I. R. 1928 Nagpur 306

FINDLAY, J. C.

Balaji—Plaintiff—Appellant.

v.

Pandurang and *others*—Defendants—Respondents.

Second Appeal No. 309 of 1926, Decided on 31st July 1928, from decree of Addl. Dist. Judge, Nagpur, D/- 16th February 1928, in Civil Appeal No. 98 of 1925.

(a) *Practice—Plea—Objection as to paramount title not raised and decision reached — Judgment cannot be reversed—Civil P. C. S. 99.*

When the parties to a mortgage suit allowed a matter of paramount title to go to trial without objection, a reversal of the judgment of the first Court on the ground that the issue was not properly triable in the action should not be allowed. There cannot be said to be a flaw in the matter of jurisdiction. At the most there is an undue or unnecessary extension of the frame of the litigation and the scope of the enquiry: 33 *Cal.* 425, *Rel. on.* [P 307 C 2]

(b) *Evidence Act, S. 114 — Possession with seller after sale.*

If possession does not pass under the sale, a presumption is apt to arise straightaway that the sale-deed is a fraudulent one. [P 308 C 1]

M. R. Bobde—for Appellant.

G. R. Deo—for Respondent 3.

Judgment.—The plaintiff Balaji came to Court claiming on a mortgage-deed, dated 2nd June 1921, for Rs. 200 executed by the first two defendants-respondents Pandurang and Govind; under it a house situated in Nagpur was hypothecated. Defendant 1 admitted execution and the receipt of consideration under the mortgage-deed. The case proceeded ex parte against defendant 2. Defendant-respondent 3, Sadasheo, was impleaded as being in possession of the property. It is with his case that I am now concerned. His position in the first Court and throughout has been that the house belonged exclusively to defendant 2 and that it was attached and auctioned by the criminal Court in a criminal case against that defendant and was purchased by him (defendant 3) free of encumbrances. He, therefore, claimed that he was not bound to redeem the plaintiff's mortgage and he further alleged that the mortgage was a fictitious and void one.

The first Court found that the mortgage had been executed and duly attested but that consideration had not passed thereunder. The Subordinate Judge further held that the mortgage was executed for an unlawful object with a view to defeat the claim of creditors and that in short, the deed in question was a fictitious and void one. On these findings he dismissed the suit against all the defendants. The plaintiff appealed to the Court of the Additional District Judge, Nagpur, who confirmed the findings of the first Court and dismissed the appeal. The plaintiff has now come up to this Court on second appeal.

An important point urged on behalf of the appellant is that as defendant 3 pleaded a paramount title, he ought to have been discharged from the suit. In this connexion reliance has been placed on the remarks of Mookerjee, J., in *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1). It is of interest, however, to note that the so-called paramount title plea was for the first time explicitly raised at a very late stage, viz., on 17th July 1925, some 2½ months after the issues had been framed. In my opinion, however, there was, in reality, no question of paramount title as such. Defendant-respondent 3's case was not that the house did not belong to the mortgagor but that the mortgage was an invalid one. Even, however, if it can, by any stretch of reasoning, be held that the said defendant's plea amounted to one of paramount title, it is perfectly obvious that the plaintiff or the other defendants took no objection to the plea in the first Court and it was only in the Court of first appeal that objection was raised on this score. It seems to me that, when a defendant like this raises a question of paramount title and the matter is allowed to go to trial on that issue in the first Court without objection from the other parties, there cannot be said to be a flaw in the matter of jurisdiction. At the most, there was an undue or unnecessary extension of the frame of the litigation and the scope of the enquiry. So far as the fictitiousness of the mortgage and the like were concerned, it would equally have been open to the other defendants, to raise similar objections. I concur with Rampini and Mookerjee, JJ., in the view taken by them in the Calcutta decision just quoted, that when the parties have allowed a matter of paramount title to go to trial without objection, a reversal of the judgment of the first Court on the ground that the issue was not properly triable in the action should not be allowed. This, therefore, disposes of the first ground of appeal.

The next point urged is that the lower Courts should have necessarily determined the vexed question in the case as to whether the house belonged solely to defendant 1, or jointly to defendants 1 and 2, and it has been urged in this connexion that, in the latter event, the plaintiff's claim would have been entitled to succeed at least to the extent of one-

(1) [1906] 33 Cal. 425=3 C. L. J. 205.

half. In the peculiar circumstances of this case, however, I am unable to see that it was essential to determine this question. Once the matter of the fictitious or real nature of the mortgage had been agitated, a decision to the former effect would necessarily imply the failure of the whole of the plaintiff's suit. The main matter agitated on appeal has, however, been with reference to the nature of the mortgage in question. It has been urged that the judgment of the Additional District Judge in this connexion is a faulty one, that only general reasons are advanced in favour of the view taken and that there has, in any event, been insufficient proof that the mortgagee was a party to the design. I am unable, however, to accept these contentions. It seems to me that both the lower Courts have given very weighty reasons indeed in favour of the view that the mortgage was undoubtedly a fraudulent and fictitious one. Only a few days after its execution did the prosecution of defendant 2 arise and it is fairly clear that, before its execution, he had admitted having committed defalcations.

The motive, therefore, for endeavouring, by the execution of the mortgage, to delay, embarrass, or altogether prevent possession of the property passing, is obvious on the face of it. It has been suggested that if the motives of the parties to this mortgage deed were as supposed what they would have entered in it would have been a sale transaction, but the obvious reply to that is that such a transaction often is inconvenient from the point of view of the present owner. If possession does not pass under the sale, a presumption is apt to arise straightaway that the sale-deed is a fraudulent one. The conduct of the appellant in rushing into the transaction in the way he did is, on the fact of it, suspicious and it is perfectly obvious that he made no proper enquiry whatever and it is almost incredible that, if he is a professional banker and went into this transaction with absolutely clean hands, he must not have been unaware that it was a shady one. The non-examination of the vendor, to whom the money raised under the mortgage was to be paid is peculiarly significant and I am inclined to share the doubt expressed by the Additional District Judge as to whether any such person in reality existed.

The finding as to the mortgage being a fictitious one, which has been arrived at by both the lower Courts, is, no doubt, one of law based on inferences from the evidence, which this Court could interfere with on second appeal, but, after examining the evidence, I can see no ground whatever which would justify my disturbing that finding.

It has lastly been urged that the plaintiff should have been allowed to prove his account-books. Copies of the account-books were produced in Court on 6th May 1925; plaintiff's evidence was taken on 17th July 1925, but apparently he did not then produce the originals, nor can I find that, in the first Court, any prayer was made for adjournment in this connexion. It must not be meant to imply here that the plaintiff would have been entitled to such an adjournment except on strong cause being shown. The matter of the account-books, seems to me of a very minor importance, because if, as I believe, the plaintiff was aware of the nature of this mortgage and of the real motive for its execution, there can be little doubt that he would not be prepared to have his accounts in such a form that they would at least superficially support the idea of consideration having passed.

The case is one, in short, in which the conclusions arrived at by the lower appellate Court are, in my opinion inevitably correct. The appeal is dismissed. The appellant must bear the respondents' costs. Costs in the lower Courts as already ordered.

A.L./R.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 308

KOLHATKAR, A. J. C.

Mahadeo and *another*—Defendants—Appellants.

v.

Ganeshram and *others* — Plaintiffs—Respondents.

Second Appeal No. 393-B of 1927, Decided on 16th June 1928, from decree of Dist. Judge, Amraoti, D/- 13th October 1927, in Civil Appeal No. 80 of 1927.

(a) *Civil P. C., S.* 100—*Construction of a document is a question of law.*

Whether a certain document is a will and not a gift or a family arrangement, depends upon the right construction of a document and involves a question of law. 34 *All.* 579, *Foll.*

[P 310 C 2]

(*b*) *Family arrangement — It is resorted to for protecting the family property or making suitable provision for a female member.*

The family arrangement or settlement is ordinarily resorted to in the interests of the whole family when recourse to it is essential to protect the family property from the extravagance of a particular member of the family, or to make a suitable provision for a female member of the family. 6 *All.* 560, (*P. C.*), *Ref.*
[P 311 C 2]

(*c*) *Family arrangement—Object of the transaction determines the character and not the consent of the members.*

It is the object and purpose of a transaction which determines whether it has the character of a family arrangement or settlement. That character is not determined by the mere fact of its being consented to by the other members of the family. [P 312 C 1]

(*d*) *Transfer of Property Act, S. 41 — No proof of enquiry as to vendor's power to transfer—Aid of S. 41 cannot be invoked.*

Where there is no evidence to prove that a vendee took reasonable care to ascertain that the vendor had power to make the transfer and that he acted in good faith in the matter of taking the property from the vendor, it is not open to him to invoke the aid of S. 41.
[P 313 C 1]

D. T. Mangalmurti and *R. S. Gokhale* —for Appellants.

S. B. Gokhale, *R. N. Chandurkar*, *A. V. Khare* and *W. B. Pendharkar*—for Respondents.

Judgment.—It is expedient to set out the following genealogical table explaining the relationship of the parties to the suit for partition giving rise to this appeal.

Madhoji
(died in 1916)

Ramji	Krishnaji Deft. 1 wife Yashoda deft. 9

Mahadeo deft. 6 by the (first wife) Janrao deft. 8	Daulat died in 1898 (by the first wife)	Shamrao (Plff. 1) Bhaorao minor (plff. 2)	Balwantrao (deft. 2)	Nana (deft. 3)	Gulab (defts. 4 and 5)	Ajab

The only subject-matter of this second appeal consists of two fields cos. 1/1 and 13/1, situated in the village Mahimapur in Chandur Taluq. These two fields are in possession of defendant 6, Mahadeo, the step brother of plaintiff 1 and defendants 2, 3, 4 and 5, and they are mortgaged by him to defendant 12, Ganeshram. Defendant 6, Mahadeo, claimed the two fields as his self-acquired property. It seems that some time after the death of the mother of defendant 6, Mahadeo and his real brother Daulat, his grand-father Madhoji executed a will on 7th June 1897, whereby he bequeathed the aforesaid two fields to his two motherless grandsons, Mahadeo and Daulat. The will was attested by both the sons of Madhoji viz., Ramji and Krishnaji. On the death of Madhoji in the year 1916 the fields were mutated in the name of defendant 6, Mahadeo. It was alleged on behalf of defendant 6 whose defence was adopted by defendant 12 his mortgagee that the two fields in question were the self-acquired property of the testator, Madhoji, and that he was competent to dispose of them by will. It was urged in the alternative that even if the said fields be held to be joint family property, the will was consented to by the then adult members of the family, and was hence binding on the plaintiffs. Defendant 6 also set up adverse possession for the statutory period of twelve years. For the purposes of this appeal it is unnecessary to refer to the pleadings of parties respecting the other properties involved in the suit. The trial Court recorded the following findings in regard to the two fields in question, and passed a preliminary decree on 31st January 1927:

(1) Madhoji executed the will dated 7th June 1897 in respect of the two fields in suit of Mahimapur.

(2) The said fields were not the self-acquired property of the testator, and he had no right to dispose of them by will. They were joint family property.

(3) The will was not executed with the consent of the adult members, and was not valid under Hindu Law.

(4) The two fields are not the self-acquired property of defendant 6, Mahadeo. The mortgages executed by him cannot affect the rest of the coparceners.

(5) Defendant 6, Mahadeo, was not in adverse possession of the two fields for the statutory period, and the plaintiff's claim in regard to them is not time barred.

From the preliminary decree for partition passed by the Court of first instance, defendant 12, Ganeshram, appealed to the Court of the District Judge. It appears, on a reference to the record of the lower appellate Court, that respondent 8, viz. defendant 6, Mahadeo, put in cross-objections which virtually supported the appeal. The lower appellate Court dismissed the appeal, holding that the two fields in question formed part of the joint family estate, that the document of which Ex. D-16 was a copy was really a will and not a gift or family arrangement taking effect from the date of its execution, that Krishnaji and Ramji assented to the will, that the will did not amount to a family arrangement to take effect after the testator's death, that there was no such consent as would bind the sons of Krishnaji, and that at any rate plaintiff 1, Shamrao, was not bound by Krishnaji's consent.

From the decree of the lower appellate Court, two appeals have been preferred in this Court one by defendant 6, Mahadeo, and the other by defendant 12, Ganeshram. The former is numbered 393-B of 1927, and the latter is numbered 33-B of 1928. This judgment will govern the disposal of both these appeals.

It is argued on behalf of the appellants in this Court that Ex. D-16 a copy of the will evidenced a gift involving a present transfer, and being consented to by the two sons of Madhoji was binding on the whole family, including plaintiffs 1 and 2, Shamrao and his minor son Bhaorao. It is further maintained that even if it be held to embody a will, it was a family arrangement or settlement accepted by the then members of the family, and was acted upon, and was consequently binding as such an arrangement or settlement on the other members of the family, even if delivery of possession of the fields in question was postponed to the date of Madhoji's death. On the other hand it is urged on behalf of the respondents 1 to 3 that the decision of the lower appellate Court to the effect that the document was a will and not a gift or a family arrangement, being a finding on a question of fact is binding on this Court. In answer to this contention the appellants' learned counsel points out that the question of the character of the transaction evidenced by Ex. D-16 depends on the right construction of the document which constitutes a question of law and can be considered in second appeal. Now the question of the right construction of a document involves, as pointed out in *Fateh Chand* v *Kishan Kunwar* (1), a question of law and consequently admits of being considered in second appeal. As regards the first contention of the appellants, the contents of the document appear to run counter to it. It would appear therefrom that the legatees were to become owners of the property and were to manage it after the death of the testator, Madhoji, and that the latter was to manage it during his life time. It is no doubt true that the will refers mainly to management and not to ownership, but had the document been intended to operate as a gift involving a present transfer of the property to Mahadeo and Daulat, and had Madhoji intended to manage the property and to remain in possession thereof on their behalf, he would have made over the management and possession to Mahadeo, as soon as the latter attained majority. In that case only, Madhoji would have been deemed to have held possession of the property on behalf of Mahadeo and his younger brother. But the fact of Madhoji having continued in possession and management of the property till his death clearly goes to indicate that he was to remain owner thereof in his lifetime, and that the transfer was to operate after his death.

There is one circumstance to be noted in this connexion which affords another indication of the fact that the transaction evidenced by the document was a will and not a gift. The appellant has admitted in the witness-box as his third witness that he took a lease of the fields in suit from Madhoji for the three years preceding the latter's death, and that he actually paid the lease money to Madhoji for those three years. Now if the property was transferred to Mahadeo in 1897, why did he take a lease of his own property from another person. The fact of taking this lease thoroughly disproves the alleged character of the transaction as a gift inter vivos involving a present transfer. It would seem

(1) [1912] 34 All. 579=16 I. C. 67=39 I. A. 247 (P. C.).

from the testimony of Vithal, witness 8 of defendant 6, the appellant Mahadeo, that it was after the death of Madhoji that defendant 6, Mahadeo, began to cultivate the fields in suit, and that before that Madhoji himself cuitivated them till his death. The testator's continuous possession on his own account till his death exposes the unsoundness of the appellant's contention that the transaction was a gift and not a will. For all these reasons I cannot accede to the appellant's contention that the transaction embodied in Ex. D-16 was virtually a gift and not a will. The case *Subbarami Reddi* v. *Rammamma* (2) is an authority for the proposition that such a will is invalid and inoperative as against the other members of the family.

As regards the second contention of the appellants, under the circumstances of the case, I am not prepared to hold that the will evidenced a family arrangement or settlement which was accepted and acted upon by the then members of the family. As coparceners, Madhoji's two grandsons Mahadeo and Daulat, were entitled to a share in the family property. They were as much entitled to such a share as Krishnaji's other sons who were living on the date of the will and who were born thereafter. There was therefore no necessity for making a provision for Mahadeo and Daulat by way of a family arrangement or settlement. It seems from the recitals in Ex. D-16 that the testator Madhoji feared that his two grandsons by the first wife of Krishnaji would be neglected by Krishnaji, who had married again, and by his second wife, and hence he made a devise in their favour. It was thus out of affection or pity for his two motherless grandsons that Madhoji made a provision for them which was to take effect after his death. Madhoji was at perfect liberty to make such a provision if he was competent under Hindu law to bequeath the family property. But from this fact it does not necessarily follow that the provision was made by way of family arrangement or settlement. If there was a likelihood of the two grandsons being neglected by his father and his stepmother what they really needed was a larger share of the affection of the other members of the family to compensate for the loss of the affection of their deceased mother, and not a larger share in the family property. The family arrangement or settlement is ordinarily resorted to in the interests of the whole family when recourse to it is essential to protect the family property from the extravagance of a particular member of the family, as in the case of *Rai Bishenchand* v. *Mt. Asmaida Koer* (3) cited on appellant's behalf, or when it is proposed to make a suitable provision for a female member of the family. It is for such purposes and other purposes of a similar nature that a family arrangement or settlement is effected. It has been already observed that in the present case Mahadeo and Daulat were entitled as a matter of right to a share in the family property as coparceners. There was therefore no occasion or necessity for making a provision for them, and for thus adding to their share in the family property, and consequently the devise in question in favour of Mahadeo and Daulat cannot be regarded as evidencing a family arrangement or settlement. It is this aspect of the transaction in question which distinguishes the present case from the cases *Rai Bishenchand* v. *Mt. Asmeida Koer* (3), *Brijrajsing* v. *Sheodansingh* (4) and *Patro Chariar* v. *Srinivasa Chariar* (5), relied on by the appellant's learned counsel. In *Rai Bishenchand* v. *Mt. Asmeida Koer* (3), the grandfather made, with the consent of his profligate son, a gift of the whole ancestral estate in favour of his minor grandson, after making an adequate provision for the son's share in the property in order to save the property from the son's extravagance, and hence the transfer was upheld as a family arrangement.

In *Brij Raj Singh* v. *Sheodan Sing* (4), the will virtually amounted to a partition of the family property, and being held to have been intended to operate from its date, was treated as a family arrangement binding on all the members of the family, while in *Patro Chariar* v. *Shrinivasa Chariar* (5), the father bequeathed a portion of his ancestral property to his daughter, with the consent of his adult son and all the relations interested in a

(2) [1920] 43 Mad. 824=12 M. L. W. 249=59 I. C. 681=(1920) M. W. N. 529.

(3) [1884] 6 All. 560=11 I. A. 164=4 Sar. 512 (P. C.).

(4) [1913] 35 All. 337=19 I. C. 826=40 I. A. 161 (P.C.).

(5) [1917] 40 Mad. 1122=32 M. L. J. 364=5 M. L. W. 544=40 I.C. 118=(1917) M.W.N. 355.

minor son of his, the portion allotted to the daughter being reasonable in extent. The very nature of the bequest indicated that it partook of the character of a family arrangement or settlement. But in the present case the devise in question is lacking in the object which justifies a family arrangement or settlement. The case *Lakshmichand* v. *Anandi* (6), in which two brothers who were the sole owners of the family property executed a registered agreement by way of a will providing that in the event of the death of either of them his widow should take a life interest in the moiety of the whole estate, and in the event of both of them dying without a male issue, the daughters of each or their male issue should divide their father's share seems to me to have no bearing on the case in question as the decision turned upon considerations which are not pertinent to the present case. It is the object and purpose of a transaction which determines whether it has the character of a family arrangement or settlement. That character is not determined by the mere fact of its being consented to by the other members of family.

The case *Patro Chariar* v. *Shinivasa Chariar* (5), does not appear to me to countenance the appellant's contention, as the decision therein rested upon the finding that the will was operative in its character as a family settlement and not as a will. No authority has been cited on the appellant's behalf to the effect that a will assented to by the other adult coparceners is valid irrespective of its character as a family arrangement or settlement. It is consequently unnecessary to enter into the question whether the will in question was assented to by the then adult members of the family. Even if it was so assented it would not be binding on the family. It may, however, be observed in this connexion that it is extremely doubtful whether Krishnaji was competent as the guardian of his minor son Shamrao, plaintiff 1, who is shown in the plaint filed in October 1924 to be 32 years old, and who must have therefore been some time before the execution of the will, and must have been living in 1897, the year of the will, to accord his consent on behalf of minor Shamrao to a transaction which was obviously detrimental to the interests of the latter. If he was not competent to consent to the will, the devise could not be operative against and binding on plaintiff 1, Shamrao. Further the only members of the family who could be adversely affected by the will were evidently Krishnaji's sons other than the legatees Mahadeo and Daulat. It is the consent of such members that would be needed to validate the will, if the will could be validated by such consent. The consent accorded by Ramji and Krishnaji on their own account would therefore be of no help in validating the will as against the other members of the family. It is, however, unnecessary to dwell on this point any further as a will even if consented to by other members of the family cannot be operative and valid, unless it amounts to a family arrangement or settlement. For the reasons set forth above I concur with the lower appellate Court in holding that the transaction evidenced by Ex. D-16 is neither a gift inter vivos nor a family arrangement nor a settlement, but that it is a will, and that the will is inoperative as against the other members of the family. This disposes of the grounds set out in Mahadeo's memorandum of appeal, and grounds Nos. 1 and 2 in that of Ganeshram.

The contention involved in ground No. 3 in Ganeshram's appeal to the effect that an issue should have been framed by the Court of first instance as to whether the will was consented to by all the adult members of the family including the plaintiff's mother Yashoda, was not pressed at the hearing by Ganeshram's learned counsel. Even if Ganeshram had succeeded in establishing that Yashoda consented to the will, her consent would have been of no avail as she could not be the legal guardian of her then minor son Shamrao, plaintiff 1, so long as his father was living. The question whether it was in the interests of the minor to accord such a consent has been already considered.

The only contention which now remains to be considered concerns the plea resting on the provisions of S. 41, Transfer of Property Act, involved in grounds 4 and 5 in Ganeshram's appeal. This plea does not seem to have been raised in either of the two lower Courts. The question involved therein is mostly, if not wholly, a question of fact. No ques-

(6) A. I. R. 1926 P. C. 54=48 All. 313=53 I.A. 123 (P.C.).

tion of fact can be raised for the first time in second appeal. I am referred by Ganeshram's learned counsel to para. (9) of defendant 6's written statement and it is urged that the plea was taken in the Court of first instance. But on perusing the contents of para. (9) I find that the said plea was not specifically and pointedly raised in the paragraph with the result that the plaintiffs had no occasion and were not called upon to reply to such a plea, that no specific issue was formulated on the point and no evidence was led thereon. There is no evidence on record to prove that Ganeshram took reasonable care to ascertain that his mortgagor had power to make the transfer and that he acted in good faith in the matter of taking the mortgage from Mahadeo. In absence of such proof he cannot avail himself of S. 41. In these circumstances it is not open to him in this Court to invoke the aid of the section.

The result is that the appeals of both Mahadeo and Ganeshram fail and are in consequence dismissed. The costs of the two appeals will be borne by the respective appellants. As regards the costs incurred in the Courts below, they will be borne as ordered.

A.L./R.K. *Appeals dismissed.*

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* * A. I. R. 1928 Nagpur 313

HALLIFAX AND KOTVAL, A. J. C's.

Ramchandra—Plaintiff.

v.

Sambashiv—Defendant.

Civil Ref. No. 174 of 1926, Decided on 28th February 1927, made by 2nd Class Sub-Judge, Chanda, D/- 19th April 1925.

* * (a) *Specific Relief Act, S. 9—Tenant dispossessed by third person—Landlord cannot sue for actual possession* : 22 N. L. R. 30= A. I. R. 1926 Nag. 290=94 I. C. 70, Overruled.

Where a tenant is dispossessed of a certain land by a person other than his landlord, the landlord cannot sue under the Specific Relief Act, S. 9, for its actual possession : 16 *C. P. L. R.* 154, *Foll.* [P 314 C 1]

(b) *Specific Relief Act, S. 9—Meaning of "any person claiming through him", illustrated.*

Where a tenant is dispossessed of land by a person other than landlord and the tenancy has either been terminated or surrendered, the landlord is a person claiming possession of the land through the tenant within the meaning of S. 9 : 28 *Mad.* 238 and 15 *C. W. N.* 294, *Rel. on.* [P 316 C 1]

M. R. Bobde—for Plaintiff.

Order of Reference

Hallifax, A. J. C.—The question referred to this Court under S. 113, Civil P. C., is which of two officially published judgments of this Court, each the judgment of a single Judge, is correct. This is one of the not inconsiderable number of cases in which a judgment of a single Judge of this Court has been officially published, presumably through inadvertence, though it breaks the rule of practice that a single Judge is bound to follow all officially published rulings till they have been overruled by a Bench. The inconvenience caused by the mistake is apparent. The learned Subordinate Judge who made the reference states the opinion that the two conflicting judgments are "of equally binding authority." That would mean that neither is of any authority at all, its effect being cancelled by the other, and indeed it is hard to say that that is not the actual position. The only means of escape from such an impossible position is to refer the question to a Bench, which will overrule one decision or the other.

The facts of the present case, including those not yet proved but assumed to be true for the purposes of the decision, are these. The original plaintiff Balaji Rangari (who has since died and been succeeded as plaintiff by his son Ramchandra) was the owner of a house, used as a shop, and of a plot of land adjoining it in the town of Chanda, which for some years he has been letting out on oral leases from year to year to one Uttamchand Marwari. The term of the last lease given before the present suit was instituted was from 29th October 1924 to 18th October 1925. On 26th February 1925 the defendant Sambashiv Komti dispossessed the tenant Uttamchand of the open plot, but not of the house, and on 3rd August of the same year the landlord Balaji filed the present suit, claiming to be restored to possession under S. 9, Specific Relief Act.

On 7th September 1925 the defendant put in a written statement alleging facts relating to the merits of the case, and also pleading that the plaintiff was not entitled to possession of the land, on his own showing, and therefore could not maintain this suit under S. 9, Specific Relief Act. It appears that the tenant Uttamchand is quite willing to be joined in the suit as a plaintiff with his land-

lord, but the question was not raised till twelve days after the expiry of six months from the dispossession.

But for the decisions that have been mentioned, there would seem to me to be no question to decide in the case. We have to do nothing more than apply the plain words of S. 9, Specific Relief Act. That section lays down that any person dispossessed of immovable property may recover possession thereof. A right to receive rent is immovable property, and a person dispossessed of that right can recover possession of that right, but he cannot recover possession of the land, of which he was not in possession and has not been dispossessed. It was Uttamchand who was dispossessed of the land here not the plaintiff, and Uttamchand alone could regain possession of it. The plaintiff was apparently not dispossessed even of his right to recover the rent from Uttamchand, anyhow not by the defendant, and that is the only immovable property of which he can claim possession.

It is, however, necessary to discuss the rulings that have been mentioned in this connexion. *Balaram Misar* v. *Bairagi Mali* (1), decided by Ismay, J. C., in 1898 is not exactly in point, but contains a clear definition of what is undoubtedly meant by possession in the section under consideration, except that for the word land, which was sufficient for the purposes of that case, we must, to make the definition more generally applicable, substitute the words immovable property which appear in the section itself. The meaning of the word "possession" in that section then is a physical detention or occupation of immovable property. In *Dinkarsha Bapu* v. *Anantsha Bapu* (2), decided in 1903, Drake-Brockman, J. C., held very distinctly that where a tenant has been ejected by a person other than his landlord, the landlord cannot sue under the Specific Relief Act for actual possession of the land.

The fact that the contrary view was taken by Prideaux, A. J. C., in *Samsherkhan* v. *Abdul Sattarkhan* (3), has led to the present reference. My learned brother mentioned the judgment in *Dinkarsha Bapu* v. *Anantsha Bapu* (2), and also that in *Sonaton Shome* v. *Sheikh Helim* (4), decided by the Calcutta High Court in 1902, which is to the same effect. He considered, however, that the authority of these two cases was outweighed by that to the contrary in three cases of the Calcutta High Court, two of the Madras High Court and one of the Court of the Judicial Commissioner of Oudh; the judgment contains no discussion of the question itself.

None of the three Calcutta cases has been officially published. The first of them is *Bindubashini Chaudhurani* v. *Jahmani Chaudhurani* (5), which was decided in 1897 but was not published, even unofficially, till 1902. The learned Judge's reason for holding that a suit by a landlord not himself entitled to possession was not outside the purview of S. 9 was that they had not been referred to any case in which this narrow construction of the section had been adopted. The case of *Sonaton Shome* v. *Sheikh Helim* (4) which takes the contrary view, was decided in 1902, and also appears in the same unofficial publication.

In *Akhil Chandra Dey* v. *Akhil Chandra Biswas* (6), decided in April 1910, the Calcutta High Court indicated a leaning to the opinion that the ruling in *Sonaton Shome* v. *Sheikh Helim* (4) was wrong, because it had never been followed and there were five rulings to the contrary effect, but refused to decide the point, as it was not necessary for the decision of the case. *Nobin Das* v. *Kailash Chandra Dey* (7), was also decided in 1910, but some months later. The decision rests on "a review of the authorities," but mainly on the fact that the tenancy had been surrendered to the landlord before the suit was filed, that is to say, that he was entitled to the possession he sought.

In the first of the two Madras cases mentioned *Jagannatha Charry* v. *Rama Rayer* (8), decided in 1904, the tenant's interest had terminated before the suit was filed. On this decision, as on that in the last Calcutta case mentioned, it may be remarked that though the landlord became entitled to possession of the land itself on the termination of the tenant's interest, he could not be said to

(1) [1898] 12 C. P. L. R. 52.
(2) [1903] 16 C. P. L. R. 154.
(3) A. I. R. 1926 Nag. 290=22 N. L. R. 30.
(4) [1902] 6 C. W. N. 616.
(5) [1909] 13 C. W. N. 303=1 I. C. 150.
(6) [1911] 15 C. W. N. 715=10 I. C. 455.
(7) [1911] 15 C. W. N. 294=7 I. C. 924=12 C. L. J. 483.
(8) [1904] 28 Mad. 238.

have been dispossessed of it, as he had never had possession since the beginning of the tenant's interest. The learned Judges of the Madras High Court also based their decision on an unreported case of their own Court, in which

it was held that the right to collect rent was immovable property, and that an action could be brought under S. 9, Specific Relief Act, for the dispossession of that right.

That hardly supports the view that he could sue for possession of another right of which he had not been dispossessed.

The view that this judgment and the unreported case mentioned in it do support was taken in 1910 by the same High Court in *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (9). In that case the plaintiff said he was the landlord of certain lands and claimed a declaration of his right to possession through tenants and an injunction restraining the defendants from obstructing that right. It was objected that he could not get these reliefs without suing for possession "of the landlord's right to receive rents," and he pleaded he could not get possession because the tenants held it. It was held that he was entitled (and therefore bound) to sue for possession of the right he claimed, the right to receive rents, and it was incidentally mentioned that he could sue for possession of that right even under S. 9, Specific Relief Act. That again is not saying that he could sue for actual possession of the land, which he was not holding, and therefore had not lost and was not entitled to hold.

The judgment of the Judicial Commissioners of Oudh in 1915 in *Nihal Singh* v. *Raghuraj Bahadur Singh* (10), is printed in another private publication. The only question that arose in that case was whether the right to collect rents, of which the plaintiffs said they had been dispossessed, was immovable property of the sort mentioned in S. 9 or not, and the learned Judges decided that it was. Thereafter they expressed their opinions on several more or less cognate questions of law, and finally found that the plaintiffs had never been dispossessed of their right to collect rents at all, so that even the question of the nature of that right did not arise.

It appears then that of the six cases mentioned as supporting the proposition that a person is entitled to sue for possession of land which he is not entitled to possess, having transferred that right to another, one only supports it fully. That is the earliest of the Calcutta cases, *Bindubashini Chaudhurani* v. *Srimati Jahnavi Chaudhurani* (5), and the reason for taking that view is that the contrary view had apparently never been taken. In one other case, *Nihal Singh* v. *Raghuraj Bahadur Singh* (10), the learned Judges expressed an opinion that that view was correct, but the question was not before them for decision. In the second Calcutta case mentioned, an expression of opinion on the point would have been an obiter dictum if it had been expressed, but it was not. In the third Calcutta case as in the first of the two Madras cases, the plaintiff was entitled to the possession he claimed, that is actual possession of the land, before he filed his suit, and in both the Madras cases all that is laid down is that the right to collect rents is immovable property within the meaning of S. 9, Specific Relief Act.

If then the question is to be decided on "authority," that is to say on the mere fact of its having been decided previously one way or the other, without any examination of the reasons given for those decisions, the position is this. In support of the view accepted by my learned brother in *Samsherkhan* v. *Abdul Sattarkhan* (3), there is one judgment of the Calcutta High Court given in 1897 and obiter dicta in another judgment of the same Court and in a judgment of the Oudh Court, none of which has been officially published, that is to say, accepted by the whole Court as correct. Against that view there are two officially published judgments of the Madras High Court of which one is perhaps neither for or against it, and the two officially reported decisions of this Court already mentioned.

The matter does not, however, appear to me open to any argument, as a statement of it in the words of the section itself, with only such explanatory interpolations as are open to no question, must necessarily be the correct view. That statement is as follows :

If any person is dispossessed without his consent of immovable property (including the right to recover rent) otherwise than in due course of law, he or any person claiming (possession of that property) through him may by

(9) [1910] 33 Mad. 452=20 M. L. J. 301=5 I. C. 630=(1910) M. W. N. 112.
(10) [1916] 18 O. C. 353=32 I. C. 202=3 O. L. J. 583.

suit recover possession thereof, notwithstanding any other title (to that property) that may be set up in that suit.

In this case therefore Ramachandra cannot sue under S. 9, Specific Relief Act to recover actual possession of the land, because he was not in possession of it and was not dispossessed of it; he could sue for possession of the right to recover rent from Uttamchand if he had been dispossessed of it but he has not.

The question of law to be referred to a Bench, to which the question of the correctness of the decision in *Samsherkhan* v. *Abdul Sattarkhan* (3), is subsidiary, is whether the plaintiff is entitled to maintain the present suit or not in the circumstances set out at the beginning of this judgment.

Order

Hallifax and **Kotval, A. J. C's.**—We have nothing to add to what is said in the order of reference made by one of us, with which we agree, except on one minor matter. It is suggested in para. 9 of that order that the fact of the tenancy having been surrendered would not give the landlord the right to sue under S. 9, Specific Relief Act, as was held in *Jagannatha Charry* v. *Rama Rayer* (8), and *Nobin Das* v. *Kailash Chandra Dey* (7), because the landlord could not be said to have been dispossessed; he was merely excluded from possession on the termination of the tenant's interest. It would seem, however, that under those circumstances the landlord would be a person claiming possession of the land through the person who was actually dispossessed. We are of opinion that the plaintiff Ramachandra is not entitled to maintain the present suit.

A.L./R.K. *Reference answered.*

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* A. I. R. 1928 Nagpur 316

KINKHEDE, A. J. C.

Punjaji and *others* — Defendants—Appellants.

v.

Ramchand—Plaintiff—Respondent.

First Appeal No. 35-B of 1928, Decided on 7th July 1928, from decree of 1st Class Sub-Judge, Akola, D/- 5th December 1927, in Civil Suit No. 34 of 1927.

* (a) *Court-fees Act, S. 7 (1), Sch. 1, Art. 1—Appeal—Property sought to be exonerated from liability of the mortgage-decree—Ad valorem Court-fees is payable on value of the property or on decretal amount whichever is less.*

Where in appeal the appellant seeks exoneration of any property from liability under mortgage-decree, or wants the appellate Courts to make the excluded property also liable under the decree, the relief sought is not merely declaratory, but that a consequential relief of exemption of specific property from, or its inclusion within, the scope of the decree is definitely claimed and therefore a Court-fee of Rs. 10 is not sufficient. It is the value of the debt or the value of the property, whichever may be less, that determines the value of the relief in appeal for purposes of the Court-fees Act: *A. I. R.* 1927 *Pat.* 46; *A. I. R.* 1926 *Lah.* 408; 30 *Mad.* 96 (*F.B.*); and 4 *Mad.* 339; *Rel. on.* [P 318 C 2]

(b) *Interpretation of Statutes—Fiscal enactment must be strictly construed.*

Unless the language of a fiscal enactment e. g., Court-fees Act, is clear and unambiguous so as to entitle the Court to levy higher duty on a relief, it must be construed very strictly and not in a manner that would result in demanding more Court-fee for a less valuable claim. [P 318 C 2]

G. G. Hatwalne—for Appellant.

Order.—The appellant was sued along with his father, respondent 2, by respondent 1 on the basis of a mortgage with a stipulation for foreclosure of the mortgaged property. The principal sum secured by the mortgage is Rs. 3,500 and the amount sought to be recovered by suit Rs. 6,141-4-0. A preliminary decree for foreclosure in lieu of Rs. 6,678-3-6 has been passed against both the defendants. The appellant comes up in appeal asking for two reliefs: (i) that the mortgage be held to be inoperative as against his share in the property and (ii) that the price of redemption be reduced by Rs. 690-7-6. The appellant paid a fixed fee of Rs. 10 only on the first, and an ad valorem fee on the second of the reliefs. The office pointed out that the proper fee for the first relief was not Rs. 10 but a fee calculated on the value of the property sought to be exempted from the operation of the decree. On being called upon to show cause why an ad valorem fee should not be demanded of him on the first relief, the appellant urged that the relief claimed being only declaratory, a fee of Rs. 10 only was quite sufficient.

I do not agree with the appellant's learned pleader's contention. So far as I have been able to judge of the nature of the first relief, it is self-evident that, the appellant disputes the mortgagee's right to foreclose his share of the mort-

gaged property in lieu of the mortgage debt declared by the decree. In other words, he claims his own share to be completely exempted from all liability for every single pie of the decree. No doubt for purposes of this relief, he need not, and even does not, dispute the extent of the price of redemption. He does not care whether the decree stands for the entire amount or for a smaller sum as against the other defendant so long as his own share of the property is exempted. He does not mind whether the rest of the property is lost to the other defendant or not, in lieu of the debt or any portion thereof. In short, if he disputes the mortgagee's right to foreclose his share of the mortgaged property, he must pay Court-fee on the principal sum of Rs. 3,500; because if the mortgagee's right to foreclose any property is in dispute in appeal, the view taken in *Dhiraj Singh* v. *Rajaram* (1) and *Jhasiram* v. *Liladhar* (2) justifies the levy of Court-fee on the principal sum and not on the value of the property, or on the amount of the decree.

If this Court for any reasons were to refuse him the first relief, he intimates that, then only he will have the need to press for the second relief claimed by him, namely, that the price of redemption be reduced by a certain amount. Out of the two reliefs the first one of exemption of his share is the main or larger relief, and the second relief which is one of reduction of the price is a subsidiary or smaller relief. In such cases Court-fee is leviable on the larger of the two reliefs.

The further question, therefore, is whether a fixed fee of Rs. 10 on the relief of exemption, as on a declaratory suit, is sufficient, or the appellant must be called upon to pay Court-fee on the principal sum secured by the mortgage, or on any other sum or value representing either the value of the debt from payment whereof or, the value of the property in respect of which, the exemption is sought in appeal. What then are the considerations on which the value of a relief in suit or appeal is to depend.

In *Krishnama Chariar* v. *Srinivasa Ayyangar* (3) it was pointed out that for purposes of jurisdictional value there are two considerations—the amount of the charge, and the value of the property it is sought to make available for the satisfaction of the charge. The Judges of the Madras High Court observed in that case that, if the value of the property is in excess of the charge, the value is the amount of the charge, for the subject of the suit is the right to make the property available for the satisfaction of the whole charge; but where the value of the property is less than the amount of the charge, the subject-matter is the right to make the property available for the satisfaction of the charge so far as the property will suffice, and and if it cannot suffice to satisfy more than a sum proportionate to its value, and consequently in such cases the value of the subject-matter is the value of the property. This view was accepted by Ismay, J. C., in *Mojiram* v. *Nandram* (4) in which also the question was as regards the jurisdictional value of a claim.

The principle laid down in the aforesaid Madras case was extended with approval by the Full Bench of the Madras High Court itself in *Ramkrishna Reddi* v. *Kotta Kota Reddi* (5), even to a case in which they had to determine the value of the subject-matter in dispute in appeal for purposes of Court-fees payable on the memorandum of appeal. Another previous decision of the same High Court reported as *Venkappa* v. *Narsinha* (6) was also noticed with approval and accepted as laying down a correct principle of law. In *Venkappa* v. *Narsinha* (6) the decree directed the payment of a certain amount, and in default that the lands of the defendants be sold and the sale proceeds applied to payment of the debt. Some of the defendants appealed against so much of the decree as declared the liability of their property and prayed that the same be released from the decree; it was held that the relief sought was not merely declaratory but one for exoneration of the appellants' land from liability, and that the proper stamp to be paid on the memorandum of appeal was, not Rs. 10 as in a declaratory decree, but a fee calculated on the value of the debt not exceeding, however, the value of the property. According to the Madras High Court then, the relief of exemption

(1) [1910] 6 N. L. R. 164=8 I. C. 1125.
(2) [1913] 9 N. L. R. 86=20 I. C. 257.
(3) [1882] 4 Mad. 339.
(4) [1902] 15 C. P. L. R. 161.
(5) [1907] 30 Mad. 95=16 M. L. J. 458 (F.B.).
(6) [1887] 10 Mad. 187.

of property is not merely declaratory, and the value of the debt or the value of property, whichever is the less, determines the value of the relief in appeal for purposes of Court-fees in such cases. In short, the less is the criterion.

This view was accepted by the Calcutta High Court in *Jagatdhor* v. *Brown* (7), and *Mt. Bibi Umatul Batul* v. *Mt. Nanji Koer* (8) and also in *Jugal Prasad Singh* v. *Parbhu Narain Jha* (9) where it was held that where the appellant in an appeal against a mortgage decree does not dispute the amount decreed but raises a question of the liability of certain properties the value of the appeal for the purpose of the Court-fees is the value of such properties. Sch. 2, Art. 17, Cl. (6), Court-fees Act (7 of 1870) has no application to such a case. The reason is obvious ; it cannot be said that the value of the subject-matter in dispute in appeal cannot be estimated.

In *Kachera* v. *Kharagsingh* (10) where the Madras Full Bench was followed it was held that Court-fee should be paid on the value of the property sought to be rendered liable in appeal. A decision reported as *Tharumal* v. *Chandu Ram* (11) is to the same effect. In it also a Court-fee of Rs. 10 was held insufficient.

Madho Ray v. *Mt. Bibi Mahbuwan Nisa* (12) was a case in which a purchaser of a portion of the mortgaged property had appealed claiming exemption of his property from liability under the decree ; it was held that, if the value of the properties purchased by the appellants was less than the decretal amount ad valorem Court-fee on the value of the properties was payable, but if the value of such properties was not less than the decretal amount an ad valorem Court-fee on the decretal amount was payable. The Lahore High Court also in *Atma Singh* v. *Nathumal* (13) took the same view.

It is thus clear that, where in appeal the appellant seeks exoneration of any property from liability under the mortgage decree, or wants the appellate Court to make the excluded property also liable under the decree, the relief sought is not merely declaratory, but that a consequential relief of exemption of specific property from or its inclusion within the scope of the decree is definitely claimed and therefore a Court-fee of Rs.10 is not sufficient. It is the value of the debt or the value of the property, whichever may be less, that determines the value of the relief in appeal for purposes of the Court-fees Act.

The decision of this Court reported in *Ghasiram* v. *Liladhar* (2) is to the effect that where in appeal there is no dispute as to the price of redemption, and the dispute is confined entirely to the right to foreclose and that only in respect of a portion of the property, the correct valuation for the purposes of calculating the Court-fee of the claim in appeal is the principal sum secured by the mortgage. The reasoning on which this conclusion is based is thus stated at p. 88 of the report:

> It cannot with any show of reason be said that the fact of the dispute relating to only a portion of the property makes any difference. That would result in demanding more for a less valuable claim. If in this case the claim in the lower Court has been for foreclosure of the quarter of the property which has been declared liable, or of the remainder that has been declared not liable, the assumed value of the claim for the purpose of calculating the amount payable as Court-fees on the plaint would have been still the principal sum secured by the mortgage, and that valuation would, as explained in *Dhirajsingh* v. *Rajaram* (1), be the correct valuation in appeal.

With all due deference, I think, I must refrain from accepting such a construction, because unless the language of the fiscal enactment like the Court-fees Act is clear and unambiguous so as to entitle the Court to levy higher duty on a relief, it must be construed very strictly and not in a manner

> that would result in demanding more (Court-fee) for a less valuable claim.

If the value to the appellant is the test, as I think it ought to be, then it follows that the valuation of the subject-matter in dispute in appeal must be determined with reference to the amount at which he values the prejudice caussd to him by the decree he appeals against. If he appeals against only that part of the decree which injuriously affects him or his interest, and he finds that the said injury is fully remedied, either by including or exonerating certain property,

(7) [1906] 33 Cal. 1133=10 C. W. N. 1010=4 C. L. J. 121.
(8) [1907] 11 C W. N. 705=6 C. L. J. 427.
(9) [1910] 37 Cal. 914=8 I. C. 1145.
(10) [1911] 33 All. 20=7 I. C. 315=7 A. L. J. 842.
(11) [1916] 11 P. R. 1916=33 I. C. 138=59 P. W. R. 1916.
(12) A. I. R. 1927 Pat. 43=5 Pat. 721.
(13) A. I. R. 1926 Lah. 408=7 Lah. 215.

within or from the scope of the decree, or by reducing or enhancing the amount of the decree, as the case may be, and if the value of such a relief is capable of being estimated in money, I do not see any valid reason why the "assumed" value for purposes of Court-fees should continue to be a constant factor even at the stage of appeal as observed in *Dhirajsingh* v. *Rajaram* (1).

It is very likely that in some cases the amount of the liability may be less than the value of the property, and in others the value of the property may be less than the amount of the debt. To levy Court-fee on the lesser of the two values would be consistent with the principle underlying the Court-fees Act as also the reported cases referred to above. It would be unjust to call upon an appellant to pay Court-fee on the value of the property even if the debt from the payment of which he seeks exemption, be less than the price of his property. Similarly, it would be inequitable to demand Court-fee with reference to the value of the entire debt even though the debt or the proportion chargeable against any property be less than the value of the whole or portion of the property sought to be charged with or exempted from liability under the decree. It sometimes happens that by reason of repayments admitted or held proved or for other reasons such as reduction of interest, etc., the debt is reduced by the Court to an amount below even the principal sum secured by the mortgage. If in such a case, the property or any portion thereof sought to be exonerated or included by worth much more than the decretal debt, there is no reason why an appellant interested in procuring such exemption or inclusion of property, or its portion, from or within the operation of such a decree, would be made to pay Court-fee on the principal sum secured by the mortgage. If this Court, in laying down the rule in *Dhirajsingh* v. *Rajaram* (1) that the principal sum secured by the mortgage shall determine the value of the subject matter in dispute in appeal where the right to foreclose is disputed, and in extending that rule in *Ghasiram* v. *Liladhar* (2) to cases where the right to foreclose is in dispute only as regards certain property meant to favour, as I think it did, the adoption of the principle that the Court-fee should be levied on the least amount recoverable on the basis of the mortgage, namely, the principal sum as the assumed value of the debt then, I think it is open to me to hold, by extending the operation of the same principle, that Court-fee should be levied not necessarily on the principal sum, but, on the principal money secured by the mortgage, or the decretal debt, or the value of the property whichever may be less according to the circumstances of each case.

I accordingly hold that the appellant is liable to be called upon to pay ad valorem Court-fee on the value of the property in respect of which he seeks exemption if it be less than the principal sum, or the decretal debt, or, on the principal sum, or decretal debt not exceeding the value of the property. As the appellant has not mentioned the value of the property sought to be exempted from liability under the decree, he shall be called upon to specify the same in his memorandum of appeal. The memorandum of appeal shall now be amended by inserting such value therein. The value so put, shall be accepted tentatively subject to any objection which the respondent-plaintiff might choose to raise at the hearing. The appellant shall be called upon to pay Court-fee within a time to be fixed after the amendment, with due advertence to the directions given above, after giving him credit for the aggregate Court-fee actually paid on the memorandum of appeal for the two reliefs.

A.L./R.K. *Ordered accordingly.*

A. I. R. 1928 Nagpur 319

KINKHEDE, A. J. C.

Deolal and *others*— Defendants — Applicants.

v.

Tularam Ramsukh—Plaintiff — Non-Applicant.

Civil Revn. No. 238 of 1927, Decided on 28th February 1928, from decree of Sm. C. C. Judge, Bhandara, D/- 23rd March 1927 in Civil Suit No. 543 of 1926.

(a) *Civil P. C., O. 7, R. 4—Plaintiff or defendant suing or sued in representative capacity—It is not necessary that the character in which they are sued must appear in the cause-title.*

If a plaintiff were to sue or a defendant were to be sued in a representative capacity, O. 7,

R. 4, does not make it necessary that the character in which the plaintiff sued or defendant is sued must appear in the cause title, although that is a most convenient place for it. It is sufficient if it appears in the body of the plaint : 19 *C. W. N.* 1193 and 46 *Cal.* 877 *Ref.* [P 321 C 2]

(*b*) *Limitation Act, S. 22—Suit against a firm—Proper representative not made a party —Name of the proper representative corrected —No question of limitation arises — Civil P. C.*, O. 30, *R.* 1.

When a suit as originally laid is against the firm, the description of the proper representative of that firm can always be corrected and such correction does not amount to either substitution or addition of a new party to the suit. No question of limitation under S. 22 arises in such a case : *A. I. R.* 1924 *Bom.* 155 and 22 *Bom.* 672, *Rel. on.* [P 321 C 2]

(*c*) *Interest—Interest on price of goods, is not ordinarily claimable in absence of specific agreement or mercantile usage.*

Interest is not claimable as of right on the price of goods, the obvious reason being that the price charged includes profit. But such interest may be claimable by virtue of specific agreement or mercantile usage : *A. I. R.* 1925 *Nag.* 204, *Ref.* [P 321 C 2]

G. G. Hatwalne—for Applicants.

V. V. Kelkar—for Non-Applicants.

Order.— This revision raises three questions for determination under the following circumstances : One Kisan Lal Govindlal was the proprietor of the firm known as "Kisanlal Govindlal." He died more than three years prior to the suit which was instituted on 28th July 1927. On his death his widow, Mt. Radhabai, became his heiress. She carried on or rather continued her husband's cloth business under the old name and style "Kisanlal Govindlal", after her husband's death. Deolal and Jagannath, sons of Laxman Das, who are Mt. Radhabai's brothers looked after the business. Defendant 1, Deolal, is admittedly the servant and agent of Mt. Radhabai. Defendant 2, Jagannath, however, is not even the servant of the shop. Plaintiff supplied goods of the total value of Rs. 4,584-10-0 on the requisition of defendants 1 and 2 in the name of the firm. The plaintiff admitted repayments to the extent of Rs. 4,415 only. Hence the suit for the difference of Rs. 169-10-0 and interest. The total claim is for Rs. 395-13-3 inclusive of 3 annas 6 pies on account of costs of notice of demand.

Originally, the description of the defendants as given in the cause title of the suit, showed that defendants 1 and 2 were the only persons impleaded. The case proceeded ex parte against defendant 2. Defendant 1 alone appeared and stated that neither of the defendants 1 and 2 was the owner of the firm known as "Kisanlal Govindlal" and that plaintiff could not sue them, and further that Mt. Radhabai was the malik of the firm and, therefore, the proper person to be sued was she and not they. He, therefore, pressed for being discharged from the suit. The Small Cause Court Judge gave plaintiff an opportunity to ascertain facts till 4th December 1926. On that day plaintiff made an application stating that defendant 3, Radhabai, was the heir of the original debtor Kisanlal Govindlal and that the names of defendants 1 and 2 who were wrongly impleaded should be allowed to be struck out and that of defendant 3 added. The following order was passed on 4th December 1926 :

Parties as before. The plaintiff's agent puts in an application for impleading Radhabai as the malik of the firm. The application for amendment will be considered. Case for 26th January 1927.

M. M. Golwalkar.

Later on,

I direct that Radhabai be impleaded as defendant 3 in this case. I would not discharge defendants 1 and 2 for the present.

M. M. Golwalkar.

On 26th January 1927, defendant 3 appeared through Mr. Shersalkar, pleader, and filed a written statement raising among other pleas, the one based on S. 22, Limitation Act, and urged that the suit was liable to be dismissed on the ground that it was orginally filed (practically) against a dead man. In the oral pleadings, however, it was admitted that defendant 3 purchased goods worth Rs. 4,584-10-0 from plaintiff's firm, through the manager of her shop, namely, defendant 1 who was also her agent. She has also admitted that the plaintiff's claim for Rs. 118-12-0 in respect of the purchase on 19th February 1925, only was within time as against her and the rest of the claim was barred by limitation.

After hearing evidence which consisted of the testimony of the absent defendant 2 as D. W No. 1, the Court formulated the necessary points for determination and recorded its decision thereon. The Judge came to the conclusion that defendant 3 was the sole malik of the firm styled "Kisanlal

Govindlal " and that defendants 1 and 2 were her brothers. That the goods were purchased by them for defendant 3. That plaintiff should have brought the suit against defendant 3 or in the name of her shop. However, it must be held that the plaintiff brought the suit against defendants 1 and 2 under a bona fide mistake wrongly treating them as the legal representatives of the firm styled " Kisanlal Govindlal. " That such an error could be corrected even after limitation. That there has been merely a substitution of the real person for the wrong persons named as defendants and the whole suit is within time. That defendants 1 and 2 are not necessary parties and they will be discharged from liability.

Exception is taken before me to this conclusion and it is urged that the plaintiff's claim for the amount in excess of that admitted by defendant 3 ought to have been dismissed as barred by limitation and that defendants 1 and 2 ought not to have been retained on record up to the last stage and that they must get their costs in any case from the plaintiff.

The question of limitation raises an important question of law. The goods in suit were supplied on 23rd December 1922, 27th July 1923, and 26th February 1925. The suit was filed on 28th July 1926, so the only claim in time on that day was in respect of the item dated 26th February 1925 unless there was a certain period of credit after the lapse whereof, the limitation was to begin to run. The plaintiff had alleged in the plaint that two months was such a period. Defendant 3 has not denied it. Moreover, if the repayments were appropriated first towards the earliest item, the first item, dated 23rd December 1922, gets satisfied and a balance is left due out of the second item The first item was of Rs. 444-10-0 and the second one of Rs. 3,021, total Rs. 4,465-10-0 The admitted repayments come to Rs. 4,415 which leaves Rs 50-14-0 only unpaid out of the second item which together with the third item of Rs. 118-12-0 dated 26th February 1925, made up a total of Rs. 169-10-0 which remained unpaid. Really speaking the question of limitation is relevant only as regards the balance amount of Rs. 50-14-0 out of the second item.

Since it is admitted by the defendant Radhabai that she was at the date of the transactions in suit the malik of the firm and the purchase was made on her behalf by defendants 1 and 2, the statement of plaintiff in his application that defendants 1 and 2 were sued as the legal representatives of the deceased debtor " Kisanal Govindalal " was on the face of it an incorrect statement of fact. It showed that the plaintiff was misinformed as to the person really liable for his claim. The real debtor was defendant 3 because she was the admitted malik of the firm with which the plaintiff had dealt. Her husband who was already dead was not the original debtor. Really speaking it was the firm which was liable and even sued for the recovery but through a wrong representative. If a plaintiff were to sue or a defendant were to be sued in a representative capacity O. 7, R. 4, Civil P. C, does not make it necessary that the character in which the plaintiff sued or defendant is sued must appear in the cause title, although that is a most convenient place for it. It is sufficient if it appears in the body of the plaint. Compare *Kuarmani Singha* v. *Wasif Ali* (1) and *Bidhu Sekhar* v. *Kuloda Prasad* (2).

In this view of the case, the decision of the lower Court to the effect that there was only an error in describing the real representative (not legal representative) of the firm is supportable. The suit as originally laid being against the firm, the description of the proper representative of that firm could always be corrected and such correction does not amount to either substitution or addition of a new party to the suit. I am supported in this view by the rulings in *Motilal Jesraj* v. *Chandmal Hindumal* (3) and *Ravji Appaji* v. *Mahadev Bapuji* (4). No question of limitation, therefore, arises in this case under S. 22, Lim. Act.

The next point for consideration is whether the plaintiff is entitled to charge interest on the price of goods. I have held in *Sheonarayan* v. *Dadabhai* (5), that interest is not claimable as of right on the price of goods, the obvious reason being that the price charged includes

(1) [1915] 19 C. W. N. 1193 =28 I. C. 818.
(2) [1919] 46 Cal. 877 =50 I. C. 525.
(3) A. I. R. 1924 Bom. 155.
(4) [1898] 22 Bom. 672.
(5) A. I. R. 1925 Nag. 204.

profit. But such interest may be claimable by virtue of a specific agreement or mercantile usage. The Court below has not given any decision as regards the specific agreement pleaded by the plaintiff but has relied on certain entries made in the defendants' books of account and inferred therefrom that defendant was liable to plaintiff for interest charged at 12 annas per cent. per mensem. I think the Court below has gone wrong on this point. There being no evidence to prove the specific agreement pleaded, the evidence as to usage not being uniform and invariable, I cannot sustain the award of interest as made by the Court below. The revision, therefore, succeeds to this extent.

The short point left is about the excess payment for which credit is claimed by the defendant. As to this there is no satisfactory evidence. The only repayments, therefore, are those for which plaintiff has given credit.

A minor point, namely, the costs of the unnecessary defendants 1 and 2 who are applicants 1 and 2 in this revision remains. So far as defendant 2 is concerned the case was proceeding ex parte against him. He incurred no costs. He has, therefore, no grievance. As regards defendant 1 he did raise the defence that he was unnecessarily joined. But he was not discharged from the suit by the Court at the earliest opportunity. His retention on record is not shown to have occasioned him any additional cost. His joinder as a party was justified by the fact that he by his dealings with plaintiff created a belief in his mind that he was dealing with him in his own interest and not for the undisclosed principal defendant 3. He had a dual capacity. He figured as defendant 3's agent also in the suit. He as manager of defendant 3's firm ought to have disabused plaintiff of the erroneous impression created about his capacity and thus prevented the mistake. I see no justification to saddle plaintiff with costs of this discharged defendant 1. The revision, therefore, fails on this point.

The total claim of the plaintiff was for Rs. 395-13-3. The principal sum left unpaid was only Rs. 169-10-0. Adding 3 annas 6 pies on account of costs of notice which was distinctly alleged but not denied, the amount to be decreed was Rs. 169-13-6. The decree of the lower Court will, therefore, stand modified by reducing the decretal amount to Rs. 169-13-6 with proportionate costs of suit.

As regards the costs of this Court, I think that, the victory being divided the parties must bear their respective costs.

A.L./R.K. *Decree modified.*

A. I. R. 1928 Nagpur 322

FINDLAY, J. C.

Vithoba—Plaintiff—Appellant.

v.

Bhangi and *others*—Defendants—Respondents.

Second Appeal No. 298 of 1927, Decided on 3rd August 1928, from decree of Dist. Judge, Chindwara, D/- 7th April 1927, in Civil Appeal No. 127 of 1926.

(*a*) *Civil P. C., O.* 41, *R.* 33—*Reversal of mortgage decree and giving a money decree instead—Appellate Court has no power to do so.*

Where the appellate Court reversed the mortgage decree of the lower Court and gave a money decree instead of mortgage decree in spite of the fact that the mortgagors had not appealed nor filed a cross-objection,

Held: that the appellate Court had no power under O. 41, R. 33, to take such an action and acted ultra vires. [P 323 C 1]

(*b*) *Contract Act, S.* 16—*Plaintiff, a malguzar money-lender—Suit against tenants—Written statement pleading illiteracy and terrorizing influence of plaintiff amounts to plea of undue influence though not raised in words—Burden of proof on plaintiff—Evidence Act, S.* 111.

Plaintiff who was a malguzar and money-lender sued his tenants who were illiterate Gonds, a class which was in certain respects given special privileges in the matter of land alienation and the like. Defendants put forward a written statement that the plaintiff was a terrorizing influence in the village and that no one could dispute what he proposed.

Held: that though the plea of undue influence was not taken in words, yet the facts seem definitely to raise a plea of undue influence which requires a careful and detailed consideration at the hands of the Judge and the burden of proof of showing that there has not been undue influence should be placed on the plaintiff. [P 324 C 2]

M. R. Bobde—for Appellant

V. R. Dhok—for Respondents.

Judgment. — The plaintiff-appellant Vithoba, a money-lender and malguzar of mouza Pandhurna (Chhindwara) brought the present suit on a mortgage deed, dated 7th June 1911, for Rs. 600 executed by Dewoo, Kowa and Dewaji (respondents 2 to 4), by Chikkoo Gond their

father and the father also of respondent 1 Bhangi and by Khenda, the father of respondent 5 Ojhi. The defendants' position in the first Court was an exceedingly unsatisfactory one. They filed a long and rambling written statement which alleged, amongst other things, that the plaintiff was a terrorizing influence in the village, that no one could dispute what he proposed and the like. The plea of undue influence was not taken in words and instead it was attempted to take shelter under the Usurious Loans Act, the Court being asked to re-open the contract and relieve in the matter of interest under the said enactment. On the issues which arose in the case, the first Court held that the mortgage deed in suit had been duly executed. The Subordinate Judge further held that the Usurious Loans Act could not apply to the present case, a point that is now admitted. On the question of interest, the Subordinate Judge came to a finding which practically amounts to one that the debtors and the creditor were unequally situated and that the latter was in a position to exercise something approaching undue influence over the former. The first Court accordingly allowed simple interest at Rs. 2 per cent. per mensem and gave a preliminary decree for forelosure on this basis.

The plaintiff appealed and the defendants neither appealed nor filed a cross-objection. The District Judge, however, was of opinion that the transaction was an unconscionable one and held that he was able to re-open the contract on such terms and conditions as he deemed fit. He accordingly came to the conclusion that the plaintiff should get a simple money decree in place of the foreclosure one with interest allowed by the first Court. viz., simple interest up to the date of the suit. A money decree for this amount was accordingly passed.

I may at once dispose of the matter of the District Judge having given a money decree instead of a mortgage decree in spite of the fact that the defendants had not appealed nor filed a cross-objection. It is obvious on the face of it that the learned District Judge had no power whatever under O. 41, R. 33, Civil P. C., to take the action he did in this connexion. The pleader for the respondent has frankly admitted this proposition and has declared his inability to support the decree of the lower appellate Court in this connexion. It would be difficult, if not impossible, to law down, in exact terms, a distinct principle embodying the nature of all the cases in which the Court can give relief under the provision just quoted. It is possible, however, to lay down precisely certain cases in which the said provision cannot be applied, and one of these obviously is that it cannot and should not be applied so as to enable a litigant to ignore the other provisions of the Code: cf. *Ilahi Bakhsh* v. *Jawinda Mal* (1). Here the defendants, if they felt themselves aggrieved by the mortgage decree which had been passed, had a right to appeal; they failed to do so and, in those circumstances, the lower appellate Court clearly acted ultra vires in passing the simple money decree it did. The object of R. 33, O. 41, is, generally speaking, to enable the appellate Court, where its decision interferes with or modifies or extends the decision of the lower Court, to give, effect to that decision by interfering, if necessary, even with the rights and liabilities of those who have not, in effect, appealed from the decision of the trial Court (cf. *Kesho Prasad Singh* v. *Narayan Dayal* (2), but I am unable to see that, in the present case, there was any necessity, in the interests of justice, to interfere with the form of a decree which the defendants were, at the time, content to accept. I fully concur also with the judgment of Richards, C. J., and Banerji and Tudball, JJ., in *Rangam Lal* v. *Jhandu* (3), where these learned Justices have taken a similar view to the one I feel impelled to take in the present case.

I now pass to the question of the fact of the disallowance of the contract rate of interest by both the lower Courts. It has been urged in this connexion that the plea of undue influence was never distinctly raised by the defendants and I have been referred to decisions like that in *Chota Nagpur Banking Association Ltd.* v. *Bhagwant Bux Rai* (4) and that of their Lordships of the Privy Council reported in *Raghunath Prasad* v. *Sarju Prasad* (5) as being in favour

(1) [1920] 1 Lah. 396=54 I. C. 971.
(2) A. I. R. 1925 Pat. 285=4 Pat. 37.
(3) [1912] 34 All. 32=11 I. C. 640=8 A. L. J. 1111.
(4) A. I. R. 1922 Pat. 491=1 Pat. 263.
(5) A. I. R. 1924 P. C. 60=3 Pat. 279=51 I. A. 101 (P. C.).

of the proposition that, in a case like the present on the pleadings of the parties, the lower appellate Court had no power to re-open the contract in the way it did. In the Privy Council case just quoted their Lordships held that, although a mortgage for ample security provided for excessive and usurious interest, no presumption arose that it was induced by undue influence in the absence of proof by the mortgagor that the mortgagee was in a position to dominate his will. In *Poosathurai* v. *Kannappa Chettiar* (6) their Lordships of the Privy Council pointed out the distinction between "influence" and "undue influence" and it, therefore, remains to decide whether in the present case, on the pleadings of the defendants, it can be said that there was at least an implied pleading of undue influence.

The pleader for the respondents, as he was entitled to do, raised the objection that there was undoubtedly influence in the present case and that the written statement of 10th August 1926 filed by the defendants' pleader, in effect, raised such a plea. That statement shows that the defendants are tenants of the plaintiff and have been borrowing from him for many years back. It was further alleged that they had always had to pay more than the reasonable amounts due, that the plaintiff was a terrorizing influence in the village, that he could not even be asked for receipts and that his proposals had, in short, to be swallowed at sight. The written statement went on to give the details of the extraordinary transaction in suit. Inartistic though the written statement was, it seems to me that it distinctly raised the plea of undue influence. When the facts of the transactions are looked into, combined with the circumstances I have already mentioned and others which I propose to mention, it seems clear to me that it was the duty of the first Court, on the material before it, to put the matter of undue influence directly in issue. That Court obviously went off at a tangent in putting instead the matter of Usurious Loans Act in issue. The principal of the mortgage in suit consisted of amounts due under old bonds executed only about a a year before the deed in suit. In these simple bonds the interest chargeable was Re. 1-12-0 per cent. per mensem and here, although the new debt was a secured one, Rs. 2 per cent. per mensem was chargeable. Although a sum approximating to Rs. 701 has already been paid, the enormous amount of Rs. 2,400 is still due. When we take into account the facts that the plaintiff is a money-lender and malguzar, that the defendants are his tenants, that they are illiterate and that they belong to the aboriginal Gond class, these facts together with the other allegations put forward in the defendants' written statement seem to me definitely to raise a plea of undue influence which requires a careful and detailed consideration at the hands of the Judge of the first Court. I am further of opinion that the terms and circumstances of the present transaction are such that in view particularly of the fact that the defendants are illiterate Gonds, a class which is, in certain respects, given special privileges in the matter of land alienation and the like, the present case is one where the burden of proof of showing that there has not been undue influence should be placed on the plaintiff. The case thus having been approached from an entirely wrong point of view, must go back to the first Court for re-trial on the merits.

The judgments and decrees of both the lower Courts are reversed and the suit is remanded to the Court of first instance for re-trial with advertence to the above remarks. Costs incurred in this Court and in the lower appellate Court will follow the event.

A.L./R.K. *Suit remanded.*

(6) A. I. R. 1920 P. C. 65=43 Mad. 546=47 I. A. 1 (P. C.).

A. I. R. 1928 Nagpur 324

PRIDEAUX, A. J. C.

Raoji—Plaintiff—Appellant.

v.

Ragho and *another*—Defendants—Respondents.

Second Appeal No. 111-B of 1926, Decided on 30th July 1928, from decree of Addl. Dist. Judge, Khamgaon, D/- 30th November 1925, in Civil Appeal No. 36 of 1925.

(a) *Pre-emption—Co-occupant.*

A sharer of trees in a survey number is not a co-occupant in that survey number. [P 325 C 1]

(b) *Berar Land Revenue Code, S. 205—Pre-emption in trees does not exist in Berar.*

Right of pre-emption in trees does not exist under the Berar Land Revenue Code and hence pre-emption cannot be allowed. [P 325 C 1]

G. G. Hatvalne—for Appellant.
M. B. Niyogi—for Respondents.

Judgment.—This case presents a novel question for decision, The plaintiff sued for pre-emption of a third share in four mango trees standing in S. No. 11 of mouza Dhamangaon in the Malkapur taluq. The plaintiff owns a share in the survey number and a third share in the four mango trees. Defendant 2 Govinda, who owns no land in the field, sold his third share in the mango trees to defendant 1 Ragho. Hence the present suit to pre-empt.

Both the lower Courts find that the plaintiff had not waived his right to pre-empt, i. e, the third share in the mango trees was never offered to him by Govinda. The first Court held the suit maintainable and decreed the plaintiff's claim, but the lower appellate Court finds that there is no right of pre-emption in trees and has dismissed the suit. Hence this present appeal by the plaintiff.

The argument advanced here is that as "survey uumber" in S. 205, Berar Land Revenue Code, under which pre-emption is claimable in Berar, means a portion of land, and the definition of "land" under S. 4, Cl. (3), includes trees, and as the plaintiff has a share in the survey-number and also in the trees, he is a co-occupant both in the survey number and the mango trees. He is certainly a co-occupant in the survey number; but in my opinion pre-emption is limited to an interest or quasi interest of a co-occupant in any survey number being transferred, and does not apply in the case of trees. Here the seller of the third share is not a co-occupant in the survey number, and he cannot be held to be a co-occupant merely because he owned a share in trees standing in that survey number. I have in a very long experience of Berar, never known of a case in which pre emption has been claimed on a sale of a share in trees standing in a survey number; and in a search through the Law Reports I can find no such case In my opinion the right of pre-emption in trees here claimed does not exist under the Berar Land Revenue Code of 1896.

The result is that this appeal fails and is dismissed with costs. The appellant will pay the respondents' costs.

A.L./R.K. *Appeal dismissed.*

A I. R. 1928 Nagpur 325

KOLHATKAR, A. J. C.

Jan Mohammad—Applicant.

v.

Jivan Khan and *another* — Non-Applicants.

Criminal Revn. No. 116-B of 1928, Decided on 29th May 1928, reported by Sess. Judge, East Berar.

(a) *Criminal P. C., S. 145—A failure to record an express finding deprecated.*

A failure to record an express finding as to possession and the consequent disregard of the express provisions of Cl. (1), S. 146, are very much to be deprecated. [P 326 C 2]

(b) *Criminal P. C., S. 145—Undefined character of land—Indecision of the Magistrate in regard to the possession is no good ground for interference by the High Court.*

The undefined character of the area of the land in question and the consequent difficulty experienced in settling the exact location thereof had presented an insuperable obstacle in the way of the Magistrate's arriving at a definite conclusion in regard to possession.

Held: that there is no good ground for interfering with the order of the Magistrate.
[P 327 C 1]

(c) *Criminal P. C., S. 145—Magistrate unable to decide the fact of possession—Apprehension of breach of peace—Attachment can be continued till the decision of a competent Court.*

Where the Magistrate is unable to satisfy himself as to which of the parties was in possession at the date of the preliminary order, it is quite open to him to continue the attachment already made till a competent Court has determined the rights of the parties or the person entitled to possession. [P 327 C 2]

S. A. Ghadge—for Applicant.
R. K. Manohar—for Non-Applicants.

Order.—This case has been reported by the Sessions Judge of East Berar, under S. 438, Criminal P. C., with a recommendation that possession of party No. 2, Jan Mohammad, should be maintained and the property attached by the Magistrate, under the pro. 2 to Cl. (4), S. 145, Criminal P. C., should be given in his possession. The learned Sessions Judge observes in his report that the Magistrate has held that Jan Mohammad was in

possession of the property in question. On making a reference to the final order passed by the Magistrate on 30th January 1928, I find, however, that it contains no finding to the effect that party No. 2, Jan Mohammad, has been in possession. The material portion of the order is contained in paras. 3, 4 and 5, and is to the following effect :

Para. (3) :

Thus it is not possible for the Court to proceed with these proceedings when the dispute is over lands which are not clearly defined.

Para (4) :

For this reason and because it is clear from the copy of the plaint filed in civil suit 530 of 1927, in the Court of the Sub-Judge, Second Class, Ellichpur, that Mt. Gopika Bai had filed a suit to evict Jan Mohammad thereby practically acknowledging his possession (though perhaps illegal). I drop these proceedings.

Para. (5) :

The order of attachment of the property will remain. The property will continue to be in the custody and management of this Court through the agents appointed pending a decision of the civil Court. (21 *Nag. L. R.* 191).

The Magistrate has given two reasons for dropping the proceedings. The second reason which is not quite intelligible as a reason for dropping proceedings makes a reference to the admission of Gopikabai, the lessor of party No. 1, Jiwankhan and Sulemankhan-in regard to Jan Mohammad's possession involved by implication in her instituting the suit for possession against the latter. This reference to the suit and to Gopikabai's implied admission seem to have been construed by the learned Sessions Judge as amounting to a finding of the Magistrate in regard to Jan Mohammad's possession at the date of the preliminary order. I am clearly of opinion that the said reference cannot admit of bearing such a construction. Nowhere in the order I find any finding to the effect that party No. 2, Jan Mohammad was in possession of the property in question at the date of the preliminary order. In absence of such a finding no order can be passed in his favour declaring him to be entitled to possession of the property until the other party is evicted therefrom in due course of law, and ordering restoration of possession to him. In view of these reasons I find myself unable to accept the recommendation of the learned Sessions Judge.

Although the learned Magistrate has not stated in express terms, it appears that he dropped the proceedings because he found himself unable to decide which of the two parties was in possession at the date of the preliminary order, in view of the undefined character of the area of the land in question, and not because he found one of the contending parties to be in actual possession at the date of the preliminary order. It is the state of indecision of his mind which seems to have led to the dropping of the proceedings. When a Magistrate is in an indecisive state of mind he should record, as required by S. 146, Criminal P. C., a finding in express terms to the effect that he is unable to satisfy himself as to which of the two parties was in possession of the subject of dispute, at the date of the preliminary order, and then proceed, in the event of continuance of the apprehension in regard to breach of the peace, to attach the property if it has not been already attached under the second proviso to Cl. (4), S. 145, Criminal P. C. A failure to record an express finding, to this effect and the consequent disregard of the express provisions of Cl. (1), S. 146, Criminal P. C., are very much to be deprecated. A failure to record in express terms such a finding of a negative character is calculated to involve the order of the Magistrate in obscurity, and to expose it to the risk of being misunderstood.

With regard to the reference in para. (4) of the order of the Magistrate to the institution of a suit for possession by Gopikabai against party No. 2, Jan Mohammad and her implied admission of Jan Mohammad's possession on the date of the suit, it may be observed that no attempt was made by party No. 2, Jan Mohammad who filed the copy of the plaint referred to in para. (4), to tender formal proof of its having been duly signed by the plaintiff 1, Gopikabai and plaintiff 2, Mohanlal. In absence of such a formal proof the copy was, strictly speaking, not admissible in evidence. Again as the admission of party No. 1's lessor, Gopikabai, evidenced by the institution of the suit on 29th October 1927 was made nearly six months after 20th April 1927 the date of the lease given by Gopikabai to party No. 1 and proved by the evidence of party No. 1's witness 1, Laxman such an admission of the lessor made some time after the granting of the lease could not be relevant against party No. 1, Jiwankhan and Suleman who were not Gopikabai's representatives in interest on the date of such

admission, in so far as the factum of possession was concerned, either under S. 21, or under any other section of the Evidence Act. Such an admission, being neither relevant nor admissible in evidence, could not, in view of the pro. 1, to S. 165, Evidence Act, form the basis of a finding in favour of Jan Mohammad's possession.

No oral evidence was adduced on behalf of party No. 2, Jan Mohammad, nor did he make any endeavour to formally prove the three original documents, viz., the two receipts and the diary, produced by him. As for the certified copies filed by him they appear to have no bearing on the factum of actual possession of the property in question. There is thus no oral nor documentary evidence which could justify a declaration in regard to Jan Mohammad's claim to be maintained in possession. The undefined character of the area of the land in question, and the consequent difficulty experienced in settling the exact location of the said land seem to have presented an insuperable obstacle in the way of the Magistrate's arriving at a definite conclusion in regard to possession. In these circumstances there seems no good ground for interfering with the order of the Magistrate.

As regards the continuance of attachment, it is objected to by the learned pleader of party No. 2 Jan Mohammad on the ground that the Magistrate was not competent to order it, and that he should have ordered delivery of possession of the property to party No. 2. I cannot accede to this contention as the order for delivery of possession to party No. 2 would have necessarily run counter to the indecision of the Magistrate as to which of the two parties was in actual possession at the date of the preliminary order. To pass such an order would have been tantamount to record a finding that party No. 2, Jan Mohammad was in possession at the date of the preliminary order. As the Magistrate was not prepared to record such a finding, he could not order delivery of possession to party No. 2, nor could he pass such an order in favour of either of the two contending parties, the question of possession having been left by him undecided. On a perusal of the provisions of Ss. 145 and 146, Criminal P. C., both of which aim at prevention of breach of the peace it will be quite clear that the order passed by the Magistrate in regard to the continuance of the attachment is perfectly justified under the circumstances of the case Both Ss 145 and 146, Criminal P. C., have reference to one and the same proceeding. The latter section provides for the final stage of the proceedings in cases where the Magistrate is unable to arrive at a definite conclusion as to which of the parties was in actual possession at the date of the preliminary order, and lays down that in such cases a Magistrate is competent to attach the property which is the subject of dispute, and to keep it under attachment until a competent Court has determined the rights of the parties or the person entitled to possession. The proviso to Cl. (1) of the section clearly shows that the said clause providing for attachment has for its sole object the prevention of breach of the peace. The Magistrate is at liberty to withdraw the attachment as soon as he is satisfied that the apprehension in regard to breach of the peace ceases to exist. It follows therefore that when a Magistrate attaches in cases of emergency the property which is the subject of dispute, under pro. 2, to Cl. (4), S. 145, Criminal P. C., and after receiving all the evidence adduced by the parties is unable to satisfy himself as to which of the parties was in possession at the date of the preliminary order, it is quite open to him to continue the attachment already made till a competent Court has determined the rights of the parties or the person entitled to possession : vide *Dashrath* v. *Tarachand* (1). There is no suggestion in the present case that the apprehension in regard to breach of the peace had ceased to exist some time before the passing of the order in regard to the continuance of attachment.

For the foregoing reasons I cannot see my way to accept the recommendation of the learned Sessions Judge. The order of the Magistrate is maintained.

A.L./R.K. *Order maintained.*

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(1) A.I.R. 1925 Nag. 297=21 N.L.R. 191.

A. I. R. 1928 Nagpur 328

PRIDEAUX, A. J. C.

Rajpal—Applicant.

v.

Municipal Committee, Arvi and *another*— Non-Applicants.

Civil Revn. No 218 of 1927, Decided on 1st March 1928.

Transfer of Property Act, S. 111—*Lessee not put into possession on the date agreed by the lessor—If time is essence of contract lessee may rescind the contract—Contract Act, S.* 55 *—Transfer of Property Act, S.* 108.

Where time is distinctly of the essence of contract, it is within the power of the lessee to rescind it when the lessor has broken the contract by not putting the lessee in possession on the date agreed upon. The Transfer of Property Act and the Contract Act have to be read together, and under part 1, S. 55, Contract Act, the lessee can rescind the contract. [P 328 C 2]

M. R. Bobde—for Applicant.

M B. Niyogi and *V. N. Harlekar*—for Non-Applicants.

Order.—This case was brought to Court by the Municipal Committee, Arvi, through its Secretary against Rajpal Deosi Bhat and Govindrao Karmakar to recover Rs. 229 14-0 as damages under the following circumstances : On 13th March 1926, the shops in Craddock Market, Arvi, were put to auction and Rajpal took a shop for the year 1926-27 at Rs. 28 per mensem. This lease was subject to the conditions laid down by the plaintiff It commenced on 1st April 1926, on which date the defendant was to be put into the shop and the lease was to continue to the end of April 1927 On 4th April Rajpal gave notice to the plaintiff that as he was not given the shop on 1st April 1926, as it had not yet been vacated by defendant 2, Govind Rao, lessee for the previous year, he declined to be responsible for the rent of the shop for the year 1926-27 and asked the plaintiff to make arrangements to lease the block to any other person. The plaintiff took action and got the block vacated on the same day. Defendant 1 was informed and asked to occupy it, but he did not do so. The plaintiff had to re-let it at an auction held on 12th May 1925 to Tarachand on Rs. 10 a month and the Municipality was thus put to a loss of Rs. 229-14-0 which it is entitled to recover from either of the two defendants. The claim is denied. The suit resulted in a decree against defendant 1 for Rs. 225-14-0 with proportionate costs and for Rs. 4 only with proportionate costs against defendant 2. This revision is filed by Rajpal. As regards defendant 2 there has been no cross-revision filed by the plaintiff and, therefore, the decree against him stands whether the suit is or is not dismissed against defendant 1.

It is contended by the plaintiff that there are two questions of law in the case: (1) as to whether a valid agreement came into being so that applicant can be held liable; (2) was it validly rescinded. As regards the first question there is no doubt that a valid agreement came into being. As regards the second, it is stated that as time was the essence of the contract and the Municipality failed to put the applicant into possession on 1st April 1926, he was within his rights to rescind the contract. There are other grounds which are, however, unnecessary to enter into. For the non-applicant it is stated that there is no real breach on the part of the Municipality and the time is not essential to the contract and mere delay in putting the applicant into possession would not justify him in rescinding the contract. It is stated that S. 111, T. P. Act, gives the only reasons under which a contract of immovable property can be rescinded and that under S. 108 (b) of the same Act the applicant is bound to ask for possession, and not having done so he must be held liable for the loss caused to the Municipality.

Now it seems to me that S. 108 gives rights and liabilities of the lessor and lessee; those rights and liabilities only arise in the absence of contract or local usage to the contrary, and that in a case like the present where time is distinctly of the essence of the contract it was within the power of the lessee to rescind it when the Municipality broke the contract themselves by not putting the present applicant in possession on 1st April. The Transfer of Property Act and the Contract Act have to be read together, and under Part 1, S. 55, Contract Act, the applicant in this case could rescind the contract. That being my opinion, it follows that I set aside the decree made against the present applicant and dismiss the suit against him with costs. He will get his costs in both Courts. I fix pleader's fee at Rs. 15. Non-Applicant 2 will bear his own costs.

A.L./R.K. *Suit dismissed.*

A. I. R. 1928 Nagpur 329 (1)

KINKHEDE, A. J. C.

Govind Bapu—Plaintiff—Appellant.

v.

Warlu—Defendant—Respondent.

Second Appeal No. 566 of 1926, Decided on 22nd April 1928, from the decree of Addl. Dist. Judge, Bhandara, D/- 12th February 1926, in Civil Appeal No. 14 of 1926.

Easements Act, S. 15 — Customary right — Tank water used for buildings without objection —Open and free user proved—Legal inference of the right for common benefit arises from the acquiescence.

Where it is proved that the villagers took water from the tank for cooking and drinking purposes, for irrigation of lands and for watering of cattle and where free use of tank water for building purposes was never objected to, the fact that the proved open and free user was so far acquiesced in by the owner of the tank can give rise to the legal inference that the right to use the tank water for building purposes exists for the common benefit of the inhabitants of the village and that its exercise is not dependent on the granting of any permission by the malguzar of the village: *A. I. R. 1928 Nag. 39* and *A. I. R. 1928 Nag. 87, Ref.* [P 329 C 2]

V. R. Dhoke—for Appellant.

M. R. Indurkar—for Respondent.

Judgment. — This second appeal raises the question whether the defendant-respondent had a right to take water from the plaintiff's tank No. 145 for house building purposes. The plaintiff-appellant is the malguzar of the village and as such the owner of the said tank. The question is whether the defendant as a member of the village community is entitled to use the tank water for house building purposes. The first Court held that defendant had no such right and therefore granted an injunction and decreed damages as well against him. The lower appellate Court held in favour of the defendant and hence this second appeal by plaintiff.

The learned Additional District Judge has discussed the evidence and held that the defendant's witnesses prove that the villagers take water from the tank for cooking and drinking purposes. So also for irrigation of lands and for watering cattle. It is also clearly found that the former malguzar of the village did not object to the free use of the tank water for building purposes and that it is only the present plaintiff-appellant who is trying to introduce a novation that before such free user, the villagers ought to obtain his permission. I think the lower appellate Court was entitled to draw the inferences of fact it did, that the proved open and free user was so far acquiesced in by the owner of the tank as to give rise to the legal inference that the right to use the tank water for building purpose exists for the common benefit of the inhabitants of the village and that its exercise is not dependent on the granting of any permission by the malguzar of the village. That such rights are of the nature of customary rights is pointed out by me in *Shridhar* v. *Rajabhau* (1) and *Rushi Bhiku* v. *Rushi Sheoram* (2).

The appeal therefore fails and is dismissed with costs.

A.L./R.K. *Appeal dismissed.*

(1) A. I. R. 1928 Nag. 39.
(2) A. I. R. 1928 Nag. 87=23 N. L. R. 192.

A. I. R. 1928 Nagpur 329 (2)

KOLHATKAR, A. J. C.

Mahepat and *others*—Appellants.

v.

Mukundrao and *others* — Respondents.

Second Appeal No. 308 of 1927, Decided on 13th April 1928, from decree of Dist. Judge, Nagpur, D/- 11th February 1927, in Civil Appeal No. 182 of 1926.

(a) Civil P. C., S. 100—Erroneous finding of fact, based on proper evidence cannot be a basis of second appeal.

An erroneous finding of fact, however gross or inexcusable the error may be, cannot be made the basis of a second appeal, provided the fact found is relevant and the finding is based on evidence proper for consideration: *A. I. R. 1924 Nag. 91, Foll.* [P 330 C 2]

(b) Record-of-Rights—Entry—Presumption of correctness is rebuttable.

Although an entry in the Settlement Records is to be presumed to be correct, it is liable to be rebutted. [P 330 C 2]

(c) C. P. Tenancy Act (1920), S. 5—Son dying —Mother getting his property by prescription —On her death the reversioners of the son succeed—Hindu Law—Succession — Reversioners.

The title to an absolute occupancy field acquired by a mother by prescription after her son's death is a limited title of a female heir, and on her death the person entitled to inherit the property would be the reversionary heir of the son. [P 331 C 1]

D. W. Kathale—for Appellants.

H. S. Gour and *W. R. Puranik* — for Respondents.

Judgment. — One Ganpati, father of the plaintiffs' vendor Mt. Baiji, owned

an absolute occupancy field No. 192, area 2· 14 acres, rental Rs. 60, one-third share in a well in the said field and two mango trees standing thereon, situated in patti No. 1 of mouza Kumari of Tahsil Saoner. On his death, which occurred in 1891, the aforesaid field was recorded in the village papers in the name of his mother Mt Kapuri. His daughter Mt. Baiji was nearly three years old at the time of his death. It is common ground that Mt. Kapuri died in the year 1925. On 7th May 1925 Mt. Baiji sold the said field with the mango trees and one-third share in the well to the two plaintiffs Mukundrao and Padamrao Malguzars of patti No. 1 by virtue of a registered sale-deed for Rs. 2000. The plaint alleges that after the execution of the sale-deed the plaintiffs took possession of the field and did summer ploughing, but that all the three defendants obstructed them in June 1925 and prevented them from sowing crops in the field and hence they seek possession of the field in question with the two mango trees and one-third share in the well. It is an admitted fact that Ganpati's two widows, Radha and Maini, remarried shortly after his death.

The plaintiffs contend that on Ganpati's death, the field in dispute devolved on his two widows and on their remarriage, on Mt. Baiji as his heir, while according to defendants 2 and 3, Ganpati left behind him a minor son by name Mahadeo who died a few months after Ganpati's death. According to them the field in dispute devolved on Ganpati's death on his son Mahadeo and on the latter's death on his grand-mother Mt. Kapuri as his heir. Defendants 2 and 3 claim to be reversionary heirs of Mahadeo, entitled to succeed to his property after the death of Mt. Kapuri. Defendant 1, disclaimed any interest in the property in dispute and denied his having obstructed the plaintiffs. The plaintiffs denied the existence of Mahadeo and the alleged relationship of defendants 2 and 3. The Court of first instance awarded the plaintiff's claim for possession, holding that Ganpati did not leave behind him a son by name Mahadeo, that defendants 2 and 3 were not related to Ganpati and Mahadeo as alleged by them, that the entry in Kapuri's favour in the settlement records was a mistake, that the plaintiffs purchased the propety in dispute from Baiji on 7th May 1925, that the purchase was not unreal, and that defendant 1 obstructed the plaintiffs. The appeal preferred by the three defendants in the Court of the District Judge was dismissed by that Court and all the findings of fact arrived at by the Court of first instance were upheld by it. It is from the appellate decree of the District Judge that the present appeal has been preferred by the defendants.

It is contended in the first instance for the appellants that Ganpati left behind him a son by name Mahadeo and that consequently Mahadeo, and not Baiji, was entiled to succeed to Ganpati's property on the latter's death. Now as regards the question of Mahadeo's existence, there is a concurrent finding of two Courts to the effect that no son was born to Ganpati and that he did not leave behind him a son by name Mahadeo. It is a finding on a pure question of fact and is as such binding on this Court. As observed in *Tukaram* v. *Chintaram* (1), an erroneous finding of fact, however, gross or inexcusable the error may be, cannot be made the basis of a second appeal, provided the fact found is relevant and the finding is based on evidence proper for consideration. There is no suggestion made on the appellants' behalf that there is no evidence on record to support the aforesaid finding of fact or that inferences are wrongly drawn from proved facts. The lower Courts have relied on the plaintiffs' evidence in preference to that adduced by the defendants. The question of credibility is manifestly one of fact. There is ample oral evidence on record especially that of P. W. 5, Baiji, P. W. 6, Mawan, P. W. 7, Narayan and P. W. 9, Pandu to sustain the negative finding in regard to the existance of Mahadeo. Relying on the oral testimony of these witnesses the lower Courts have arrived at the conclusion that Ganpati did not leave a son behind him and that the entry in the name of Mt. Kapuri in the Settlement Records of 1893-94· and 1912-13 was a mistake. Although the said entry is to be presumed to be correct it is liable to be rebutted, and the rebutting proof is furnished by the testimony of the aforesaid witnesses of the plaintiffs For all these reasons it is not open

(1) A. I. R. 1924 Nag. 91=20 N. L. R. 17.

to the appellants to question in this Court the concurrent negative finding concerning Mahadeo's existence. I have therefore, to proceed on the assumption that Ganpati did not leave a son behind him and that on the remarriage of his two widows his property devolved on the plaintiffs' vendor, Mt. Baiji his rightful heir.

It is next contended that Mt. Kapuri was in possession of the field in dispute on her own account for over 30 years till her death which took place in 1925, that her possession was adverse to Baiji, and that consequently the plaintiffs' claim is barred by limitation. The question of adverse possession and limitation does not appear to have been raised in either of the two lower Courts. Apart from the fact that the question of limitation in the present case is a mixed question of law and fact, and that consequently it is not open to the appellants to raise it for the first time in this Court, it seems to me that the said question cannot arise in the present case for the following reasons. Even if no reliance be placed on the testimony of the plaintiffs' vendor Mt. Baiji as P. W. 5, to the effect that Kapuri managed the estate for the witness, and if Kapuri's possession be held to be adverse to Mt. Baiji it would be possession either of a limited owner or of an absolute owner. If on the strength of the ruling in *Sheolal* v. *Mt. Sheoraji* (2), Kapuri be held to have acquired by prescription a limited title as a female heir of deceased Ganpati as against the rightful heir Mt. Baiji, the property in suit would under Hindu law pass on Kapuri's death in the year 1925 to Mt. Baiji as the heir of the last male holder Ganpati. While if Kapuri be held to have acquired by prescription the title claimable by an absolute owner, her two daughters Malan and Jani would succeed to the field in suit as her heirs, but Malan and Jani by executing a registered farkat patrak, dated 11th October 1925 (Ex P. 2) in plaintiff's favour have relinquished their rights as tenants if any, in favour of the malguzars of patti No 1, and the latter are consequently entitled to claim possession of the field in suit from the defendants who have no legal right to retain it. In this view of the case the plaintiffs' right to claim possession would accrue on Kapuri's death, which occurred in 1925, and their suit, being instituted in December 1925 would be in time even on the assumption of acquisition of prescriptive title by Kapuri. It seems to me that the fact of Mt. Kapuri being Ganpat's mother, who would have been, but for the existence of the nearer heir Baiji, entitled to succeed to his property, after the remarriage of his two widows, and the further fact of her having taken possession of the land, in suit, after Ganpat's death, presumbably as his heir, and not as a mere trespasser would very well warrant in absence of proof to the contrary, the presumption that Kapuri prescribed for a limited title of a female heir, and that it was such a limited title that was acquired by prescription, and would thus attract the application of the principle involved in the decision in *Sheolal* v. *Mt. Sheoraji* (2). It is urged on appellants' behalf that the interest involved in *Sheolal* v. *Mt. Sheoraji* (2), was a proprietary interest and therefore, the decision in that case has no application but in so far as the question of the right of inheritance and succession is concerned, a proprietary interest in immovable property stands on the same footing as the interest of an absolute occupancy tenant in his holding.

Section 5, C. P. Tenancy Act 1920, lays down, that the interest of an absolute occupancy tenant in his holding, shall on his death pass by inheritance or survivorship, in accordance with his personal law. There is therefore no sound reason, why the decision in the aforesaid case should not be made applicable to the facts of the case in question. As regards the case *Mt. Amba* v. *Sheoram* (3) relied on by the appellants' learned counsel, the character of the possession involved therein was essentially different from that of the possession of Kapuri, who entered into possession of the absolute occupancy land in question after Ganpati's death, and consequently that case seems to have no bearing on the facts of case under consideration. The title acquired by Kapuri by prescription being a limited title of a female heir which came to an end on her death, the person entitled to inherit the property in suit would be the reversionary heir of the last male-holder, Ganpati. It is an undisputed fact that Ganpati's daughter Baiji would be such

(2) [1914] 10 N. L. R. 35=23 I. C. 719.

(3) [1915] 11 N. L. R. 8=27 I. C. 864.

an heir and would consequently be entitled to possession of the land on Kapuri's death. The present suit having been instituted within two years of Kapuri's death the period prescribed by Art. 1, Sch. 2, C. P. Tenancy Act 1920, is clearly within time. The plaintiffs' claim cannot therefore be held to be barred by limitation. In view of the above findings it is needless to consider the question of the alleged relationship of the defendants with deceased Ganpati.

The only question which now remains to be dealt with is that respecting the decree passed against defendant 1, Dewaji. It is argued, that as defendant 1, Dewaji disclaimed all interest in the property in suit, no decree should have been passed against him. This contention would no doubt have prevailed, had the plaintiffs failed to substantiate their plea of defendant 1's obstruction to their cultivation, but the plaintiffs have established by the evidence of P. Ws. 2 and 4, that all the defendants including defendant 1, Dewaji obstructed them at sowing time. In face of this proof, it cannot be said that the decree passed against defendant 1, Dewaji was unwarranted.

The appeal thus fails on all grounds advanced on behalf of the appellants, and it is, in consequence dismissed with costs. The decree of the lower Court is affirmed.

A.L./R.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 332

FINDLAY, J. C.

R. S. Kholkute and *others*—Decree-holders—Applicants.

v.

Tukaram Kunbi and *others*—Non-Applicants.

Civil Revn. No 399 of 1927, Decided on 4th April 1928, from an order of 1st Sub-Judge, Nagpur, D/- 12th September 1927, in Execution Case Suit No. 7 of 1925, D/- 8th February 1926.

Civil P. C. S. 73—Application with transfer certificate of the decree subsequently received complies with the requirements of law—O. 21, R. 11—S. 63, Cl. (2).

There is no express provision of law that there should be an actual transfer of the decree to the Court granting rateable distribution. When an application for rateable distribution is supplemented with the transfer certificate subsequently received, all the requirements of law are duly complied with: 21 *Cal.* 200 ; 2 *C. W. N.* 126 ; 26 *M. L. J.* 406 ; and 35 *Mad.* 588, *Foll.* [P 333 C 1 & 2]

R. W. Fuley—for Applicants.

V. R Dhoke and *A. V. Wazalwar*—for Non-Applicants.

Judgment.— The facts of this case are sufficiently clear from the lower Court's order and need not be repeated here. The present applicants were decree-holders against non-applicant 3, Baldeopuri in Suit No. 7 of 1925. The latter's malik makbuza fields had been attached and were sold on 7th March 1927, and the proceeds some Rs. 5,700 were all paid into Court on 16th March 1927. Meanwhile, the non-applicant 1, Tukaram, applied for rateable distribution in the lower Court on 25th February 1927, under S. 73, read with O. 21, R. 11, Civil P. C. In the case of Tukaram's decree, execution application had been made on 21st August 1926, but it was dismissed in November of the same year. A second application followed on 17th January 1927, and the fields were attached, but the second application was dismissed on 25th February 1927. The actual certificate was, however, not received until 26th April in the same year, and the question which remains for consideration is whether rateable distribution was properly allowed by the lower Court, although the decree had not been transferred at the time of the application to this Court.

A view favourable to the present applicants has been taken by the Bombay High Court in *Nimbaji Tulsiram* v. *Vadia Venkati* (1) and in *Dattatraya* v. *Rahimtulla Nurmahomed Khoja* (2). The view taken in *Nimbaji Tulsiram* v. *Vadia Venkati* (1) was, however, overruled by a Full Bench of the Bombay High Court in *Chhotalal* v. *Nabibhai* (3) and it may be said, therefore, that there is now a uniformity of agreement between the various High Courts on the point involved so far as non-applicant 1 is concerned: cf. *Clark* v. *Alexander* (4), *Har Bhagat Das* v. *Anandaram* (5), *Narasimhachariar* v. *Krishnamachariar* (6) and *Arimuthu*

(1) [1892] 16 Bom. 683.
(2) [1894] 18 Bom. 456.
(3) [1905] 29 Bom. 528=7 Bom. L. R. 567.
(4) [1894] 21 Cal. 200.
(5) [1898] 2 C. W. N. 126.
(6) [1914] 26 M. L. J. 406=23 I. C. 909=1 M. L. W. 403.

Chetty v. *Vyapuri Pandaram* (7). The point involved has again and again been considered in these and other similar cases and I see not the slightest ground for once more reopening this matter. I may point out that there is no express provision of law that there should be an actual transfer of the decree to the Court granting rateable distribution. In this connexion I may also refer to the provision contained in sub-S. (2), S. 63, Civil P. C. So far as non-applicant 1, Tukaram is concerned, therefore, I am of opinion that the order of the lower Court was a correct one.

In the case of non-applicant 2 Jagannath, the actual facts are not, in reality, disputed. The Court of the Subordinate Judge, Second Class, Katol, had been closed for a few weeks from the end of January 1927, until the beginning of the March of that year. During this closure non-applicant 2, applied to the Court below stating that, as the Katol Court was closed, he could not obtain a transfer certificate but he claimed rateable distribution. His application was treated as one for execution and he was accordingly eventually allowed to share in rateable distribution. The certificate, however, was not received from the Katol Court until 31st March 1927, and the contention urged on behalf of the present applicant is that there was no sufficiently formal application giving the particulars required by O. 21, R. 11, Civil P. C. I have been referred to the decision in *Dwarkadas* v. *Ghasiram* (8) as well as to the decision of Baker, J. C., dated 24th February 1925, in *Ali Muhammad* v. *Muhammad Noor* (9) in favour of the proposition that here there had been no sufficient compliance with the requirements laid down in O. 21, R. 11, Civil P. C. In view of the exceptional circumstances of the present case, it is difficult to see what more this non-applicant could have done in view of the fact that the Katol Court was temporarily closed. The case is one in short, in which the present applicant is attempting to obtain his personal advantage by relying on an ultra technical interpretation of the law applicable: cf. *Maharashtraya Jnan Kosh Mandal* v. *Bijjulal* (10), and I do not think that there is any substance in the applicant's present position. Non-applicant 2, had, in the peculiar circumstances of the present case, done everything he could but was unable, at the moment, to obtain the transfer certificate, and his application to the Court of the 1st Subordinate Judge, First Class, Nagpur, stated the fact as to his being unable to obtain this certificate owing to the temporary closure of the Katol Court and declared his intention of applying for rateable distribution. When this application is read with the transfer certificate subsequently received all the requirements of the law seem to me to have been duly complied with and I am of opinion that, in the circumstances, the lower Court was correct in granting rateable distribution.

These findings govern the application which is dismissed. The applicants must bear the non-applicants' costs. Costs in the lower Court as already ordered. I fix Rs. 20 as pleader's fees, costs accordingly to be allowed separately to non-applicants (1) and (2) in this Court.

A.L./R.K. *Application dismissed.*

(7) [1911] 35 Mad 588=21 M. L. J. 505=8 I. C. 852=(1911) 1 M. W. N. 47.
(8) A. I. R. 1921 Nag. 5=17 N. L. R. 143.
(9) A. I. R. 1925 Nag. 382.
(10) A. I. R. 1928 Nag. 182=19 N. L. R. 36.

A. I. R. 1928 Nagpur 333

KOLHATKAR, A. J. C.

Mt. Manjari—Defendant—Appellant.

v.

Surajmal and *another*—Plaintiffs—Respondents

First Appeal No. 2-B of 1928, Decided on 16th June 1928, from order of First Class, Sub-Judge, Amraoti, D/- 22nd August 1927, in Civil Suit No. 60 of 1912.

(a) *Court-fees Act, Sch. 2, Art. 17, Cl. (6)—Defaults in payment of instalments of a mortgage decree — Application for making decree final—Defendant's application for extension of time for payment of money under O. 34, R. 3—Application refused—Decree made final—Appeal against the order of refusal—Advalorem fees were not necessary.*

An application was made for a mortgage decree being made final as defaults were made in payment of the decretal amount. Defendants applied for an extension of time for payment of instalment. The application was refused and the mortgage decree was made final. An appeal was preferred to the High Court.

Held: that the appeal was under Cl. (c), R. 1. O. 43, Civil P. C., from an order under O. 34. R. 3, refusing to extend time for the payments of

the mortgage money and not one from a final decree. Success of the defendants in such a case will necessarily have the effect of vacating the final decree which followed the refusal to extend time. The defendants need not appeal from the final decree which automatically followed the refusal to extend time for payment. Advalorem Court-fees were not necessary : 35 *All.* 476, *Dist.* [P 335 *C* 1]

(*b*) *Civil P. C., O.* 34, *Rr.* 2 *and* 3—*Mortgage suit—Instalment decree by consent—Decree-holder must obtain final decree.*

The mere fact of an instalment decree being passed in a mortgage suit on the consent of the parties is not a circumstance which can per se exclude the application of the provisions contained in O. 34. A compromise decree drawn up on the printed form No. 3 prescribed in Appendix 1, Sch. 1, Civil P. C., purports to be a preliminary decree passed under O. 34. Such a decree has of necessity to be made final under R 3 before the plaintiff can take out execution of the decree : *A. I. R.* 1923 *Pat.* 375 ; *A. I. R.* 1923 *Cal.* 626 ;and *A. I. I. R.* 1924 *Bom.* 169 ; *Dist.* [P 335 C 1,2]

(*c*) *Civil P. C., O.* 34, *R.* 3—*Court may extend time for payment even after default for sufficient cause even in a compromise instalment decree.*

Where the defendant had paid a number of instalments in a mortgage decree and where sufficient cause for granting the first enlargement of time was shown, extension was granted and the final decree was vacated. [P 336 C 2]

A. V. Khare—for Appellant.

M. B. Niyogi—for Respondents.

Judgment —On 8th July 1912, Motilal Mansaram as owner of the firm Motilal Champalal, instituted a suit on a mortgage for Rs. 3,000 against Punjaji and his son Zingu. On 22nd August 1912 a consent decree for foreclosure was passed in the plaintiffs' favour on the basis of a compromise arrived at between the parties. The decree provided that defendants 1 and 2 should pay Rs. 5,175 in twenty three annual instalments of Rs. 225 payable at the end of December every year, that in default of payment of one instalment interest at 8 annas per cent per mensem was to be charged, and that in default of two instalments the whole amount was to become payable at once and that if payment was not made as ordered, the defendants were to be debarred from all rights to redeem the property and the mortgaged property was to be foreclosed and to be put in the plaintiffs' possession. On 23rd February 1926 Hiralal and Surajmal, sons of deceased plaintiff Motilal made an application to the lower Court for bringing on record Mt. Manjari, the legal representative of the deceased defendants 1 and 2, and then to make the decree final, default having been committed in payment of the instalment due on 31st January 1926. On 17th April 1926, the application was summarily rejected as not maintainable on the ground that the decree passed in 1912, being an instalment compromise decree, there was no necessity of passing a final decree in the case. It seems that this order of rejection was set aside on an appeal being preferred therefrom to this Court, and the case was remanded to the Court below for proceeding with the plaintiffs' application for making the decree final. After the case was sent back to the lower Court, the new defendant Mt. Manjari presented an application on 9th October 1926 for granting to her extension of time for payment of the overdue instalment of 1925. On 7th January 1927 she deposited Rs. 225 in Court. The defendant's prayer for extension was opposed by the plaintiffs who denied the grounds set out in the application and urged that the Court had no jurisdiction to extend time as the decree was a consent decree, and as the High Court in its remanding judgment had directed that the decree should be made final. The lower Court refused to grant extension as the grounds stated in the application were not proved, and as default had been made in respect of two instalments, passed a final decree for foreclosure.

The defendant Mt. Manjaribai had appealed to this Court. Her appeal is directed against the order refusing extension of time and passing the final decree for foreclosure. Before entering into the merits of the appeal I shall deal with the preliminary objection raised on behalf of the respondents in regard to the question of Court-fees. It seems that relying on the decision in *Dadnoo* v. *Somnath* (1), the appellant has paid a Court-fee of Rs. 10 on the memorandum of appeal. It is argued on the respondents' behalf that as the appellant seeks reversal of the final decree for foreclosure passed by the lower Court she should be called upon to pay ad valorem Court-fees. It seems to me that the appeal in question is substantially one under Cl. (c), R. 1, O. 43, Civil P. C., from an order under O. 34, R. 3, Civil P. C., refusing to extend time for the payment of mortgage money, and not one

(1) [1911] 7 N. L. R. 41=10 I. C. 736.

from a final decree. Success of the appellant in such an appeal from an order under O. 34, R. 3, Civil P. C., will necessarily have the effect of vacating the final decree for foreclosure which followed the refusal to extend time. In such a case therefore the defendant need not appeal from the final decree which automatically followed the refusal of the lower Court to extend time for payment of the mortgage money. Although therefore it is stated in the memorandum of appeal that the appeal is directed against the order refusing to extend time and passing a final decree of foreclosure it must be treated to be virtually an appeal under Cl. (c), R. 1, O. 43, Civil P. C., against an order refusing to extend time and to be chargeable as such with Court-fees. In this view the appellant has paid more than the requisite amount of the Court-fees payable on a memorandum of appeal against an order. It may further be noted in this connexion that the memorandum of appeal nowhere says that the appeal is from a final decree. As the appeal is one from an order and not from a decree neither the case *Bajrangilal* v. *Mahabir Kunwar* (2) nor the unreported case *Balaji* v. *Vallabdas* (*) decided by Findlay, J. C., relied upon by the respondent's learned pleader has any application. In both these cases, the appeal was preferred from a final decree. The respondents' preliminary objection in regard to inadequacy of the amount of Court-fees is therefore disallowed.

As regards the merits of the case, the respondents' learned counsel challenges the appellant's right to apply to the lower Court for extension. It is contended by him that in the case of an instalment consent decree, an application for extension of time under the proviso to Cl. (2), R 3, O. 34, Civil P. C., is not tenable as in such cases there is no necessity of applying for making the consent decree final and consequently O. 34, R. 3 cannot have any operation. The view expressed by Hallifax, A. J. C., in the unreported case *Narayan* v. *Daulat* (*A. I. R.* 1922 *Nagpur* 182), is, however, in direct opposition to this contention. With due respect I find myself in entire agreement with it. The mere fact of an instalment decree being passed in a mortgage suit on the consent of the parties does not appear to me to be a circumstance which can per se exclude the application of the provisions contained in O. 34, Civil P. C. The compromise decree passed in this case in 1922 is drawn up on the printed from No. 3 prescribed in Appendix 1, Sch. 1, Civil P. C., for decrees to be drawn up under O. 34, R. 2, Civil P C., It thus purports to be a preliminary decree passed under O. 34, R. 2, Civil P. C. Such a decree has of necessity to be made final under R. 3, before the plaintiff can take out execution of the decree. The compromise petition filed by the parties in this case does not contain an express direction, as in the case of *Ishan Chandra Kundu* v. *Nilratan Adhikari* (3) to the effect that the decree to be passed in the terms of the compromise should be considered as final and absolute, nor does it disclose, as in the case of *Hemendra Lal Singh Deo* v. *Fakirchandra Datta* (4) any indication of the intention of the parties to treat the consent decree as final. Neither of these two cases relied on by the respondents' learned pleader has therefore any bearing on the facts of the present case. The instalment decree passed in *Sukiya* v. *Sukal Motichand* (5) was one under the provisions of S. 15 (b), Deccan Agriculturists' Relief Act. The decision in that case seems to rest on the view that the provisions of the special legislation would override those of the general law contained in the Civil Procedure Code. In this view the question of applying the principle underlying the decision in the Bombay case to the facts of the present case cannot possibly arise. As for the cases *Ambadas* v. *Laxman* (6), *Kandhaiya Singh* v *Mt. Kundan* (7) and *Komal Singh* v. *Jagannath* (8) cited on respondents' behalf, the decisions in the first and the third have special reference to S. 148, Civil P. C., which it is not invoked by the appellant in this case. What has been affirmed in the second case is simply this:

Except in the case of a decree in a mortgage suit to which O. 34, R. 8, Civil P. C., applies, a Court has no power to extend the time limited for the payment of money ordered by a decree

(2) [1913] 35 All. 476=21 I. C. 498=11 A. L. J. 801.

[* Since reported in A. I. R. 1928 Nag. 146.]

(3) A. I. R. 1923 Pat. 375=2 Pat. 538.
(4) A. I. R. 1922 Cal. 626=50 Cal. 650,
(5) A. I. R. 1924 Bom. 169=48 Bom. 172.
(6) A. I. R. 1923 Nag. 210=19 N. L. R. 8.
(7) [1920] 42 All. 639=57 I. C. 16=18 A. L. J. 826.
(8) [1919] 15 N. L. R. 39=49 I. C. 840.

to be paid as a condition precedent to its operation.

This case also can be of no assistance to the respondents, as the Court has as much power to extend time under O. 34, R. 3, in a suit for foreclosure as it has under O. 34 R. 8, in a suit for redemption and it is this power which is invoked by the appellant in this case. None of the cases relied on by the respondents does support their contention that the provisions of O. 34, Civil P. C., are inapplicable to an instalment consent decree. It is worthy of note, in this connexion that the respondents-plaintiffs who relied on this contention applied to the lower Court for making the decree final, and thus admitted by implication the applicability of the provisions of O. 34, Civil P. C., and the necessity of obtaining a final decree before applying for execution. The stand which they have now taken in this Court is thus anything but consistent with their conduct involved in their application for making the decree final. On all these grounds I hold that the contention raised on behalf of the respondents is lacking in soundness and cannot prevail. The appellant's application under the proviso to Cl. (3), R. 3, O, 34, Civil P. C., for extension of time is quite competent and merits consideration.

This brings me to the merits of the application for extension. It seems that in the lower Court, the appellant Mt. Manjari who is an ignorant and illiterate woman was not properly advised by her legal adviser in the matter of the production of evidence, with the result that no evidence was led on her behalf in support of the allegations of fact contained in her application. As in view of the peculiar facts of the case, and especially in view of so many as twelve instalments, viz., more than half the number, having been actually received by the plaintiffs, and of two instalments having been deposited in Court, it would have been unfair to the appellant, and opposed to the dictates of justice to make her suffer for the mistake or neglect of her legal adviser, she was permitted to produce in this Court her affidavit by way of proof of the aforesaid allegations. No counter-affidavit was filed on behalf of the respondents. The evidence furnished by her affidavit thus stands unchallenged. It proves the alleged failure of crops and other material circumstances set out in her application. They, as well as the fact of the appellant having paid up till now fourteen instalments aggregating a sum of Rs. 3,150 admitted by the respondents' learned counsel afford ample proof of a sufficient cause for granting the first enlargement of time sought by her which does not require a very strong reason; vide the case of *Balkishan* v. *Atmaram*. (9) The appellant has already deposited in Court on 7th January 1927, the instalment of Rs. 225 in respect of which she has applied for this extension. As a sufficient cause for this first extension has been made out by her, the extension of time is granted to her till 7th January 1927, for paying the instalment in question on condition that she will pay within three months from the date of this order, interest on the amount of instalment at 12 per cent per mensem from the date on which the said instalment became payable under the preliminary decree, till the amount was deposited in Court on 7th January 1927. The result of this extension being granted is to vacate the final decree passed by the lower Court on 22nd August 1927, after refusing the extension.

In the result the appeal is allowed, the order refusing extension is set aside the final decree dated 22nd August 1927, following the refusal is vacated, and extension of time till 7th January 1927, is granted to the appellant subject to the aforesaid condition. In the circumstances of the case it is ordered that costs incurred by the parties in this Court will be borne as incurred. The counsel's fee is fixed at Rs. 30. The appellant has presented an application in this Court for a second extension on 20th April 1928. It will be forwarded to the lower Court for disposal.

A.L./R.K *Appeal allowed.*

(9) [1914] 10 N. L. R. 150=26 I. C. 701.

A. I. R. 1928 Nagpur 336

FINDLAY, J. C.

Ramrao—Appellant.

v.

Wasudeo—Respondent.

Misc. Appeal No. 11 of 1928, Decided on 25th April 1928, from order of Dist. Judge, Nagpur, D/- 25th November 1927, in Civil Appeal No. 124 of 1927.

(a) *Provincial Insolvency Act* (1920), *S.* 44 (2)—*Attaching creditor not proving debt—Discharged insolvent is released from the debt.*

If an attaching creditor does not prove his debts under S. 34, an order of discharge releases the insolvent from such a debt. [P 337 C 1]

(b) *Provincial Insolvency Act* (5 *of* 1920), *S.* 51 (2)—*An attaching creditor is not a secured creditor.*

The mere factum of attachment is not sufficient to bring the attaching creditor within the category of secured creditor. The attachment only creates a species of temporary lien which continues until the insolvency petition has been duly admitted. [P 337 C 2]

K. P. Vaidya—for Appellant.

G. R. Deo—for Respondent.

Judgment.—Admittedly, in this case a Receiver was appointed as far back as 1st May 1916, in execution of a money decree and he was placed in possession of four occupancy fields on 3rd February 1916. From that date payments had been made to the present appellant towards the satisfaction of his decree. When the respondent applied to be declared as insolvent in 1924, the appellant was the only creditor shown in the application. The appellant, however, did not want to be shown as a scheduled creditor and claimed a prior right under his attachment.

The appellant's position is that a lien was created by the attachment in his favour and that he was, to all intents and purposes, a secured creditor and that the order of the insolvency Court discharging the respondent could not affect the appointment of the Receiver who must continue until the appellant's decree is fully satisfied. I do not think the appellant's position in this connexion is a correct one. The effect of S. 44 (2), Insolvency Act, is that the order of discharge, dated 23rd December 1926, released the insolvent from all debts provable under the Insolvency Act. Turning to S. 34,-sub-S. (2), Insolvency Act, there can be no question but that, during the insolvency proceedings, the balance of the claim due to the present appellant under his decree was a debt provable under the Act. That the appellant deliberately chose not to have it proved is quite another matter and it seems to me, in these circumstances, that automatically the respondent was released from the balance of the debt in question which clearly could not come under either of the four classes mentioned in sub-S. (1) of S. 44 of the Act.

I may add that I do not think the mere factum of attachment was sufficient to bring the appellant within the category of secured creditor. The attachment at the most, only creates a species of temporary lien which continues until the insolvency petition has been duly admitted. In this connexion the provision contained in S. 51, Insolvency Act, is significant.

Holding as I do, therefore, that the debt was wiped out by the order of discharge passed by the insolvency Court *ex nutura rei* the appointment of the Receiver lapses. In those circumstances the orders of the lower Courts are correct. The appeal accordingly fails and is dismissed. Appellant must bear respondent's costs in this Court. I fix Rs. 20 as pleader's fees. Costs in the lower Courts as already ordered.

A L./R.K. *Appeal dismissed.*

A. I. R. 1928 Nagpur 337

KOLHATKAR, A. J. C.

Wasudeo Waman Shendurnikar—Accused—Applicant.

v.

Akola Municipality—Non-Applicant.

Criminal Revn. No. 95-B of 1928, Decided on 23rd May 1928, from order of 1st Class Magistrate, Akola, D/- 23rd December 1927, in Criminal Appeal No. 104 of 1927.

C. P. Municipalities Act (2 *of* 1922), *S.* 199—*Lawful direction by a notice lawfully issued and disobedience to such a direction must be proved.*

What the prosecution has to prove under S. 199 is that a lawful direction was given to the accused by a notice lawfully issued under the powers conferred by Part 3 of the Act and that the accused disobeyed the said direction. [P 338 C 2]

A. V. Khare and *W. B. Pendharkar*—for Applicant.

Order.—The applicant was convicted by a Bench of Honorary Magistrates of an offence under S. 199, Municipalities Act, and sentenced to pay a fine of Rs. 10. He was further ordered to construct, within ten days of the judgment of the trial Court, the drain in respect of which the notice dated 4th September 1926, was issued by the Municipal Committee, and in case of failure to comply with the

order, he was ordered to pay a fine of Rs. 2 per day for the period during which the breach continued. In appeal the Sub-Divisional Magistrate set aside the order in regard to the payment of Rs. 2 fine per day, but maintained the conviction and the sentence of Rs. 10, fine awarded to the applicant. He has now applied in revision to this Court and has challenged the conviction and sentence on various grounds. None of them seems to me to be tenable.

It is argued in the first instance that the notice forming the basis of the prosecution was not validly issued, and that it was meaningless and not capable of compliance. The applicant's learned pleader was, however, unable to show in what respect it was invalid. By the notice the applicant was given three alternatives in the matter of the construction of the drain. Even if it be conceded that the permission of Messrs. Anantrao Kolhatkar and Lote—the applicant's neighbours—was needed before starting the work of the construction of the drains mentioned in the first two directions, and that there being no proof of such permission having been obtained beforehand, the first two directions were not capable of compliance, it cannot be said of the third direction, in regard to the construction of a private drain connecting the *mori* with the Municipal drain at the point where Mr. Anantrao Kolhatkar's drain was connected, was incapable of compliance. No permission of any neighbour was needed to construct the said drain. This disposes of grounds 1 and 2. As regards ground 3, the requisition involved in the third direction cannot be said to be beyond the powers of the Municipal Committee, no permission of any of the neighbours being needed to construct the aforesaid drain connecting the applicant's *mori* with the Municipal drain. As regards unreasonableness of the time fixed by the notice, raised in ground 4, it is obviously a frivolous plea. It was not raised at all in the trial Court. Had the time been unreasonable the applicant would not have failed to advance the plea in the trial Court. It is only when such a plea is advanced on behalf of the accused that the occasion for determining the question of the reasonableness of time contemplated by the proviso to S. 199, Municipalities Act arises. What the prosecution has to establish in such a case is that a lawful direction was given to the accused by a notice lawfully issued under the powers conferred by Part 3 of the Act, and that the accused disobeyed the said direction. Both these things were proved by the evidence adduced on behalf of the prosecution. S. 107 of the Act, comprised in Part 3 empowers the Committee to issue a notice to the owner or occupier of any building requiring him to connect any drain of such a building with a public drain. The notice Ex. P-2 taken along with the direction No. 3 given therein answers the description of such a notice. It follows, therefore, that the direction in question, in the notice lawfully issued under S. 107, was a lawful direction which the accused was bound to obey, while the disobedience of the direction is proved by the evidence of P. W. 1, as well as by the accused's own admission of his failure to have constructed the drain contemplated by direction 3. The two material ingredients of the offence having been established, no exception can be taken to the appellant's conviction under S. 199, Municipalities Act. This disposes of grounds 4 and 5. In this view it is unnecessary to consider ground 6, referring to the finding of the appellate Court in para. 4 of its judgment.

In the result the application fails, and it is in consequence dismissed without issuing notice to the other side.

A.L./R.K. *Application dismissed.*

A. I. R. 1928 Nagpur 338

FINDLAY, J. C.

Tikaram and *another*—Appellants.

v.

Sukka Lodhi—Respondent.

Second Appeal No. 373 or 1927, Decided on 2nd July 1928, from a decree of of the Dist. Judge, Nagpur, D/- 29th April 1927, in Civil Appeal No. 5 of 1927, D/- 29th April 1927.

(a) *Registration Act, S. 17—Lease not registered though requiring registration—Other evidence can be considered to establish tenancy.*

Though an unregistered lease deed which requires compulsory registration, should be excluded so far as it is evidence of the lease, other evidence indicative of the creation of tenancy can be considered in establishing the tenancy : 1 *N. L. R.* 147, *Appr.* [P 339 C 2]

(b) *C. P. Tenancy Act* (1 *of* 1920), *Ss.* 13 *and* 89—*Surrender to landlord—Landlord creating tenancy—Surrender can be contested under S.* 13.

Where surrender of occupancy field has been made in favour of landlord, and landlord has created the tenancy in favour of a third person the surrender can be contested under S. 13 : *A. I. R.* 1927 *Nag.* 330, *Rel. on.* [P 339 C 2]

(c) *C. P. Tenancy Act* (1 *of* 1920), *Ss.* 12 *and* 13—*Surrender of occupancy field and creation of tenancy—Transfer is good until set aside under Ss.* 12 *and* 13.

Where an occupancy field has been surrendered to landlord and lease has been created in favour of a third person, the transfer stands good until it has been set aside in the manner contemplated by the provisions of Ss. 12 and 13. [P 339 C 2]

M. R. Bobde—for Appellants.

R. B. Gadgil—for Respondent.

Judgment.—The plaintiff-respondent, Sukka, sued in the Court of the Subordinate Judge, Second Class, Ramtek, for possession of three occupancy fields in Mauza Pipri of that Tahsil. The plaintiff's case was that one Narayan, who died in 1918, was the occupancy tenant of the fields in question and that they were inherited by his daughter, Mt. Soni, who, in 1925 surrendered them to the malguzar, and the latter, in turn, created a tenancy in the plaintiff's favour. Defendants' case was that defendant 1 Tikaram was the divided brother of Narayan and that he and his son, defendant 2, succeeded to the fields as Narayan's heirs.

The case was strenuously fought out in the lower Courts on the allegation that Mt. Soni was not the daughter of Narayan at all but was the daughter of his second wife Mt. Sita who had a previous husband also named Narayan. This point was found against the defendants in both Courts after a careful and minute examination of the evidence.

In this Court the pleader for the defendants-appellants did not contest the finding that Soni duly inherited the fields in question ; instead an attack was expressly limited to the documents (P-11 and P-13), representing the transactions which occurred on 16th June 1925. The position of the appellants is that, as P-11 which represented, as it did in effect, a lease, was unregistered, the plaintiff's case, which essentially rested thereon, was bound to be dismissed. As is obvious, however, the Judge of the First Court held that there was other evidence indicative ofthe creation of the tenancy, and the learned District Judge has expressly pointed out that Tikaram himself admits that the landlord would not recognize him as a tenant. There was, in addition in the plaintiff's favour, receipt for rent (Ex. P-12) which certainly does not require registration and there is, in addition, the evidence of Mohinuddin (P. W. No. 7) as to the creation of the tenancy in the plaintiff's favour. Although P-11, so far as it is evidence of the lease or of the previous payment of rent thereunder must be excluded [cf. *Narayan Bisnoi* v. *Jaswant Singh* (1)], I am aware of no reason why the other evidence, which has been relied on by both the lower Courts, cannot be considered as sufficiently establishing the tenancy That was the express position taken up by the plaintiff in his pleading of 8th July 1926. The learned District Judge, doubtless, erred in considering that the surrender was made under the old Tenancy Act, but this, in my opinion, makes no essential difference ; even, under the new Tenancy Act, the remedy was to contest the surrender under S. 13, Tenancy Act ; cf. *Gangoo* v. *Laxman* (2).

It has been suggested on behalf of the appellant Tikaram, that, as he is in possession and is now on his defence, it is still open to him to urge that the transfer offends against S. 12, Tenancy Act and that the plaintiff's suit is liable to be dismissed being thus based on a bad title. I do not think it is possible to allow this contention to prevail at this time of day in view of the definite finding arrived at by both the lower Courts that the tenancy has been proved independently of the so-called receipt (Ex. P-11) Under Ss. 12 and 13, Tenancy Act, the transfer stands good until it has been set aside in the manner contemplated by the said provisions.

On these grounds I see no reason to interfere and am of opinion that the case has been rightly decided in the Courts below. The appeal is accordingly dismissed. The appellants must bear the respondent's costs. Costs in the lower Courts as already ordered.

A.L./R.K. *Appeal dismissed.*

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(1) [1905] 1 N. L. R. 147.

(2) A. I. R. 1927 Nag. 330=24 N. L. R. 93.

* A.I.R. 1928 Nagpur 340

KOLHATKAR, A. J. C.

Secretary of State—Applicant.

v.

Gulabchand—Non-Applicant.

Civil Revn. No.25-B of 1928, Decided on 16th June 1928, against order of Small Cause Court Judge, Amraoti, D/- 29th November 1927.

* (*a*) *Railways Act, S. 72 (2) (b)—Risk-note B (New Form)—Company is bound to disclose to consignor manner in which consignment was dealt with—Disclosure shifts burden on consignor to prove misconduct — Non-disclosure necessitates evidence to be given by company of its dealings with consignment.*

In view of the proviso (inserted in the new form of Risk-note B) the Railway Administration is bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control. If the company discloses to the consignor how the consignment was dealt with by it and if the material placed before is satisfactory, it is not necessary for the company to give evidence before the consignor is called upon to prove misconduct. [P 341 C 2]

Failure to make a disclosure as to how the consignment was dealt with necessitates the giving of evidence in regard to the manner in which the consignment was dealt with by the company throughout the time it was in its possession or control. [P 341 C 2]

(*b*) *Railways Act, S. 72 (2) (b)—Risk-note B (New Form)—Failure to disclose or to give satisfactory evidence with respect to manner in which consignment was dealt with raises presumption of misconduct on part of railway and it should be held liable for loss suffered by consignor.*

Where the Railway Administration fails to make the requisite disclosure to the consignor or in the event of disclosure being made, but being not found to be satisfactory, fails to give evidence in regard to the manner in which it dealt with the consignment, throughout the time it was in its possession or control, the inevitable result is to fasten on it the liability for loss suffered by the consignor, as the Court will have in such a contingency no other alternative than to presume misconduct from the aforesaid failure and to hold the company liable for the loss caused by the misconduct of its servants: *A. I. R.* 1926 *All.* 565, *Foll.* [P 342 C 1]

(*c*) *Railways Act, S. 72—Risk-note B (New Form)—Legitimate inferences of misconduct on part of railway servants drawn—Consignor need not be called upon to adduce evidence of misconduct,*

Where from the facts found an inference of misconduct on the part of the railway servants may be legitimately drawn, it is not necessary to call upon the consignor to give evidence of misconduct: *A. I. R.* 1925 *Nag.* 350; *A. I. R.* 1928 *P. C.* 24; and *A. I. R.* 1927 *Mad.* 908; *Dist., A. I. R.* 1927 *All.* 371, *Foll.* [P 342 C 2, P 343 C 1]

(*d*) *Railways Act, S. 72—Risk-note B (New Form)—Loss of part of package is covered.*

Loss of a portion of a consignment or of a package does come within the main provisions of the new form: *A. I. R.* 1927 *All.* 371, *Foll.* [P 342 C 2]

A. V. Khare and *W. B. Pendharkar*—for Applicant.

G. L. Subhedar—for Non-Applicant.

Order.—The applicant seeks revision of a decree passed by the Court of Small Causes at Amraoti, for payment of Rs. 186-12-0 as damages in a suit instituted by the plaintiff for recovery of Rs. 232-13-3, on account of damages sustained by the plaintiff owing to the defendant's failure to deliver six tins of ghee. It seems that the plaintiff despatched 25 tins of ghee by rail from Beawar on the B. B. and C. I. Ry. line to Amraoti on 3rd December 1925. It was noticed at the time of giving delivery at Amraoti that out of 25 tins 5 tins contained cotton seeds, and that they were tampered with. The plaintiff took delivery of only 19 tins, the Railway Company having kept one tin as a sample and having delivered it to the police for an enquiry into the matter. The plaintiff thus claimed damages on account of six tins of ghee not delivered to him. The consignment was booked under Risk-Notes A. and B. The tins which were not delivered were sold by auction by the railway company for Rs. 25. On the strength of the following findings, the lower Court decreed the plaintiff's claim to the extent of Rs. 186-12-0.

(1) The five tins in question contained pure ghee at the time of delivery to B. B. and C. I. Ry. Co. at Beawar.

(2) Cotton seeds were replaced therein while they were in the custody of the G. I. P. Ry. Co.

(3) The defendant is liable to the plaintiff's claim on account of the Risk Notes Forms A and B.

(4) The defendant did not offer one tin of ghee to the plaintiff. He is liable for damages in regard to that tin.

(5) Notice was given to the defendant under S. 77, Railways. Act.

(6) The defendant is liable to pay Rs. 186-12-0 as damages.

The applicant's learned counsel objects in the first instance to the finding of the lower Court that the five tins in question contained pure ghee when they were consigned at Beawar Station. It

seems to me that the said finding is supported by the evidence of the plaintiff's witness Ramlal, who was examined on commission. He affirms that all the 25 tins were soldered in his presence, and that before soldering he satisfied himself that all of them contained pure ghee, and that the tins were in good condition, when they were sent in a cart to Beawar Station. It is no doubt true that the plaintiff did not examine the consignor, who consigned the goods at Beawar Station, to depose to the good condition of the tins at the time of the consignment. But from the evidence of a negative character furnished by D. W. 1, Walayat Hussain, to the effect that there was nothing in the books maintained at the Khandwa Railway Station to show that the goods were received in a damaged condition, it would appear that the tins were in good condition when they reached Khandwa Railway Station. The fact of their being in a good condition at a date subsequent to the date of the consignment, clearly argues the good condition of the tins at the time of the consignment. The evidence of the plaintiff's witness Ramlal stands unrebutted. I think, therefore, that there is sufficient evidence on record to sustain the finding of the lower Court that the five tins in question contained pure ghee at the time they were consigned at Beawar Station.

The next question is as regards the loss sustained by the plaintiff. It has been proved by the testimony of the plaintiff Jawaharlal, as P. W. 1, that at the time of delivery, out of the 25 tins five were found to have been tampered with and to contain earth and dirt, and not ghee. It has also been admitted by the defendant in his pleadings that the five tins contained cotton seeds, and not ghee. Now ghee is much more valuable than cotton seed. The aforesaid evidence furnished adequate proof of the loss of the ghee kept in the five tins in question. The next question is whether in view of the Risk-Note Form B (Ex. D-3), the Railway Company was liable for the said loss. The Risk-Note provides that the Company cannot be held liable for such loss except upon proof that it arose from the misconduct of the Railway Administration's servants. The new form of the Risk-note, Form B. adds a proviso to this main condition in regard to the liability of the Company. It provides that in two cases, viz:

(1) Clause (a).—In the case of non-delivery of the whole of the said consignment or of the whole of one or more packages forming part of the said consignment, and

(2) Clause (b).—In the case of pilferage from a package or packages forming part of the said consignment, when such pilferage is pointed out to the servants of the Railway Administration on or before delivery, the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence the burden of proving such misconduct shall lie upon the consignor.

Now the case in question falls under Cl. (b) of the proviso. It was the case of a pilferage from five packages forming part of the consignment, which was pointed out to the servants of the Railway Administration by the plaintiff at the time of delivery. In view of the proviso inserted in the new form, the Railway Administration was bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control. There is absolutely nothing on record to show that the Railway Company complied with this requirement. Had the company disclosed to the consignor how the consignment was dealt with by it, and had he been satisfied with the material placed before him, it would not have been necessary for the company to give evidence, before the consignor was called upon to prove misconduct. But its failure to make a disclosure in this respect necessitated the giving of evidence in regard to the manner in which the consignment was dealt with by the company throughout the time it was in its possession or control. But the company neither made the disclosure nor produced any evidence with the result that there was no material before the Court to enable it to deduce any inference in regard to the alleged misconduct of the Railway Administration's servants. It would appear from the proviso in the new form that the burden of proving misconduct shall, in cases falling under Cl. (a) or Cl. (b), lie upon the consignor, only if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from the evi-

dence to be adduced by the administration. This condition seems to involve an implication that the burden of proof will not lie on the consignor if an inference of misconduct can be drawn from the evidence to be adduced by the Railway Administration, in cases falling under Cls. (a) and (b) of the proviso. This appears to me to be the meaning of the plain wording of the proviso. Can the defendant rely upon the failure of the Railway Administration to make the requisite disclosure and to give evidence which would have furnished material for drawing an inference in regard to misconduct, as a basis of the contention that the burden of proof lay on the plaintiff, as the Court was for want of any material unable to deduce any inference about misconduct? I think not. It is quite clear from the plain wording of the proviso that the consignor cannot be called upon to prove misconduct if the Railway Administration fails to make the requisite disclosure to the consignor or in the event of the disclosure being made but being not found to be satisfactory, fails to give evidence in regard to the manner in which it dealt with the consignment throughout the time it was in its possession or control. The inevitable result of such a failure on the part of the Railway Administration to make the disclosure and to give evidence would be to fasten on it the liability for the loss, as the Court will have in such a contingency no other alternative than to presume misconduct from the aforesaid failure and to hold the company liable for the loss caused by the misconduct of its servants. The case *Secretary of State* v. *U. P. Glass Works* (1) is an authority for the proposition that in a case of non-delivery falling under Cl. (a) of the proviso in the new form, the Railway Administration would be liable if it fails to disclose in detail how it has dealt with the consignment, or if the said disclosure or the evidence adduced by it is such as to give rise to an inference of misconduct.

Even if it be assumed that in spite of the failure on the part of the Railway Administration to make the requisite disclosure or to give evidence the burden of proof lay upon the consignor in cases falling under Cl. (b) of the proviso, there is sufficient evidence on record in regard to misconduct of the servants of the Railway Administration. In the first place there is proof of the disappearance of the ghee kept in the five tins in question. Secondly, there is the evidence of the plaintiff as P. W. 1 that the five tins were tampered with. Thirdly, there is the evidence of D. W. 1 Walayat Husssain, the Sub Inspector of Railway Police, to the effect that there is nothing in the books maintained at the Khandwa Railway Station to show that the goods in question were received in a damaged condition at that station. This evidence would amount to a proof of the fact that when the consignment came into the possession of the G. I. P. Ry. Co., it was in good condition. This fact, coupled with the proof of the five tins being found at the time of the delivery to be tampered with would go to show that the tins were tampered with in transit somewhere between Khandwa and Amraoti. All this evidence read together can very well be regarded as adequate proof of misconduct on the part of the servants of the Railway Administration.

The two cases *B. N. Ry. Co.* v. *Dillu* (2) and *Ardeshir Bicaji Tamboli* v. *Agent G. I. P. Ry. Co.* (3) quoted by the applicant's learned counsel had reference to the old form which did not contain the proviso referred to above, and can have consequently no application. As for the case *Secretary of State* v. *U. P. Glass Works* (1) cited by him, a case decided by a single Judge, it is dissented from in *Secretary of State* v. *Bhagwan Das* (4) decided by a Bench of two Judges. In the latter case the reasoning in the former has been subjected to very close analysis by Boys, J., and the error involved in overlooking the provisions of Cl. (b) of the proviso, and in holding that the word "loss" does not include loss of part of a consignment or package has been pointed out. With due respect I find myself in full agreement with the reasoning given in the judgment of Boys, J., and with the conclusion reached by him to the effect that loss of a portion of a consignment or of a package does come within the main provision of the new form, as well as with the view of Walsh, J., that where from the facts found, and inference of misconduct on the part of the Railway servants may legitimately be drawn, it is

(1) A. I. R. 1926 All. 555=48 All. 584.

(2) A. I. R. 1925 Nag. 350=21 N. L. R. 78.
(3) A. I. R. 1928 P. C. 24=52 Bom. 169=55 I. A. 67 (P.C.).
(4) A. I. R. 1927 All. 371=49 All. 889.

not necessary to call upon the consignor to give evidence of misconduct. As regards the case *M. S. M. Ry. Co., Ltd.* v. *Nallathambi Chetti* (5) it seems that the learned Judge who decided it has not given due consideration to the imperative character of the condition in the proviso appearing in the new form of making a disclosure to the consignor as to how the Railway Administration dealt with the consignment throughout the time it was in its possession or custody, and I am consequently unable to fully subscribe to the view expressed therein.

For the foregoing reasons I hold in concurrence with the lower Court that the defendant is liable to pay damages for the loss sustained by the plaintiff As regards the one tin which was kept by the plaintiff with the Station Master and was subsequently made over to the police, it seems from Ex. P-3 that the Railway Company gave a notice to the plaintiff calling upon him to receive the said tin, and intimating the readiness of the company, to deliver it to the plaintiff. In spite of this, however, the plaintiff, it seems, did not go to receive the tin. There is no proof that he went to the railway station to take delivery of the tin. In these circumstances he is not entitled to claim any damages in respect of that tin. What he is entitled to is only the amount fetched by its sale. It seems from the record that all the six tins including the one tin containing ghee were sold by auction by the Railway Company for Rs. 25. As the other five tins did not contain ghee this amount must he held to substantially represent the value of the one tin containing ghee. The plaintiff would, therefore, be entitled to receive :

Rs.	a.	p.	
25	0	0	on account of the value of the one tin of ghee which was kept by him with the Station Master and which he failed to take back from the latter, and
155	11	0	the value of the five tins at the rate given by the plaintiff in the box.
180	11	0	Total.

The result is that the decree of the lower Court is slightly varied by substituting Rs. 180-11-0 for Rs. 186-12-0. As the revision application has substantially failed it is ordered that costs incurred in this Court will be borne by the applicant. As regards costs in the lower Court they will be borne in proportion to the success and failure of the parties. The counsel's fee will be assessed in this Court at Rs. 30.

A.L./R.K. *Decree varied.*

(5) A. I. R. 1927 Mad. 908.

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* A. I. R. 1928 Nagpur 343

HALLIFAX, A. J. C.

King-Emperor—Applicant.

v.

Daulat Singh—Non-Applicant.

Criminal Revn. No. 157-B of 1928, Decided on 26th July 1928, reported by Dist. Mag., Buldana.

(a) Criminal P. C., S. 562 (1-A)—High Court would refuse to disturb illegal order unless it were unjust.

However illegal an order might be High Court would refuse to disturb it in revision unless it were unjust, and however legal it might be, High Court would not hesitate to disturb it in revision if it were unjust. High Court is a Court of justice not an Academy of Law. [P 344 C 1]

(b) Criminal P. C., S. 562 (1-A)—Sub-S. (1-A) is governed by proviso in sub-S. 1.

The proviso in sub-S. (1) S. 562, governs sub-S. 1-A also. Sub-S. 1-A added to S. 562 in 1923 is not only a part of the same section as the proviso but a part of the same sub-section : *A. I. R.* 1925 *Bom.* 479, *Foll.* *A. I. R.* 1925 *All.* 614, *not Foll.* [P 344 C 1]

G. P. Dick—for Applicant.

Order.—A warrant of arrest was issued in execution proceedings against the accused Daulat Singh Rajput. The chaprasi to whom it was entrusted showed it to Daulat Singh, who refused to surrender to it on the frivolous excuse that it could only be executed under the orders of the Tahsildar, as he was a Kamdar Patel. The chaprasi then laid hold of Daulat Singh's arm (not of his hand as has been recorded in the case in accordance with the invariable mistranslation of the word *hath*), and Daulat Singh jerked himself free and went away. On these facts he has been rightly convicted by a Magistrate of the 2nd Class of an offence punishable under S. 225-B, I. P. C., and has been released "after due admonition" under S. 562 (1-A), Criminal P. C.

The case has been referred to this Court on two grounds. The first, which is of no importance whatever in the case, is admittedly taken solely for the purpose of getting a " ruling" from this Court on a point of law. It is the contention that a Magistrate of the Second Class not specially empowered by the Local Goverment in that behalf is not competent to release an offender after due admonition under S. 562 (1-A), Criminal P. C. But, however, illegal such an order might be, this Court would refuse to disturb it in revision unless it were unjust, and, however, legal it might be, this Court would not hesitate to disturb it in revision if it were unjust. This is a Court of justice not an Academy of Law.

It may be mentioned, however, that it seems beyond doubt that the proviso in the middle of sub-S. (1), S. 562, Criminal P. C., does govern both the other parts of that sub-section. In *Murlidhar* v. *Mahbub Khan* (1), two Judges of the Allahabad High Court expressed the opinion that it did not, but no reasons for the opinion are stated in the judgment. In April 1928, four months later, two Judges of the Bombay High Court expressed the contrary opinion in *Emperor* v. *Ranchhod* (2) and supported it on reasoning with which I am in respectful agreement.

The paragraph added to S. 562 in 1923 is not only a part of the same section as the proviso, as the learned Judges of the Bombay High Court pointed out, but a part of the same sub-section. But the other reason stated in that judgment is quite conclusive. The proviso governs all cases in which " the powers conferred by this section" (not sub-section) are exercised, and sub-S. (1-A) is as much a part of the whole section as sub-S. (1).

That, however, is all outside the case before the Court. The only question is whether the penalty imposed on Daulat Singh is so inadequate as to require enhancement or not. That it undoubtedly is. Every sentence must be as heavy as is necessary to deter others from doing it from fear of sharing his fate, and no heavier. This offence committed by Daulat Singh is particularly rife in Berar, where the process of a Court is daily defied with impunity, as it has been so far by Daulat Singh in this case. Letting him off with a warning is an invitation to him and to others to do the same thing again.

The proper sentence to pass would have been one of rigorous imprisonment for six months, but it is perhaps undesirable to send the man to jail now, though it is not easy to find sound reasons for not doing so. But the fine which is substituted for the imprisonment must be of an amount which will be difficult for him to pay and will put the fear of the law into all others who hear of it. Daulat Singh is sentenced under S. 225-B, I. P. C., to pay a fine of two thousand rupees, or in default to undergo rigorous imprisonment for six weeks. Under S. 388, Procedure Code it is ordered that the fine shall be payable within fifteen days, that is by the 10th of August.

R.K. *Sentence enhanced.*

(1) A. I. R. 1925 All. 644=47 All. 353.
(2) A. I. R. 1925 Bom. 479.

END

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1928

OUDH SECTION

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CITATION: A. I. R. 1928 OUDH

PRINTED AND PUBLISHED BY

V. V. CHITALEY, B.A., LL.B.,

AT THE "ALL INDIA REPORTER" PRESS.

NAGPUR, C. P.

1928

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SRINAGAR (Kashmir)

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1928

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** ——**Arts. 57 and 40**—Deed of security agreeing to pay compensation to the Court on failure of the decree-holder restoring the property in the event of his failure in appeal—Immovable property hypothecated as security—Deed is a contract and Art. 57 applies and not Art. 40 **(FB) 143**
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——**S. 31**—Gift over—Incidents indicated (*Obiter*) **67***c*

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*——**S. 43**—The mortgage by Hindu woman whose husband is not heard of for seven years and who is deemed as dead at the time of the suit is operative at that date **13***b*

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——**S. 54**—Possession and sale-deed not delivered—Nor passing of consideration—Mere registration does not operate to pass title to vendee **439***a*

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——**S. 58 (d)**—Usufructuary mortgagor is not entitled even to enhanced rent **405 (2)***a*

——**S. 60**— Mere stipulation for high interest is not clog **330***d*

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——**S. 62**—Scope—Where a mortgage is not a usufructuary mortgage pure and simple, the terms of S. 62 are inapplicable **273***d*

——**S. 73**—Mortgage of under-proprietary holding — Mortgagee not paying arrears of rent due from the mortgagor—Sale in execution of a rent decree—Mortgage does not become invalid—Purchaser does not purchase property free of mortgage—S. 73, T. P. Act has no application **442***b*

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——**S. 22 (e)**—Sale proceeds under—They do not include sale-proceeds of refuse to which private persons are entitled **271***b*
——**S. 26**—District Magistrate cannot order that town area authorities should credit to the town fund sale proceeds of refuse to which private persons are entitled **271***a*
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——(as amended by Act 28 of 1926), S. 3(b) (i)—Transferee of a debtor is a debtor—Power to relieve such transferee is discretionary **(FB) 396*a*
——**S. 3 (4)**—Transferee of creditor is creditor (*obiter*) **(FB) 396***b*

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——Construction compatible with Hindu law possible — Widow given power of transfer—Power of transfer is according to Hindu law **509***c*
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——Wajib-ul-arz authorizing lambardar to make collections—He is not necessarily prevented from making a lease for making those collections—Test is whether cosharers are benefited **406***c*
——Entries in — Presumption about—Estate held in the manner mentioned in S. 3, Oudh Estates Act—Grant originally rent free—Village is an estate within S. 3 **307***d*
——Entry in, is admissible to prove custom—Custom onerous to tenants—Entry of zamindar's statement is not of much value **265***a*
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——**S. 4**—Whipping in addition to a sentence under S. 436, Penal Code, is not allowed **111**
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——Construction — Guiding principle—Various clauses must be read together—True intention and real object must be ascertained **155***c*
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*——Construction—Will drafted by unskilled persons — Construction should follow the meaning of the words as found to be meant by the testator **(FB) 49***c*
*——Construction — Defeasance clause is valid only if gift is in favour of person existing at date of gift (*Misra, J.*) **(FB) 49***d*
—— Power of appointment means right to nominate successor **155***a*
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——"Khandan" means group of persons descending from common progenitor **155***h*

THE
ALL INDIA REPORTER
1928 OUDH

COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1928 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1928 with corresponding references of the ALL INDIA REPORTER.

Table No. III—This Table is the converse of the **First** and **Second Tables**. It shows serially the pages of the ALL INDIA REPORTER for 1928 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing seriatim the pages of Indian Law Reports, Lucknow Series for the years 1927 and 1928, with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 2 and 3 Lucknow.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 2 Lucknow= All India Reporter

ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.		
1	1927	O	59	226	1926	O	470	416	1928	O	25	507	1926	O	431	659	1927	O	603
4	"	"	74	239	"	"	444	419	1927	"	134	553	1928	"	209	662	"	"	572
40	"	"	91	249	"	"	560	421	"	"	147	561	1927	"	180	666	"	"	325
43	"	"	240	253	1927	"	44	425	1928	"	32	564	"	"	199	670	"	"	332
93	"	PC	110	259	1926	"	605	430	1927	"	235	578	"	"	264	676	"	"	594
97	"	O	125	261	"	"	621	433	1928	"	36	575	"	"	201	680	"	"	345
109	"	"	118	264	1927	"	70	437	1928	"	20	580	"	"	190	686	"	"	552
133	"	"	305	269	1926	"	610	444	1927	"	196	588	"	"	224	691	"	"	580
137	"	"	108	274	1927	"	18	447	"	"	129	592	"	"	221	694	"	"	361
145	"	"	120	279	"	"	12	452	"	"	142	594	"	"	263	703	"	"	367
152	"	"	145	288	"	"	27	459	"	"	149	597	"	"	259	707	"	"	560
157	"	"	306	293	1927	"	55	464	"	"	156	602	"	"	316	710	"	"	358
169	"	"	33	316	"	PC	165	470	1928	"	103	605	"	"	321	713	"	"	450
172	1926	"	464	335	1926	O	561	475	1927	"	202	612	"	"	339	726	"	"	438
180	"	"	601	388	"	"	487	482	"	"	154	618	"	"	347	731	"	"	455
187	1927	"	328	395	1927	"	51	487	1928	"	145	631	"	"	369	736	"	"	474
198	1926	"	576	398	1928	"	42	490	"	"	98	640	"	PC	248	740	"	"	467
218	"	"	357	401	"	"	43	492	1927	"	188	646	"	O	326	746	"	"	471
216	"	"	360	408	"	"	40	496	"	"	261	651	"	"	357	75	"	"	502
221	"	"	346	412	1927	"	110	503	"	"	296	654	"	"	337	7	"	"	506

I. L. R. 3 Lucknow (Parts 1 to 10)=All India Reporter

Parts 11 and 12 are not received till 1-4-1929. For Comparative Tables of these parts, if issued, *see* Comparative Tables of the next year.

I.L.R.	A. I. R.			I.L.R.	A. I. R.			I.L.R.	A. I. R.			I.L.R.	A. I. R.			I.L.R.	A. I. R.		
1	1928	*O*	1	150	1928	*O*	214	237	1928	*O*	104	413	1928	*O*	239	506	1928	*O*	251
10	"	"	40	154	"	"	138	238	"	"	143	416	"	"	233	521	1929	"	97
76	"	*PC*	87	167	"	"	152	302	"	"	203	430	"	"	486	571	1928	"	266
80	1927	*O*	363	170	"	"	195	314	"	*PC*	162	436	"	"	223	578	"	"	286
102	"	"	478	182	"	"	190	323	"	*O*	404	439	"	"	289	580	"	"	337
107	"	"	482	190	1927	"	552	326	"	"	307	446	1929	"	80	584	"	"	297
113	"	"	510	220	"	"	480	363	"	"	226	456	"	"	86	588	"	"	263
118	"	"	476	237	"	"	465	366	"	"	229	459	1928	"	273	591	"	"	340
126	1928	"	30	241	"	"	484	368	"	"	237	472	1929	"	88	598	"	"	287
130	"	"	8	244	1928	"	15	372	"	*PC*	202	478	1928	"	265	603	"	"	303
133	"	"	23	253	1927	"	526	382	"	*O*	241	482	"	"	258	608	"	"	306
139	"	"	19	256	1928	"	125	403	"	"	482	487	"	"	359	610	"	"	333
142	"	"	88	273	"	"	95	411	"	"	490	494	"	"	277	616	"	"	369
145	"	"	103	282	"	"	93												

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1928 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

5 Oudh Weekly Notes =All India Reporter.

OWN)	A. I. R.			OWN)	A. I. R.			OWN)	A. I. R.			OWN)	A. I. R.			OWN)	A. I. R.		
1	1928	*O*	203	190	1928	*O*	230	443	1928	*PC*	87	674	1928	*O*	375	936	1929	*O*	16
11	"	"	237	193	"	"	227	452	"	*Notes*	22*e*	677	"	"	386	947	1928	"	501
15	"	"	143	195	"	*PC*	30	454	"	*O*	338	686	"	"	376	951	"	*PC*	156
20	"	"	231	202	1929	*O*	80	457	"	*Notes*	18*f*	689	"	"	374	964	"	*Notes*	65*c*
23	"	"	229	210	"	"	88	459	"	*O*	305	693	"	"	406	968	"	"	35*a*
26	"	"	226	216	"	"	86	463	"	"	295	698	"	"	393	974	1929	*O*	30
29	"	"	221	219	1928	*PC*	24	466	"	*PC*	99	706	"	*PC*	231	980	"	"	25
33	"	"	207	226	"	"	39	475	"	*O*	303	713	"	*O*	405	985	1928	"	507
35	"	"	224	236	"	*Notes*	14*e*	479	"	*PC*	103	715	"	*Notes*	50*a*	990	1929	"	21
38	"	*PC*	1	240	"	"	16*d*	487	"	*O*	344	725	"	*O*	439	992	1928	"	509
42	"	*O*	240	242	"	"	28*c*	495	"	"	353	732	"	"	417	1001	1929	"	1
44	"	"	249	245	"	*PC*	51	497	"	"	326	735	"	"	378	1022	1928	*Notes*	82*d*
48	"	"	239	252	"	*O*	265	502	"	*PC*	162	750	"	"	408	1031	1929	*O*	32
50	"	"	241	256	"	"	285	510	"	*O*	353	753	"	"	460	1037	"	"	35
61	"	"	482	260	"	"	258	515	"	"	348	760	"	"	430	1039	1928	*Notes*	58*e*
68	"	"	195	265	"	"	359	525	"	*Notes*	25*e*	776	"	*Notes*	17*d*	1041	1929	*O*	40
78	1927	"	632	272	"	*PC*	49	529	"	*O*	329	780	"	*O*	396	1044	"	"	35
80	1928	"	225	275	"	*O*	269	533	"	"	342	791	"	"	442	1053	"	"	76
82	"	"	218	281	"	"	277	538	"	*Notes*	51*f*	805	"	*PC*	264	1062	"	"	67
85	"	*Notes*	10*c*	291	"	"	262	543	*B.R.*	*Case*		812	"	*O*	418	1070	"	"	56
87	"	*O*	220	293	"	*Notes*	14*b*	545	1928	*O*	336	825	"	"	472	1076	"	"	43
89	"	"	404	296	"	*O*	257	547	"	*PC*	152	832	"	"	481	1077	1928	*Notes*	81*a*
91	"	*Notes*	11*d*	299	"	"	307	556	"	*Notes*	45*a*	836	"	"	465	1081	1929	*O*	63
93	"	"	73*a*	347	"	"	263	565	"	*PC*	202	847	"	"	449	1085	"	"	60
96	"	*PC*	2	350	"	"	297	579	"	"	139	871	"	*PC*	291	1091	"	"	54
108	"	*O*	199	353	"	"	337	589	"	*O*	365	873	1929	*O*	26	1094	"	"	59
121	"	"	246	357	"	"	292	596	"	*Notes*	69*e*	880	1928	"	464	1097	1928	*Notes*	72*a*
124	"	"	215	364	"	"	286	598	"	"	19*b*	882	"	"	494	1101	1929	*O*	72
130	"	"	486	366	"	"	266	601	"	*O*	373	886	"	"	488	1111	"	"	113
135	"	"	490	372	"	"	251	604	"	"	355	890	"	"	492	1117	"	"	91
138	1927	"	630	385	"	"	289	612	"	"	401	891	"	"	485	1122	"	"	83
143	1928	"	233	391	"	"	282	616	"	"	391	893	"	"	480	1126	"	"	79
155	"	"	223	395	"	"	287	622	"	"	369	895	"	"	478	1128	1928	*Notes*	73*e*
157	"	"	228	400	"	*PC*	64	633	"	"	362	897	"	"	503	1131	1929	*O*	85
160	"	"	241	411	"	"	68	641	"	"	402	905	1929	"	12	1133	"	"	90
162	"	"	208	424	"	*Notes*	21*f*	646	"	"	384	911	1928	*PC*	254	1134	"	"	71
163	"	"	218	427	"	*O*	340	652	"	*PC*	248	920	1929	*O*	22	1136	"	"	87
166	"	*PC*	35	432	"	"	301	658	"	*O*	411	927	1928	"	495	1138	1928	*PC*	303
174	"	*O*	248	435	"	"	330	661	"	*PC*	251	932	"	*Notes*	46*b*	1142	"	"	
178	"	"	273	441	"	"	306	668	"	"	172								

9 and 10 All India Criminal Reports=All India Reporter

A. I. Cr. R.	A. I. R.	A. I. Cr. R.	A. I. R.	A. I. Cr. R.	A. I. R.	A. I. Cr. R.	A. I. R.	A. I. Cr.R.	A. I. R.

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1928 Allahabad.**

29 Cr. L. J. & 106 to 112 Indian Cases=All India Reporter.

Cr.LJ. & I.C.	A. I. R.	Cr.LJ. & I.C.	A. I. R.	Cr.LJ. & I.C.	A. I. R.	Cr.LJ. & I.C.	A. I. R.	Cr.LJ. & I.C.	A. I. R.

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1928 Lahore.**

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1928, Oudh SECTION with corresponding references of other REPORTS, JOURNALS AND PERIODICALS, including the INDIAN LAW REPORTS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1928 OUDH.
Column No. 2 denotes corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

A. I. R. 1928 Oudh=Other Journals.

A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R.)	Other Journals
1 FB	4 *O W N* 1085	36	2 *Luck* 433	98	100 *I C* 787	145	2 *Luck* 487
	107 *I C* 545		8 *A I Cr R* 46	99	1 *L C* 663		4 *O W N* 270
	3 *Luck* 1		4 *O W N* 337		106 *I C* 491		101 *I C* 274
8	4 *O W N* 1005		28 *Cr L J* 401		3 *Luck* 282	146	4 *O W N* 1275
	105 *I C* 781		101 *I C* 177	101	4 *O W N* 1196		107 *I C* 556
	3 *Luck* 130	38	4 *O W N* 1045		107 *I C* 333		10 *L R A Rev* 7
9	9 *LRA Rev.* 333		106 *I C* 133		9 *LRARev* 355	148	4 *O W N* 1262
	111 *I C* 264	40	2 *Luck* 408	103	2 *Luck* 470		106 *I C* 831
10	4 *O W N* 1069		4 *O W N* 98		4 *O W N* 265	152	4 *O W N* 1255
	106 *I C* 392		99 *I C* 897		101 *I C* 282		107 *I C* 871
13	4 *O W N* 1077	41	4 *O W N* 1033	104	1 *L C* 653		3 *Luck* 167
	106 *I C* 489		106 *I C* 126		29 *Cr L J* 102		10 *L RA Rev* 15
15	1 *L C* 579		9 *LRARev* 344		106 *I C* 694	153	4 *O W N* 1269
	28 *Cr L J* 1029	42	2 *Luck* 398		9 *A I Cr R* 356		107 *I C* 872
	106 *I C* 213		13 *O L J* 821		3 *Luck* 287		10 *L R A Rev* 2
	9 *A I Cr R* 217		3 *O W N* 866	108	4 *O W N* 1173	155	1 *L C* 733
	3 *Luck* 244		98 *I C* 298		106 *I C* 496		108 *I C* 817
17	4 *O W N* 1035	43	2 *Luck* 401		3 *Luck* 145	195	5 *O W N* 68
	106 *I C* 805		13 *O L J* 833	111	1 *L C* 668	FB	108 *I C* 105
18	104 *I C* 760		3 *O W N* 930		29 *Cr L J* 666		3 *Luck* 170
19	4 *O W N* 1081		98 *I C* 1053		110 *I C* 218	199	5 *O W N* 108
	106 *I C* 494	46	4 *O W N* 1058	112	4 *O W N* 1200	FB	3 *Luck* 182
	3 *Luck* 139		106 *I C* 26		29 *Cr L J* 70		110 *I C* 83
	9 *LRARev* 348		9 *LRARev* 347		106 *I C* 582	203	5 *O W N* 1
20	106 *I C* 363	47(1)	105 *I C* 224		9 *A I Cr R* 372		3 *Luck* 302
	2 *Luck* 487	47(2)	104 *I C* 586	113	4 *O W N* 1225		107 *I C* 866
23	106 *I C* 244	48	4 *O W N* 1119		107 *I C* 178	207	5 *O W N* 32
	4 *O W N* 1019		110 *I C* 140	114	1 *L C* 685		107 *I C* 876
	3 *Luck* 133	49	4 *O W N* 1125		107 *I C* 184		29 *Cr L J* 311
	9 *LRARev* 336	FB	106 *I C* 593	121	4 *O W N* 1229		10 *A I Cr R* 21
25	100 *I C* 193		3 *Luck* 19		107 *I C* 560	208	5 *O W N* 162
	2 *Luck* 416	67	1 *L C* 592	122	4 *O W N* 1211		108 *I C* 111
	4 *O W N* 137		109 *I C* 835		29 *Cr L J* 94	209(1)	105 *I C* 734
26	104 *I C* 847	88	4 *O W N* 1103		106 *I C* 686	209(2)	2 *Luck* 553
	4 *O W N* 1041		106 *I C* 541		9 *A I Cr R* 336		4 *O W N* 330
28	105 *I C* 191		3 *Luck* 142	125	3 *Luck* 256		101 *I C* 683
30	105 *I C* 611	89(1)	4 *O W N* 1114		1 *L C* 700	212	4 *O W N* 1240
	4 *O W N* 1025	89(2)	4 *O W N* 1061		110 *I C* 466		107 *I C* 875
	3 *Luck* 126		105 *I C* 836	135	4 *O W N* 1219		9 *AICr R* 414
32	101 *I C* 258	92	4 *O W N* 1106		106 *I C* 823		29 *Cr L J* 310
	2 *Luck* 425		107 *I C* 181	138	4 *O W N* 1243	214	4 *O W N* 1258
	4 *O W N* 252	95	1 *L C* 677		107 *I C* 890		107 *I C* 877
33	106 *I C* 8		107 *I C* 326		3 *Luck* 154		3 *Luck* 150
	4 *O W N* 1037		3 *Luck* 273	143	5 *O W N* 15		9 *LRARev* 358
	9 *LRARev* 342		9 *LRARev* 350	FB	107 *I C* 553		5 *O W N* 124
35	1 *L C* 674	98	2 *Luck* 490		3 *Luck* 298	215	9 *A I Cr R* 416
	105 *I C* 132		4 *O W N* 273	144	105 *I C* 912		

A. I. R. 1928 Oudh=Other Journals—(*Concld.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
215	10	*AICrR*	169	258	5	*O W N*	260	329	5	*O W N*	529	402	111	*I C*	578
	29	*Cr L J*	525		3	*Luck*	482		110	*I C*	175	404	3	*Luck*	323
	109	*I C*	349		112	*I C*	13	330	5	*O W N*	435		5	*O W N*	89
218(1)	5	*O W N*	163	260	107	*I C*	330		110	*I C*	91		110	*I C*	113
	106	*I C*	481	262	5	*O W N*	291	333	108	*I C*	102	405 (1)	5	*O W N*	718
218(2)	5	*O W N*	82		111	*I C*	473	336	5	*O W N*	545		110	*I C*	702
	107	*I C*	879	263	5	*O W N*	347		10	*LRARev*	29	405 (2)	110	*I C*	70
219	106	*I C*	907		109	*I C*	633		110	*I C*	320	406	5	*O W N*	693
	10	*LRARev*	18		3	*Luck*	588	337	5	*O W N*	353		111	*I C*	834
220	5	*O W N*	87	265	5	*O W N*	252		3	*Luck*	580	408	5	*O W N*	750
	106	*I C*	822		3	*Luck*	478		110	*I C*	704		112	*I C*	247
221	5	*O W N*	29		10	*LRARev*	27	338	5	*O W N*	454	409	110	*I C*	4
	107	*I C*	177		112	*I C*	10		109	*I C*	791	411	5	*O W N*	653
	29	*Cr L J*	230	266FB	5	*O W N*	366		3	*Luck*	610		112	*I C*	266
	10	*AICrR*	438		3	*Luck*	571	340	5	*O W N*	427	414	110	*I C*	26
223	5	*O W N*	150		10	*LRARev*	30		3	*Luck*	591	417	5	*O W N*	732
	109	*I C*	304		110	*I C*	67		112	*I C*	136		29	*Cr L J*	989
	3	*Luck*	436	269	5	*O W N*	275	342	5	*O W N*	533		112	*I C*	109
	10	*LR A Rev*	23		112	*I C*	68		110	*I C*	618	418	5	*O W N*	812
224	5	*O W N*	35	271	106	*I C*	820	344	5	*O W N*	487	424	110	*I C*	500
	107	*I C*	881	273	5	*O W N*	178		10	*LRARev*	38	430	5	*O W N*	760
225	5	*C W N*	80		3	*Luck*	459		110	*I C*	357		29	*Cr L J*	1009
	107	*I C*	884		112	*I C*	481	348	5	*O W N*	515		112	*I C*	337
226	5	*O W N*	26	277	5	*O W N*	281		110	*I C*	180	438	110	*I C*	309
	9	*A ICr R*	431		3	*Luch*	494	353 (1)	5	*O W N*	495	439	5	*O W N*	725
	3	*Luck*	353		29	*Cr L J*	983		10	*LRARev*	44		112	*I C*	273
	29	*Cr L J*	664		112	*I C*	103		110	*I C*	289	442	5	*O W N*	791
	110	*I C*	216	282	5	*O W N*	301	353 (2)	5	*O W N*	510	449	5	*O W N*	847
227	5	*O W N*	193	285	5	*O W N*	256		110	*I C*	531		112	*I C*	522
	112	*I C*	400		29	*Cr L J*	979	355FB	5	*O W N*	604	460	5	*O W N*	753
228	5	*O W N*	157		112	*I C*	99		111	*I C*	161		112	*I C*	315
	08	*I C*	112	286	5	*O W N*	364	359	5	*O W N*	265	463	110	*I C*	561
229	5	*O W N*	23		3	*Luck*	578		3	*Luck*	487	464	5	*O W N*	880
	3	*Luck*	366		110	*I C*	77		112	*I C*	169		29	*Cr L J*	960
	10	*LRARev*	21	287	5	*C W N*	395	362FB	5	*O W N*	633		111	*I C*	880
	110	*I C*	115		3	*Luck*	508		110	*I C*	826	465	5	*O W N*	836
230	5	*O W N*	190	289FB	5	*O W N*	385	365	5	*O W N*	589	470	110	*I C*	569
	10	*LRARev*	24		3	*Luck*	439		110	*I C*	886	472	5	*O W N*	825
	110	*I C*	50		112	*I C*	130	369	5	*O W N*	622		113	*I C*	263
231	5	*O W N*	20	292	5	*O W N*	357		3	*Luck*	616	475	110	*I C*	564
	107	*I C*	882		10	*AICr R*	445		111	*I C*	465	478	5	*O W N*	895
233	5	*O W N*	143		29	*Cr L J*	657	373	5	*O W N*	601	479	110	*I C*	875
	109	*I C*	310		110	*I C*	209		11	*AI Cr R*	41	480	5	*O W N*	893
	3	*Luck*	416	295	5	*O W N*	463		29	*Cr L J*	763	481	5	*O W N*	832
237	5	*O W N*	11		110	*I C*	410		110	*I C*	795		113	*I C*	258
	3	*Luck*	368	296	107	*I C*	895	374	5	*O W N*	689	482	3	*Luck*	403
	110	*I C*	119	297	5	*O W N*	350		112	*I C*	845		5	*O W N*	61
239	5	*O W N*	48		109	*I C*	639	375	5	*O W N*	674		107	*I C*	887
	3	*Luck*	413		3	*Luck*	584		111	*I C*	715	485	5	*O W N*	891
	110	*I C*	96	298	107	*I C*	885	376	5	*O W N*	686	486	3	*Luck*	490
240	5	*O W N*	42	300	107	*I C*	865		111	*I C*	903		5	*O W N*	130
	107	*I C*	896	301	5	*O W N*	432	378FB	5	*O W N*	735		109	*I C*	187
	10	*LRARev*	19		112	*I C*	142		112	*I C*	288	488	5	*O W N*	886
241 (1)	5	*O W N*	160	302	107	*I C*	880	384	5	*O W N*	646	490	3	*Luck*	411
	29	*Cr L J*	465	303	5	*O W N*	475		111	*I C*	631		5	*O W N*	135
	109	*I C*	113		109	*I C*	892	386	5	*O W N*	677		108	*I C*	723
	10	*AICrR*	241		3	*Luck*	603		111	*I C*	829	491	110	*I C*	860
241 (2)	5	*O W N*	50	305	5	*O W N*	459	391	5	*O W N*	616	492	5	*O W N*	890
	108	*I C*	98		111	*I C*	360		111	*I C*	362	493	111	*I C*	106
	3	*Luck*	392	306	5	*O W N*	441	393	5	*O W N*	698	494	5	*O W N*	882
246	5	*O W N*	121		10	*AICrR*	239		112	*I C*	897	495	5	*O W N*	927
	108	*I C*	109		29	*Cr L J*	543		30	*Cr L J*	33	498	111	*I C*	31
248	5	*O W N*	174		109	*I C*	367	396FB	5	*O W N*	780	500	111	*I C*	194
249	5	*O W N*	44		3	*Luck*	608	401	5	*O W N*	612	501	5	*O W N*	947
	108	*I C*	97	307	5	*O W N*	299		11	*A I Cr R*	32		112	*I C*	408
251FB	5	*O W N*	372		3	*Luck*	326		29	*Cr L J*	801	503	5	*O W N*	897
	3	*Luck*	506		109	*I C*	422		111	*I C*	305	507	5	*O W N*	985
	110	*I C*	70	326	5	*O W N*	497		5	*O W N*	641	509	5	*O W N*	992
257	5	*O W N*	296		29	*Cr L J*	721	402	29	*Cr L J*	893		112	*I C*	387
	112	*I C*	123		110	*I C*	577								

THE

ALL INDIA REPORTER

1928 OUDH

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I. L. R. 3 LUCKNOW

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ABBREVIATIONS EXPLAINED

A. I. Cr. R.	...	... All India Criminal Reports.
All. or A.	...	... Indian Law Reports, Allahabad Series.
A. L. J.	...	... Allahabad Law Journal.
A. I. R. 1928 All.	...	... All India Reporter, 1928 Allahabad.
Bom. or B.	...	... Indian Law Reports, Bombay Series.
Bom. L. R.	...	... Bombay Law Reporter.
A. I. R. 1928 Bom.	...	... All India Reporter, 1928 Bombay.
Bur. L. T.	...	... Burma Law Times.
Cal. or C.	...	... Indian Law Reports, Calcutta Series.
C. L. J.	...	... Calcutta Law Journal.
C. L. R.	...	... Calcutta Law Reports.
C. W. N.	...	... Calcutta Weekly Notes.
A. I. R. 1928 Cal.	...	... All India Reporter, 1928 Calcutta.
Cr. L. J.	...	... Criminal Law Journal.
I. A.	...	... Law Reports, Indian Appeals.
I. C.	...	... Indian Cases.
Lah. or L.	...	... Indian Law Reports, Lahore Series.
A. I. R. 1928 Lah.	...	... All India Reporter, 1928 Lahore.
Lah. L. J. or L. L. J.	...	... Lahore Law Journal.
L. B. R.	...	... Lower Burma Rulings.
A. I. R. 1921 L. B.	...	... All India Reporter, 1921 Lower Burma.
L. R. A.	...	... The Law Reporter, Allahabad.
Luck.	...	... Indian Law Reports, Lucknow Series.
Mad. or M.	...	... Indian Law Reports, Madras Series.
M. L. J.	...	... Madras Law Journal.
Mad. Cr. C.	...	... Madras Criminal Cases.
M. L. T.	...	... Madras Law Times.
L. W. or M. L. W.	...	... Madras Law Weekly.
M. W. N.	...	... Madras Weekly Notes.
A. I. R. 1928 Mad.	...	... All India Reporter, 1928 Madras.
N. L. J.	...	... Nagpur Law Journal.
N. L. R.	...	... Nagpur Law Reports.
A. I. R. 1928 Nag.	...	... All India Reporter, 1928 Nagpur.
O. C.	...	... Oudh Cases.
A. I. R. 1928 Oudh	...	... All India Reporter, 1928 Oudh.
O. L. J.	...	... Oudh Law Journal.
O. W. N.	...	... Oudh Weekly Notes.
P. R.	...	... Punjab Record.
P. L. R.	...	... Punjab Law Reporter.
P. W. R.	...	... Punjab Weekly Reporter.
Pat. or P.	...	... Indian Law Reporters, Patna Series.
P. H. C. C.	...	... Patna High Court Cases (Supplt. to C. W. N.)
A. I. R. 1928 Pat.	...	... All India Reporter, 1928 Patna.
A. I. R. 1928 P. C.	...	... All India Reporter, 1928 Privy Council
Pat. L. J.	...	... Patna Law Journal.
Pat. L. T.	...	... Patna Law Times.
Pat. L. W.	...	... Patna Law Weekly.
Rang. or R.	...	... Indian Law Reports, Rangoon Series.
A. I. R. 1928 Rang.	...	... All India Reporter, 1928 Rangoon.
Sar.	...	... Saraswati's P. C. Judgments.
S. L. R.	...	... Sind Law Reporter.
Suther.	...	... Sutherland's P. C. Judgments.
A. I. R. 1928 Sind	...	... All India Reporter, 1928 Sind.
U. B. R.	...	... Upper Burma Rulings.
A. I. R. 1921 U. B.	...	... All India Reporter, 1921 Upper Burma.
W. R.	...	... Weekly Reporter.

OTHER ABBREVIATIONS.

Appl.	... Applied.	Disc.	... Discussed.	F. B.	... Full Bench.
Appr.	... Approved.	Diss. from	... Dissented from.	P. C.	... Privy Council.
Cons.	... Considered.	Expl.	... Explained.	Ref.	... Referred to.
Dist.	... Distinguished.	Foll.	... Followed.	S. B.	... Special Bench.

THE
ALL INDIA REPORTER
1928
OUDH CHIEF COURT

** A. I. R. 1928 Oudh 1
Full Bench

WAZIR HASAN AND GOKAR NATH MISRA, JJ.
Afterwards
STUART, C. J., RAZA AND PULLAN, JJ.

Ganesh Singh and *another*—Defendants—Appellants.

v.

Bhikham Singh and *another* — Plaintiffs—Respondents.

S. A. No. 40 of 1927, Decided on 1st November 1927, from the decree of the Addl. Sub-Judge, Hardoi, D/- 22nd November 1926.

** (a) *Civil P. C., Sch. 2, para. 16—Trial Court setting aside award—Lower appellate Court decreeing suit in terms of award—Second appeal lies.* (*Gokaran Nath Misra and Wazir Hasan, JJ.*)

A second appeal is maintainable where the Court of first instance sets aside the award and passes a decree on the merits and the lower appellate Court sets aside that decree and passes a decree in accordance with the award. The mere fact that the decree of the lower appellate Court is in accordance with the award is no ground for refusing the appeal. The provision of Cl. (2), para. 16, Sch. 2, applies only where a decree has been pronounced by the trial Court in accordance with the terms of the award : 8 *C. W. N.* 390 and 2 *C. L. J.* 153, *Foll.* [P 3 C 1]

* (b) *Award — Validity should be determined by looking to its operative portion only.* (*Gokaran Nath Misra, J.*)

The award of the arbitrators should, according to the ordinary rule of law, be read as a whole and portions out of it cannot be picked up to show that the finding of the arbitrators was inconsistent with those portions. According to Form No. 5 in the appendix attached to the second schedule, the only thing which arbitrators are required to state in their award is their conclusion and nothing else. Therefore, in order to find out what the award means, one has only to refer to the operative portion of the award ; and the legality or illegality of the award must depend upon that portion and not upon anything else. [P 3 C 2 ; P 4 C 1]

* (c) *Civil P. C., Sch. 2, para. 15—Decree by arbitrators not being one which a Court would ordinarily pass — Award should not be set aside.* (*Gokaran Nath Misra, J.*)

The position of arbitrators is different from that of a Court. The arbitrators are Judges of law as well as facts and their error in law does not vitiate the award. An award, therefore, should not be set aside merely upon the ground that the decree passed by the arbitrators is not one which would have ordinarily been passed by the Court in which that suit was instituted : 29 *Cal.* 167 (*P. C.*) and *Knox* v. *Symmonds* (1791) 1 *Ves. J.* 369, *Rel. on.* [P 4 C 2 ; P 5 C 1]

(d) *Transfer of Property Act, S. 58—Possessory mortgage — Period of redemption need not be fixed.* (*Gokaran Nath Misra, J.*)

In the case of a usufructuary mortgage it is not necessary that the period for redemption should be fixed in the mortgage. If the property to be mortgaged is capable of being ascertained, and further the amount of money, for which the property is to be mortgaged, can also be ascertained, everything which is necessary for a deed of usufructuary mortgage is ascertainable and such a mortgage is valid [P 5 C 1]

** (e) *Civil P. C., Sch. 2, Para. 15 — Award setting aside deed of gift on condition of donor's paying to donee compensation to the extent of benefits received by donor is valid.* (*Per Full Bench*).

One of two brothers executed a gift-deed of immovable property in defendant's favour, but later on both the brothers sued to set it aside alleging the gifted property to be joint family property and also fraud, undue influence and misrepresentation. The pleas were denied by defendants who further pleaded that they had paid certain loans to the donor prior to the gift. The whole matter was referred to arbitration and the arbitrators were authorized to settle all disputes between the parties. The arbitrators decided that the property transferred by the

deed of gift was the sole property of the donor and that he had full power to make the transfer. They did not decide explicitly, but decided impliedly, that there was no fraud, misrepresentation or undue influence and they further decided that the defendants had paid money to the donor and that the deed of gift had been executed as a consequence of the receipt of benefit by him from the defendants. They then set aside the deed of gift upon payment of compensation by the donor to the defendants to the extent of benefits received by him, and directed that the defendants should remain in possession of the property transferred until the plaintiffs paid them the amount of compensation :

Held : that the award is not objectionable either under the provisions of para. 12 or para. 14 and it cannot be set aside. [P 7 C 2]

Har Narain Das and *Ali Zaheer* — for Appellants.

Kedar Nath Tandon — for Respondents.

Gokaran Nath Misra, J. — This is an appeal arising out of a suit brought by the plaintiffs-respondents to recover possession over a share amounting to ten biswansis of thok Purab, mahal Puri, situate in village Mahui Puri, district Hardoi. The plaintiffs alleged that a deed of gift in respect of this share had been executed by plaintiff 1 in favour of defendant 1 on 8th January 1925. The plaintiffs are own brothers ; and defendant 2 is the father of defendant 1. The plaintiffs wished to avoid this deed of gift on two grounds : firstly, that as plaintiffs 1 and 2 constituted a joint Hindu family plaintiff 1 alone had no power to make a gift thereof ; secondly, that the deed of gift had been obtained by undue influence, misrepresentation and fraud practised by defendant 2 in the name of his son, defendant 1. As stated above, the plaintiffs in their suit claimed possession by avoidance of the deed of gift.

The suit was contested by defendants on the ground that plaintiffs 1 and 2 did not constitute a joint Hindu family but were separate from each other, and plaintiff 1 was, therefore, competent to execute the deed of gift in respect of the property in suit. It was also urged in defence that the deed of gift had been executed by plaintiff 1 out of his free will and consent and that no misrepresentation, undue influence or fraud had been practised upon him. It was further alleged that the defendants had helped plaintiff 1 with a sum of about Rs. 700 in order that he might be able to defend himself when he had been prosecuted in a criminal case in the Sessions Court, Hardoi, in which he was ultimately convicted and fined Rs. 200. It was also alleged that over and above this sum of Rs. 700 they had paid to plaintiff 1 Rs. 200 for payment of the fine which had been inflicted upon him. It was further alleged that they had also paid Rs. 400 to the different creditors of plaintiff 1. The following issues were framed in the case :

(1) Was the property in suit the joint family property of the plaintiffs at the time when Ex. 1 (the deed of gift) was executed ?

(2) Were plaintiffs 1 and 2 separate from each other and was the property in suit the separate property of the plaintiff 1 as alleged ?

(3) Was Ex. 1 (the deed of gift) executed under fraud and misrepresentation as alleged ?

(4) Did the defendants pay off any sum of money on behalf of plaintiff 1 and also to plaintiff 1 himself ? If so, how much and to what effect ?

(5) To what relief are the plaintiffs entitled ?

On the date fixed for evidence the parties applied to the Court that the entire case be referred to arbitration of five persons named in the application. They clearly stated in that application that they would willingly accept whatever decision the said arbitrators unanimously arrived at. The case was thereupon referred to arbitration, and the arbitrators filed their award on the 16th April 1926, under which they declared the deed of gift to be inoperative and to be treated as having been cancelled but directed plaintiff 1 to pay Rs. 680. Plaintiff 1 was also directed to execute a mortgage-deed with possession and if he failed to do so, defendant 1 would be entitled to get it executed through Court. Parties were ordered to bear their own costs. It was also declared that plaintiff 1 was quite separate from plaintiff 2 and that the latter had, therefore, nothing to do with the property in suit.

On the 24th April 1926, the two defendants filed a joint application urging their objections against the validity of the award. Their chief objection was that the provision in the award directing plaintiff 1 to execute a mortgage-deed in favour of defendant 1 was legally invalid and incapable of being enforced, such a provision being beyond the power of the arbitrators to impose. They, however, clearly stated in the application that they had no objection if the Court passed a decree on the basis of the rest of the award. The learned Munsif passed a very

brief order on the 19th May 1926, in the following terms :

The award is obviously illegal. I, therefore, supersede the order of arbitration and proceed with the suit myself.

Having passed this order he tried the case himself and as a result of the trial he dismissed the plaintiffs' suit with costs. Plaintiff 1 appealed and the appeal was heard by the Additional Subordinate Judge of Hardoi. The chief contention urged in appeal was that the trial Court was wrong in having set aside the award and tried the case itself. The learned Subordinate Judge accepted that contention and disagreeing, with the view of the trial Court held the award to be good and passed a decree in terms thereof. The defendants have now come up to this Court in second appeal, and the chief contention urged by their learned counsel is that the lower appellate Court was wrong in passing a decree in accordance with the terms of the award since the award was invalid and no decree should have been passed on the basis thereof.

A preliminary objection was taken on behalf of the respondents that no appeal could lie from the decree of the lower appellate Court since it had been passed in terms of the award. Para 16, Sch. 2, Civil P. C., was referred to in this connexion. We are of opinion that a second appeal is maintainable where the Court of first instance sets aside the award and passes a decree on the merits and the lower appellate Court sets aside that decree and passes a decree in accordance with the award. The mere fact that the decree of the lower appellate Court is in accordance with the award is no ground for refusing the appeal. In our opinion the provision in Cl. (2) of para. 16, Sch.2, applies only where a decree has been pronounced by the trial Court in accordance with the terms of the award. This appears to be clear from the entire scheme of Sch. 2. We are supported in this view by two decisions of the Calcutta High Court—one reported in *Shyama Charan Pramanik* v. *Prolhad Durwan* (1), and the other in *Chintamoni Aditya* v. *Haladhar Maiti* (2). Both these decisions were under the previous Civil P. C. (Act 14 of 1882), in which S. 522 was equivalent to para 16, Sch. 2, of the present Code. Mookerjee, J., held in the second case that the bar of appeal provided by S. 522 was applicable only when a decree had been made in accordance with the award by the Court of first instance and not when a similar decree had been made by a Court of appeal in reversal of the order of the first Court setting aside the award. We, therefore, overrule the preliminary objection.

I now proceed to discuss the appeal on the merits, and to examine the contention urged by the learned counsel for defendants-appellants, viz., that the award is invalid in law and that, therefore, no decree should be passed on the basis thereof. We have heard the learned counsel at great length and have taken time to consider our judgment. The conclusion at which I have arrived is that the award dated the 16th April 1926 is a good award and must be maintained.

The chief contention put forward by the learned counsel for the appellants was that the arbitrators had in the body of the award declared that the deed of gift had been executed by plaintiff 1 (Bhikham Singh) for consideration (ba muawiza) and that Rs. 680 had been spent by defendant 1 (Ganesh Singh) on behalf of plaintiff 1 in paying off two decrees of the Court of the Subordinate Judge of Hardoi and a debt due to one Piare Lal bazaz (cloth seller) from him. It was urged that this portion of the award was inconsistent with the operative portion thereof where the arbitrators had declared the deed to be inoperative and directed it to be cancelled, asking plaintiff 1, to pay a sum of Rs. 680 and to execute a possessory deed of mortgage in favour of defendant 1, in respect of the property in suit. It was argued that if the deed of gift was executed for consideration it necessarily implied that the deed had not been executed under fraud, misrepresentation or undue influence and consequently the award of the arbitrators could not stand. I have given my best consideration to this argument and have come to the conclusion that it cannot be accepted. I am unable to interpret the word 'ba-muawiza' (with consideration) as used by the arbitrators to mean that the deed was a good one and its validity the arbitrators were going to uphold. Indeed, the operative portion of the award which just follows the passage containing this expression directly militates against this view. The award of the arbitrators should according to the ordinary rule of

(1) [1901] 8 C. W. N. 390.
(2) [1905] 2 C. L. J. 153=10 C. W. N. 601.

law be read as a whole and portions out of it cannot be picked up to show that the finding of the arbitrators was inconsistent with those portions. We are not concerned with the reasoning of the arbitrators; the only thing with which we are concerned is the operative portion of their award.

In the appendix attached to Sch. 2, Civil P. C., Form No. 5 provides how an award is to be stated; and it appears to us from the said form that the only thing which arbitrators are required to state in their award is their conclusion and nothing else. It, therefore, appears to me that in order to find out what the award in this case was we have only to refer to the operative portion of the award; and the legality or illegality of the award must depend upon that portion and not upon anything else. It is possible that the arbitrators might have meant by the expression 'ba-muawiza' to mean that some money had been spent by defendants on behalf of plaintiffs. Issue No. 4 was expressly directed towards this matter. I do not, however, wish to pursue the matter further. It appears that plaintiff 1, is a young man of 20 years, and defendant 2, the father of defendant 1, helped him with money and in other ways while a criminal case was going on against him in the Sessions Court of Hardoi. It is, under the circumstances, possible that defendant 2, might have acquired influence over plaintiff 1, and the deed of gift might have been the result of the said influence. I do not wish to arrive at any definite finding on the point since it is not necessary for us to do so. We are not entitled to sit in judgment on the award of the arbitrators. I only point out to these circumstances as they appear to us to exist on the record as reasons which might have very well induced the arbitrators to set aside the deed of gift and to declare it inoperative and to direct at the same time plaintiff 1, to pay defendants a sum of Rs. 680 which in the opinion of the arbitrators was proved to have been spent by them on his behalf.

Another contention which was urged before us by the learned counsel for the defendants-appellants was that the direction in the award calling upon plaintiff 1 to execute a deed of mortgage in favour of the defendants was an invalid and unenforceable condition and that the arbitrators had no jurisdiction to incorporate such a condition in their award. I have not been able to understand the attitude of the defendants regarding this matter. The condition is obviously to their own benefit, and unless their object in raising the contention be to get thereby the whole of the award set aside, I do not see any point in the objection. In my opinion plaintiff 1's claim for possession of 10 biswansis share by avoidance of the deed of gift executed in favour of defendant 1 had been referred to arbitration and the arbitrators were quite within their authority when they declared the said deed of gift to be inoperative, and while cancelling it they also directed plaintiff 1 to pay defendant 1 a sum of Rs. 680 which in their opinion was proved to have been spent by him on his (plaintiff 1's) behalf. I do not see any illegality in such an award, and am of opinion that it cannot be considered to be in any way invalid or unenforceable. It was merely a direction to make the position of defendants secure in regard to the money spent by them on behalf of plaintiff 1.

While dealing with this point I might also state that the position of arbitrators is different from that of a Court. It may be that it would not be open to the Court to pass a decree like the one passed by the arbitrators in this case. If the Court had found the deed to have been executed under undue influence, misrepresentation or fraud, it would have passed a decree declaring the deed to be inoperative and ordering it to be cancelled. If the Court found that the deed was executed with full and free consent the suit of the plaintiffs would have been dismissed. The arbitrators are, however, judges of law as well as of facts; and they may have erred in law, but their error in law does not vitiate the award: vide *Ghulam Khan* v. *Muhammad Hassan* (3). In *Knox* v. *Symmonds* (4) Lord Chancellor Thurlow observed as follows:

> Upon a general reference to arbitration of all matters in dispute between the parties, the arbitrator has a greater latitude than the Court in order to do complete justice between the parties; for instance, he may relieve against a right which bears hard upon one party; but which having been acquired legally and without fraud could not be resisted in a Court of justice.

(3) [1902] 29 Cal. 167=29 I. A. 51=6 C.W.N. 226=8 Sar. 154 (P.C.).
(4) [1791] 1 Ves. J. 369=3 Bro. C. C. 358.

It, therefore, appears to me that we will not be justified in setting aside the award merely upon the ground that the decree passed by the arbitrators is not one which would have ordinarily been passed by the Court in which that suit was instituted.

I might also refer to another objection, which was urged in connexion with the validity of the award, it being that the condition, as laid down by the arbitrators, requiring the plaintiff 1 to execute a deed of possessory mortgage in favour of defendant 1, was a vague and indefinite condition and was not capable of being enforced. On this point I am in entire agreement with the opinion of the learned Subordinate Judge that there is no vagueness or indefiniteness in the proposed terms of the mortgage. A possessory mortgage laying down that the mortgagee is to obtain possession of the property in lieu of a fixed sum with a condition that the redemption is to take place whenever the mortgage money is paid, is quite a good and valid transaction. In the case of a usufructuary mortgage it is not necessary that the period for redemption should be fixed in the mortgage. As to the property to be mortgaged it is clear that the property which was the subject-matter of the gift was intended to be mortgaged. If, therefore, the property to be mortgaged is capable of being ascertained and further the amount of money, for which the property is to be mortgaged, can also be ascertained, I am of opinion that everything, which is necessary for a deed of usufructuary mortgage, is ascertainable and on that score no objection can be taken to the validity of the award. The well-known rule of law is *certum Est quod certum reddi poted* (that is sufficiently certain, which is capable of being made certain) and that should be applied to this case: vide Broom's Legal Maxims, Ninth Edition p. 399.

I am, therefore, of opinion that the decision of the learned Subordinate Judge is correct and must be maintained. I would, therefore, dismiss this appeal with costs.

Wazir Hasan, J.—The material portion of the award in question is as follows:

The facts of the case are that a deed of gift was executed by Bhikam Singh (plaintiff) in favour of Ganesh Singh (defendant) as against which deed Bhikam Singh has brought a suit in Court for cancellation on the allegation that it is fictitious, without consideration and obtained by deception and fraud. But Ganesh Singh, etc., the defendants, deny this. On a consideration of the evidence and documents produced by the parties we have reached this conclusion that the deed of gift executed by Bhikam Singh aforesaid was executed for consideration which comprises Rs. 680 which Ganesh Singh has paid to Bhikam Singh in the following manner. . . . . Accordingly we decide this case in this way that by declaring the deed of gift as cancelled and non-existent we award Rs. 680 due to the defendants from the plaintiff for which the plaintiff shall execute within one month a deed of possessory mortgage in favour of the defendant. In the event of the plaintiff not executing the deed of mortgage within one month the defendant shall be entitled to obtain execution of the possessory mortgage from the plaintiff through Court. The parties will bear their own costs.

In my opinion this award is not only illegal in part, but is also vague and indefinite in the whole, and contradictory in its own terms. To my mind the direction in the award that the plaintiff shall give a possessory mortgage to the defendant, and that the defendant shall accept such a mortgage is a condition precedent on which the decision as to the cancellation of the deed of gift rests. The intention of the whole award is that relief as to the cancellation shall enure only in the event of the execution of the contemplated deed of mortgage. Now that is a contingency happening of which is made to rest first on the option of the plaintiff, and secondly, on the option of the defendant. Either of them may well choose not to exercise the option. Thus there is an inherent lacuna in the award. This makes the award unenforceable and therefore illegal.

Further I do not see how it is possible any more for the arbitrators than for a Court of justice to compel parties to specifically perform such acts as would make one of such parties the debtor of the other and the latter a creditor of the former: *South African Territories* v. *Wellington* (5); Fry on Specific Performance, p. 24, and *Meenakshisundara Mudaliar* v. *Rathnasami Pillai* (6). In this view of the case also this part of the award is illegal, and as I am of opinion that this part lays down a condition precedent on the fulfilment of which the cancellation of the deed of gift entirely

(5) [1898] A. C. 309=67 L. J. Q. B. 470=46 W. R. 545=78 L. T. 426=14 T. L. R. 298.
(6) [1918] 41 Mad. 959=8 M. L. W. 438=35 M. L. J. 489=49 I. C. 291=(1918) M. W N. 811.

depends, the whole award must be held as illegal. It is impossible to conceive that the decision as to the cancellation of the deed of gift is not subservient or merely a sequel to the happening of the contingency contemplated by the condition under consideration. It appears to me that the principle of the decision of their Lordships of the Judicial Committee in the case of *Ram Protap Chamria* v. *Durga Prosad Chamria* (7) is applicable to this case.

I am of opinion that the direction that a mortgage-deed shall be executed, when carefully analyzed, makes the award wholly unenforceable. We cannot treat this direction as merely indicating a method of payment of Rs. 680. To me it seems to be the essence of the whole award. If by virtue of the direction we cannot give to the plaintiff liberty to pay and cannot impose an obligation on the defendant to receive Rs. 680 in cash, as obviously we cannot, the direction cannot be treated as merely an indication of the manner of payment of Rs. 680. It appears to me that according to the intention of the arbitrators the possessory mortgage when it came into existence is to take the place of the gift in question. In so doing the arbitrators created a new relation between the parties: of debtor and creditor; of mortgagor and mortgagee. This they had no authority to do. This reasoning brings the case within the rule laid down by Lord Denman, Chief Justice, in the case of *Ross* v. *Boards* (8). I will quote here the observations of Lord Denman which to my mind are very apposite to the case before us:

> The objection insisted upon must prevail. The agreement between these parties was, that the defendant should sell the land to the plaintiff, the title to be made out to the satisfaction of Mr. Blunt. It was referred to the arbitrator to settle all questions between the parties, on the agreement. He does not decide the questions arising on the agreement, but awards, of and concerning the matters referred, that the defendant shall convey to the plaintiff the title contained in the abstracts, to the parcel of ground specified in the agreement, such parcel to extend, and be bounded, as the award points out. He leaves it in doubt whether the title is good or bad, and, in effect orders that it shall be taken with all faults. The doubt is rendered stronger by the direction that an indemnity bond shall be executed, which is more than the arbitrator had a right to order. The award is not final, because, instead of deciding the questions referred, it sets on foot new ones; and instead of ascertaining a right for the plaintiff, gives him a new action for the recovery of damages.

I have said before that the award is vague and indefinite. It is so in relation to the intended mortgage. Except the consideration every other necessary ingredient is wanting. The subject-matter of the mortgage, the period as to the continuance of the mortgage, the time at which the right to redeem shall accrue to the mortgagor are all unprovided for. The best test it seems to me will be to treat this direction as a contract between the parties and then to see whether a specific performance could be claimed, by one or the other, of such a contract. No elaborate argument is needed to show that specific performance of such a contract is wholly out of question.

I have also said before that the award is contradictory in its own terms. The first conclusion at which the arbitrators reach is that the deed of gift has been executed for consideration. This clearly means that it is not open to the objections raised by the plaintiff. This being so it is a contradiction in terms then to say, as the arbitrators have said, that it is liable to be cancelled and to be replaced by a mortgage.

Finally, it is enough to say that I am clearly of opinion that the arbitrators on the terms of the award do not declare the cancellation of the deed of gift unless the condition relating to the execution of the deed of mortgage was fulfilled and that if it was not fulfilled or was incapable of being fulfilled, or was otherwise illegal or was beyond the authority of the arbitrators to make it, the deed of gift shall not stand cancelled. I would therefore allow the appeal, set aside the decree of the Court below and restore the decree of the Court of first instance with costs in favour of the appellants in all Courts.

On the preliminary objection as to the maintainability of the appeal I agree with the opinion of my learned brother.

[The following order was made by Wazir Hasan and Gokaran Nath Misra, JJ.:]

Order.—In view of the fact that there is a difference of opinion between us as to what ought to be the decision in the case, we direct that the whole case

(7) A. I. R. 1925 P. C. 293=53 Cal. 258=53 I. A. 1 (P. C.).

(8) [1883] 7 L. J. Q. B. 209=8 A. & E. 291=3 N. & P. 382=2 Jur. 567=1 W. W. & H. 376.

be referred for decision to a Full Bench in accordance with S. 13 (ii) (b) Oudh Courts Act, 1925.

Opinion.

Stuart, C. J.—The reference before us is as follows: A certain Bhikham Singh executed on the 8th January 1925, a deed of gift of a share in a village in favour of Ganesh Singh. The property transferred by the deed of gift is stated in the plaint to have been worth Rs. 1,500 but it is on the record that Bhikham Singh had executed a simple mortgage in reference to this property. Bhikham Singh with his brother Ratan Singh instituted, on the 4th January 1926, a suit in the Court of the Munsif of Hardoi in which they claimed as against Ganesh Singh the donee and his father Dulam Singh possession of the property transferred by the deed of gift on the allegations that the property in question was the property of a joint Hindu family consisting of Bhikham Singh and Ratan Singh, that Bhikham Singh alone had no power to transfer the property by gift, and that the execution of the deed of gift had been obtained by the exercise of misrepresentation, fraud and undue influence. Ganesh Singh and Dulam Singh replied that Bhikham Singh and Ratan Singh, although brothers, were not members of a joint Hindu family, that they had separated some years previously and that Ratan Singh had become a convert to the Sikh religion. They added that the property in question was the sole undivided property of Bhikham Singh, that he had executed the deed of gift of his own free will and accord without undue influence, misrepresentation or fraud and that the deed of gift was executed in recompense for past services rendered by the defendants who had advanced money on several occasions to Bhikham Singh. The defendants in one portion of their written statement put forward that if the plaintiffs were awarded possession they should only be awarded possession on payment of the amount paid by the defendants.

The dispute between the parties may then be summarized as follows: The plaintiffs wished to repudiate the deed of gift and to obtain the property back without payment of anything. The defendants supported the deed of gift and asked that they should be allowed to retain the property, but added that if they were obliged to give it up they should be recompensed for what they had paid already. The matter was referred to the arbitration of arbitrators. The terms of the reference were very wide. The arbitrators were directed to settle all the disputes between the parties. The arbitrators decided that the property transferred by the deed of gift was the sole property of Bhikham Singh and that he had full power to make the transfer. They did not decide explicitly, but decided impliedly, that there was no fraud, misrepresentation or undue influence and they further decided that the defendants had paid money to Bhikham Singh and that deed of gift had been executed as a consequence of the receipt of benefit by Bhikham Singh from the defendants. In these circumstances it was undoubtedly open to them to dismiss the suit. But in my opinion they were not precluded under the terms of the reference from setting aside the deed of gift upon payment of compensation by Bhikham Singh to the defendants. The whole of the dispute had been placed before them. It was perfectly reasonable for the arbitrators to take the view that the property transferred by the deed of the gift was of value considerably greater than the value of the benefits previously received and in these circumstances I consider that they were well within their rights in arriving at the decision at which they did arrive.

This decision was that, although the property was the sole property of Bhikham Singh and though the execution of the deed of gift was an act of his independent volition, nevertheless he should be permitted to retain the property transferred by the deed of gift provided that he paid Rs. 680 to the defendants. They fixed Rs. 680 as the value of the benefits which he received from the defendants and they ended with a direction that Bhikham Singh was to execute a deed of usufructuary mortgage in favour of the defendants for a consideration of Rs. 680. I do not consider that that portion of the award by which they directed that the defendants should remain in possession of the property transferred until the plaintiffs paid them Rs. 680 is objectionable either under the provisions of para 12 or para 14 of Sch. 2, Civil P. C., and I, undoubtedly, am unable to consider that that portion of the award could be set aside on any of the grounds mentioned in para 15.

I should have had more difficulty in deciding whether this Court should or should not direct that the order, that a usufructuary mortgage be executed should be expunged from the award on the ground that it was upon a matter not referred to arbitration which could be separated from the other part and did not affect decision on the matter referred. But I have been relieved from any difficulty on that score as the parties before us have now requested that that portion of the award should be expunged. They have accepted the conclusion that it is quite sufficient if the decree states that the defendants remain in possession of the property in question until Bhikham Singh pays to them the sum of Rs. 680. The decree will be sufficient title-deed without the execution of a deed of mortgage.

I should accordingly suggest that the decision on the appeal should be this: that in place of the present decree the following decree be passed : That the deed of gift of the 8th January 1925 should be set aside and that Ganesh Singh and Dulam Singh retain possession of a share of 10 biswansis out of 20 biswanis in village Mahui Puri mahal Puri, thok Purab, pargana Gopamau until Bhikham Singh pays them Rs. 680. Bhikham Singh will recover possession of the said share on payment of Rs. 680. I should suggest that the parties pay their own costs throughout these proceedings.

Raza, J.—I agree and have nothing to add to the judgment that has just been delivered by the Hon'ble Chief Judge.

Pullan, J.—I also agree with the judgment delivered.

D.D. *Decree modified.*

A. I. R. 1928 Oudh 8

STUART, C. J., AND RAZA J.

Ali Husain—Plaintiff—Appellant.

v.

Mohammad and *others*—Defendants—Respondents.

S. A. No. 216 of 1926, Decided on 26th September 1927, from the decree of the Sub-Judge, Barabanki, D/- 3rd February 1926.

Civil P. C., O. 21, R. 36—Suit for possession—Delivery of Symbolical possession gives fresh start for limitation.

If upon an execution sale, symbolical possession has been delivered to auction-purchaser in accordance with the provisions of the law, the auction-purchaser gets a fresh start for the computation of limitation from the date of the delivery of such possession : *A. I R.* 1921 *All.* 9 (*F. B.*), *Foll.* [P 8 C 2 P 9 C 1]

M. Wasim—for Appellant.

Bishambhar Nath for *Bisheshar Nath*—for Respondent No. 4.

Judgment.—The plaintiff-appellant obtained a decree for possession of certain property on the 12th November 1912. In execution he was placed in possession over certain property in the following manner. The property was at that time in the possession of a mortgagee. He had obtained possession against the mortgagor and his right was subordinate to the right of the mortgagee in possession. Thus all that he had obtained was the same possession to which the mortgagor was entitled, that is to say, symbolical possession. The papers in the execution proceedings show clearly, in our opinion that he obtained symbolical possession, the actual persons in physical possession remaining in physical possession and a proclamation being made by beat of drum as to the plaintiff's possession. He sued on the 29th April 1924, for possession over certain plots on the ground that he had been subsequently dispossessed. The trial Court found that these plots were not covered by his decree and dismissed the suit accordingly. He appealed. The lower appellate Court found that the plots were covered by his decree, but dismissed the suit on the ground that it was time barred because he had not obtained possession in law over the plots in question. The learned Judge arrived at this conclusion on the ground that he had obtained possession under O. 21, R. 35 when he should have obtained possession under O. 21, R. 36, Civil P. C. But we are clearly of opinion, after having gone through the papers, that he actually obtained possession under O. 21, R. 36 and in these circumstances his possession was good in law. The decision which the learned Judge has quoted in *Jang Bahadur Singh* v. *Hanwant Singh* (1) is in favour of the plaintiff-appellant, not, as the learned Judge would have it, against him. This is a decision of a Full Bench of the Allahabad High Court which lays down that if upon an execution sale possession has been delivered to the auction-purchaser in accordance with the provisions of the law the auction purchaser

(1) A. I. R. 1921 All. 9=43 All. 520 (F. B.)

gets a fresh start for the computation of limitation from the date of the delivery of such possession. This is the view of the law which we take. But on this view of the law the plaintiff obtained possession on the 15th December 1912 in accordance with the provisions of the law over the property in suit, and this property, according to finding of fact which cannot be questioned in second appeal, was covered by the terms of his decree. In these circumstances the suit was not time barred. There is no necessity to send the case back under the provisions of O. 41, R. 23,Civil P. C. as the whole of the facts necessary for decision are before us and we are competent under the provisions of S. 103 to dispose of the case finally. Under the powers which we possess under S. 103 we grant the plaintiff-appellant a decree for possession over plots Nos. 3276, 3277 and 3278 with three years' mesne profits prior to the date of suit and mesne profits up to the date of delivery of possession. We direct the trial Court to make an inquiry as to the amount of the mesne profits in question. That amount, when so decided, will be incorporated in the decree. The defendants will pay their own costs and those of the appellant in all Courts.

N.D. *Appeal allowed.*

A. I. R. 1928 Oudh 9

GOKARAN NATH MISRA AND RAZA, JJ.

Raja Rukmangad Singh—Plaintiff—Appellant.

v.

Balbhaddra Prasad and *others*—Defendants—Respondents.

*S. Rent Appeal No. 23 of 1925, Decided on 6th August 1926, against the decree of 3rd Addl. Dist. Judge., Lucknow, D/- 19th November 1924.

(a) *Oudh Rent Act* (1886), *S.* 108 (15)—*Co-sharers making their own collections but found to collect more than their share—Co-sharer receiving less can call them to account for the same.*

The practice among the co-sharers of the village of collecting rents according to their shares cannot relieve either the lambardar or other co-sharers of the necessity to account to one who is admittedly a co-sharer. What should be done is that the amount collected by each co-sharer should be taken into consideration and the accounts settled as a whole. If any co-sharer is found to have collected less than his share out of the total collections and the other co-sharers to have collected more than their shares the former should be held entitled to call upon them to account for the same. [P 10 C 2]

(b) *Oudh Rent Act* (1886). *S.*126—*Co-sharers making their own collections*—*"Division of land" not proved—Lambardar is to be treated as a "Manager" and his right to collect rent is not taken away.*

The mere fact that the co-sharers make their own collections in a joint estate does not amount to a 'division of land' among them, and does not take the case out of the provisions of S. 126 and disentitle the lambardar from collecting rents and doing all necessary acts relating to the management of the estate for the common benefit of all the co-sharers. The "Manager" referred to in Cl. (1), S. 126 of the Act must be the lambardar: 18 *O. C.* 5, *Foll.* [P 10 C 1]

Bishambar Nath—for Appellant.

H. Husain—for Respondents.

Order.—This is an appeal in a profits case. The appellant Raja Rukmangad Singh is a mortgagee of a portion of a share in village Jituli and there are as many as 25 co-sharers in the village. The Raja brought a suit for profits against all the co-sharers out of whom three were lambardars, on the allegation that they had collected more than their share and were therefore liable to account to the plaintiff.

The learned Assistant Collector who tried the case found that the co-sharers made their own collections in the village, and that one of them namely Baldeo Singh, had collected more than his share. He, therefore, gave the plaintiff a decree for that amount against him.

The plaintiff carried the matter further in appeal to the learned District Judge and he held that because the co-sharers had been found to make their own collections in the village the defendants though lambardars were not liable to account. He also held that a lambardar was liable only for the payment of the Government revenue and was not responsible for profits of co-sharers where they made collections themselves. In result he dismissed the appeal and confirmed the decree passed by the learned Assistant Collector.

The plaintiff appealed to this Court and the matter came up for hearing before a single Judge. The accuracy of the proposition laid down by the learned District Judge was challenged in appeal and the case has now been laid for a decision before a Bench.

* This case is mentioned in Mata Prasad Saksena's Oudh Rent Act (6th Edition: 1927).

In our opinion the view taken by the learned District Judge is not correct. S. 126, Oudh Rent Act (22 of 1886) provides that a co-sharer in a joint estate or under-proprietary or other tenure, in which a division of land has not been made among the sharers, shall not exercise any of the powers conferred by the Act in regard to the recovery of arrears of rent, enhancement of rent, ejectment of tenants or distress otherwise than through a manager authorized to collect the rents on behalf of all the sharers. It is also provided in the same section that in pattidari estates or tenures those powers shall be exercised only through a lambardar or through the pattidar who is entitled to collect the rent of the patti.

It was admitted before us that the village Jituli in respect of which the claim for profits has been laid in this case is a village in which land has not been divided among the co-sharers The point which requires decision is whether lambardars of that village are entitled to collect rents, because if they are entitled to collect rents they would be liable to account for profits to their co-sharers. It appears to us to be clear that the mere fact that the co-sharers make their own collections in the village does not amount to a division of land among them. If, therefore, the co-sharers in this village have been making their own collections that does not take the case out of the provisions of S. 126 of the said Act and disentitle the lambardars from collecting rents. The powers mentioned in the said section are to be exercised only through a manager authorized to collect rents on behalf of all the co-sharers. It was contended on behalf of the appellant that the lambardar was to be treated as such a manager, and in our opinion the contention is well-founded. It was held by the late Court of the Judicial Commissioner of Oudh in *Bhan Pratap Sahi* v. *Manohar Lal* (1) that the 'Manager' who is referred to in Cl. (1) S. 126, of the aforesaid Act must be the lambardar, and in a joint estate he was entitled to collect rents, settle tenants, eject tenants, procure enhancement of rents and do all necessary acts relating to the management of the estate for the common benefit of all the co-sharers. With this opinion we fully agree. It, therefore, appears to us to be quite clear that simply because there is practice among the co-sharers of the village of collecting rents according to their shares it cannot be held that it would relieve either the lambardar or other co-sharers of the necessity to account to the plaintiff who is admittedly a co-sharer. Section 108 Cl. 15, Oudh Rent Act expressly provides for a suit by a sharer against a lambardar or co-sharer for arrears of the profits of an estate or any part thereof or for the rendering and settlement of accounts in respect of those profits. The plaintiff-appellant has brought his suit under this very clause and he is entitled to call upon the lambardars or other co-sharers of his village to render and settle accounts in respect of the profits of that village. This right of his cannot, in our opinion, be taken away simply because the co-sharers in the village happen to make their own collections.

In our opinion the plaintiff's suit has been looked at from an erroneous point of view. What should have been done was that the amount collected by each co-sharer should have been taken into consideration and the accounts settled as a whole. If the plaintiff be found to have collected less than his share out of the total collections and the defendants to have collected more than their shares the plaintiff should he held entitled to call upon them to account for the same. We, therefore, allow the appeal and remand this case to the learned District Judge for disposal in the light of the above observations made by us. Costs in the case will abide the result.

D.D. *Appeal allowed.*

(1) [1915] 18 O. C. 5=28 I. C. 236=2 O. L. J. 123

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* A. I. R. 1928 Oudh 10

WAZIR HASAN AND RAZA, JJ.

Mohammad Ali —Defendant—Appellant.

v.

Jhao Lal and *another*—Plaintiffs—Respondents.

S. A. No. 144 of 1927, Decided on 24th October 1927, from the decree of the Sub-Judge, Lucknow, D/- 17th January 1927.

* (a) *Hindu Law—Debts—Immoral and illegal—Sons are not liable to pay costs in suits brought and defended by the father on false and dishonest grounds.*

Where the grounds on which the father bases his claim against other persons and also the

grounds on which he resists the suit brought against him by others are false and dishonest, the sons are not liable to pay costs for which decrees are passed against the father : 20 *M. L. J.* 89, *Foll* ; *A. I. R* 1925 *Oudh* 230 ; *A. I. R.* 1925 *Oudh* 325 ; 40 *Bom* 126 ; 33 *All.* 472 ; 39 *Cal.* 862 ; 40 *Cal.* 288 ; 37 *Mad.* 458 and 65 *P. R.* 1900, *Ref.* [P. 13 C 1]

(*b*) *Hindu Law—Debts—Avyavaharika debt, meaning of.*

The expression "avyavaharika" debt means a debt which is not supportable as valid by legal arguments, and on which no right could be established by the creditor in a Court of Justice : 37 *Mad.* 458, *Foll.* [P 12 C 2]

Hyder Husein and *A C. Mukerji*—for Appellant.

Ali Zaheer and *Mahabir Prasad Srivastava*—for Respondents.

Judgment.—This is an appeal from a decree of the Subordinate Judge, Lucknow, dated the 17th January 1927, setting aside a decree of a Munsif in Lucknow, dated the 22nd September 1926.

The facts of the case, so far as it is necessary to state them for the purpose of disposing of this appeal are as follows:

Sheikh Mohammad Ali (defendant 1) had obtained two decrees for costs against Dayal (defendant 2), father of Jhao Lal (plaintiff 1) and grandfather of Babu Lal (plaintiff 2). The decrees were passed under the following circumstances : In September 1910 Dayal sold to Sheikh Mohammad Ali a four annas share in village Chaurasi out of the seven annas share in the possession of Mt. Menda and Mt. Dhanu. Sheikh Mohammad Ali was to sue jointly with Dayal for the recovery of the entire seven annas share and was defraying expenses of the litigation. They brought the suit and eventually the claim was decreed by the Court. In 1916 Dayal sued Sheikh Mohammad Ali for possession of a seven and half pies share which the latter had got under a compromise filed in the former suit. Dayal's suit against Sheikh Mohammad Ali was based on the allegation that the sale-deed executed by him in favour of Sheikh Mohammad Ali was void as it was without consideration and an unconscionable transaction. Sheikh Mohammad Ali also brought a suit against Dayal for possession of a three annas four and half pies' share on the ground that he was entitled to a four annas share under the terms of the sale-deed executed by Dayal, but had obtained possession over a seven and half pies' share only. Dayal's suit was dismissed, but Sheikh Mohammad Ali's suit was decreed by the Courts. Costs were awarded to Sheikh Mohammad Ali against Dayal in both the suits. Sheikh Mohammad Ali took out execution of the decree for costs and attached an eight annas zamindari share to realize the decretal amount (Rs. 454-4-0).

Jhao Lal, son of Dayal and Babu Lal, grandson of Dayal, then brought the present suit for a declaration that the zamindari share is not liable to attachment and sale in execution of the decrees for costs obtained by Sheikh Mohammad Ali against Dayal. The suit was dismissed by the first Court, but decreed by the lower appellate Court on plaintiff's appeal. Sheikh Mohammad Ali has now come to this Court in second appeal.

It appears that Dayal died after the appeal was heard by the learned Subordinate Judge. The learned Subordinate Judge has decreed the appeal holding that Dayal's conduct in both the suits mentioned above in which costs were decreed against him was 'like that of a dishonest man. It is contended on behalf of the appellant that Dayal's conduct could not be said to be immoral and it was the duty of the son and the grandson of Dayal, under the Hindu law, to pay off the debts of Dayal which were not tainted with immorality.

In our opinion there is no substance in this appeal. The appellant's learned counsel has referred to the following cases.

Shambhu Bhan Singh v. *Chandra Shekhar Bakhsh Singh* (1), *Mata Din* v. *Mahraj Din* (2), *Ram Krishna Trimbak Nadkarni* v. *Narayan* (3). *Sumer Singh* v. *Liladhar* (4), *Chhakauri Mahton* v. *Ganga Prasad* (5), *Kirpal Singh* v. *Balwant Singh* (6). *Venugopala Naidu* v. *Ramanadhan Chetty* (7).

In was held in *Shambhu Bhan Singh* v. *Chandra Shekhar Bakhsh Singh* (1) that under the Hindu law a decree for mesne profits passed against the father alone as the result of a litigation in

(1) A. I. R. 1925 Oudh 230.
(2) A. I. R. 1925 Oudh 325.
(3) [1916] 40 Bom. 126=31 I. C. 301=17 Bom. L. R. 955.
(4) [1912] 33 All. 472=9 I. C. 624=8 A. I. J. 306.
(5) [1912] 39 Cal. 862=16 C. W. N. 519=12 I. C. 609=15 C. L. J. 228.
(6) [1913] 40 Cal. 288=17 I. C. 666=11 A. L. J. 1 (P. C.).
(7) [1913] 37 Mad. 458=14 I. C. 705=23 M. L. J. 61.

which he unsuccessfully defends his position to the family estate can be executed against the joint family property. It is hardly possible to characterize such conduct of the father as immoral or illegal.

It was held in *Mata Din* v. *Maharaj Din* (2), that the liability imposed by the Court upon the father to indemnify the person, with whose property he had improperly interfered, creates a debt which may justly be recovered from the ancestral property in the hands of the son.

It was held in *Ram Krishna Trimbak Nadkarni and others* v. *Narayan* (3), that sons cannot escape liability for payment of the debts of their father contracted in a trade carried on by him in contravention of Government Servants' Conduct Rules on the ground that the conduct of their father in contracting debts in such trade was "avyavahar."

It was held in *Sumer Singh* v. *Liladhar* (4), that under the Hindu law money borrowed by the father to defend a suit for defamation is a debt for which a Hindu son and grandson are liable.

It was held in *Chhakauri Mahton* v *Ganga Prasad* (5), that a decree obtained by a person for damages on account of injury done to his crops by the obstruction of a channel through which he was entitled to irrigate his land, against one *B*, who was governed by the Mitakshara school of Hindu law, could be executed on his death against his son where it could not be said that the decree obtained was due to an act of the judgment-debtor, which was a wanton interference with the rights of the decree-holder, and that the liability imposed thereby on the judgment-debtor was an illegal or immoral debt.

In *Kirpal Singh* v. *Balwant Singh* (6), the ruling in *Devi Ditta* v. *Saudagar Singh* (8) that a "just debt" means

> a debt which is actually due, and is not immoral, illegal or opposed to public policy, and has not been contracted as an act of reckless extravagance or of wanton waste, or with the intention of destroying the interests of the reversioner

was approved of by their Lordships of the Judicial Committee.

It was held in *Venugopala Naidu* v. *A. Ramanadhan Chetty* (7), that the liability of a Hindu father, who as a member of a devastanam committee, unauthorizedly spends the devastanam funds for expenses of a litigation, and is afterwards directed by the Court to pay the costs out of his own private funds, constitutes a debt which his sons and grandsons are under a pious obligation to discharge. The expression "avyavaharika" debt means a debt which is not supportable as valid by legal arguments, and on which no right could be established by the creditor in a Court of justice. The following observations were made by Sadasiva Ayyar, J., in his judgment in that case :

> I am inclined to adopt Colebrook's paraphrase, namely, "debt incurred for a cause repugnant to good morals" as more nearly approaching the true import of the expression than any of the meanings given by the other authorities. If I might venture upon giving my own translation of the expression "avyavaharika" I would paraphrase an "avyavaharika debt" as a debt which is not supportable as valid by legal arguments and on which no right could be established in the creditor's favour in a Court of Justice. As regards the case in *Ramaiengar* v. *Secretary of State* (9) also relied on strongly by the appellant's learned vakil, that decision rested 'on its own special circumstances', for the learned Judges found in that case that the father knowingly brought a false case as a pauper. When he lost the suit and was made liable for the Government costs, it was held that his sons were not liable to Government for such costs so incurred. Without saying that I agree with the reasons given in the said decision that decision is easily distinguishable from the present case. The judgment in *Alagirisami Naickar* v. *Sundareswara Ayyar* (10) does not establish that the committee members (three of whom joined in the appeal to the High Court with the concurrence of the remaining two), dishonestly preferred the appeal to the High Court which appeal costs they were directed to bear out of their private funds. Imprudent and even unconscientiously imprudent debts of the father are not in my opinion immoral, illegal or 'Avyavaharika' debts.

In the case of *Durbar Khachar Odha* v. *Khachar Harsur Oghad* (11) a Hindu father erected a dam which obstructed the passage of water to the property of his neighbour. The Court found that the father had no right in law to erect the dam and a decree was passed against the father for damages. It was held by Knight, J., that the sons were not liable for the amount of the decree as such a debt is 'Avyavaharika', i. e., a debt which a father ought not as a decent and respectable man to have incurred. A Hindu son is answerable for the debts legitimately incurred by his father, not for those attributable to his (father's) fail-

(8) [1900] 65 P. R. 1900=(1900) P. L. R. 322.

(9) [1910] 20M. L. J. 89=4 I. C. 105=6 M. L. T. 308.

(10) [1897] 21 Mad. 278.

(11) [1908) 32 Bom. 348=10 Bom. L.R. 297.

ings, follies or caprice. This interpretation of the word 'Avyavaharika' appears to be too narrow, for it excludes debts for which the sons might be held legitimately liable and the view taken in this case has been dissented from by the High Courts of Calcutta, Madras and Allahabad —see *Chhakauri Mahton* v. *Ganga Prasad* (5), *Venugopala Naidu* v. *A. Ramanadhan Chetty* (7), and *Sumer Singh* v. *Liladhar* (4).

It appears that the learned Sanskrit scholars have differed as to the meaning of the expression 'Avyavaharika debt'. We are inclined to adopt Colebrooke's paraphrase, namely, a debt incurred for a cause repugnant to good morals.

Cases Nos. 1 to 6 referred to by the learned counsel for the appellant are not in point, so far as the decision of the point under consideration is concerned. We have carefully considered the 7th case— *Venugopala Naidu* v. *A. Ramanadhan Chetty* (7), referred to by the appellant's learned counsel, and the case of *Ramiengar* v. *Secretary of State* (9) referred to by the respondents' learned counsel. In *Ramiengar's* case a Hindu father brought a suit in forma pauperis as next friend of one of his sons to establish his adoption and the suit was dismissed on the ground that the adoption set up was false. The father was ordered accordingly to pay the costs due to Government under S. 440, Civil P. C., 1882. The question arose as to whether the sons were liable to pay such costs. It was held that the liability to pay the costs was imposed as a penalty for the father's misconduct in bringing a suit which he must have known to be false, that such liability might be regarded as in the nature of a fine and that the debt incurred by the father being thus tainted with immorality, his sons were not bound to pay it.

In our opinion *Ramiengar's* case (9) was rightly decided. We agree with the decision and the reasons for the decision in that case. We agree with the learned Subordinate Judge that the grounds on which Dayal based his claim against Sheikh Mohammad Ali and also the grounds on which he resisted the suit brought against him by Sheikh Mohammad Ali were false and dishonest. He had knowingly brought a false case against Sheikh Mohammad Ali and had knowingly on false grounds defended the suit which Sheikh Mohammad Ali had brought against him. We hold, agreeing with the learned Subordinate Judge, that the plaintiffs are not liable to pay the costs for which the decrees in question were passed against Dayal. The result is that the appeal fails and must be dismissed. We dismiss the appeal with costs. The decree of the lower appellate Court is confirmed in all respects.

N.D. *Appeal dismissed.*

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* A. I. R. 1928 Oudh 13

GOKARAN NATH MISRA, J.

Mahadeo Singh—Defendant — Appellant.

v.

Har Bukhsh Dube—Plaintiff—Respondent.

S. A. No. 293 of 1927, Decided on 2nd November 1927, from the decree of the Sub-Judge, Sultanpur, D/- 31st May 1927.

(a) *Evidence Act, S. 108—No presumption arises under the section as to time of the person's death.*

When the Court has to determine the point whether a particular person ought to be presumed as dead on the ground that he has not been heard of for more than seven years, there can be no presumption that he was dead at a particular time. The utmost that can be considered is that he was dead at the time when the suit was brought: ... *I. R.* 1926 *P. C.* 9, *Foll.* :[P 14 C 2]

* (b) *Transfer of Property Act, S. 43—The mortgage by Hindu woman whose husband is not heard of for seven years and who is deemed as dead at the time of the suit is operative at that date.*

Where a widow executes a mortgage and subsequently her husband is deemed as dead at the date of the suit brought by the mortgagee, the mortgage must be considered to be an operative deed at that date. [P 15 C 1]

(c) *Landlord and Tenant—Abandonment—Merely going to reside in another village is not abandonment.*

The mere fact that a tenant leaves a particular village and goes to take residence in another village, but retains control over his property situate in the village in which he originally resided, can be no indication of the fact that he intended to leave the village permanently. [P 15 C 1]

Mahabir Prasad Srivastava and *Ram Bharosey Lal*—for Appellant.

Hyder Husein and *M. N. Khan*—for Respondent.

Judgment.—This is a defendant's appeal arising out of a suit in which the plaintiff as a mortgagee claims possession of the property mortgaged. The facts of the case are: One Waris Ali owned certain trees situate in village Dakkhin Gaon, district Sultanpur. Defendant 1 is his wife, and defendant 2 his minor son. It was alleged that Waris Ail had left the village some eight years ago for Rangoon and had not been heard of since then. On the 22nd September 1924, a usufructuary mortgage in respect of the trees in suit was executed by the widow of Waris Ali in favour of the plaintiff. The plaintiff alleged that he had been in possession of the trees, but was illegally dispossessed in March 1926, by defendants 3 to 5, who are the zamindars of the village. The plaintiff, therefore, claims possession of the trees and also damages. Defendants 1 and 2 did not put in any defence. The suit was contested only by defendants 3 to 5. Their defence was to the effect that the mortgage-deed in suit was invalid on the ground that on the date when it was executed Waris Ali was not dead; and consequently defendant 1 had no right to mortgage the trees in suit, or in any case, in was contended, she had no right to mortgage more than two annas share in the trees in dispute. It was also contended that shortly after Waris Ali had left for Rangoon, defendant 1 left the village and began to reside in another village close by and consequently defendants 3 to 5 being zamindars of the village became entitled to the trees in suit by right of escheat.

The learned Munsif of Musafirkhana at Sultanpur who tried the suit, held that Waris Ali had not been heard of for more than seven years, and consequently there was a presumption that he was dead, or in any case he must be presumed to be dead at the time when the inquiry was being made,and in that case the mortgage-deed executed in plaintiff's favour would be treated as a valid mortgage under S. 43, Transfer of Property Act. He also held that the more fact that Waris Ali's widow had left the village to reside with her father in a neighbouring village, would not indicate that she had become "mafrur" and that she had left the village with an intention of permanently abandoning her residence therein. In this view of the case, the learned Munsif decreed the plaintiff's suit.

Defendants 3 to 5 appealed against the decision of the learned Munsif and the learned Subordinate Judge of Sultanpur, agreeing with findings of the learned Munsif dismissed the appeal.

In second appeal the same pleas are again raised on behalf of the defendant-appellant. I do not, however, see that there is any force in any of these contentions, and it appears to me that the decisions of the Courts below are quite correct and must be maintained.

As to the plea that the mortgage-deed in suit is invalid, I agree with the contention raised by the learned pleader for the appellant that the mere fact that Waris Ali had not been heard of for more than seven years, would not raise any presumption that he was dead at the time when the mortgage-deed was executed in September 1924. In *Lal Chand Marwari* v. *Ramrup Gir* (1), it has been held by their Lordships of the Privy Council that under S. 108, Indian Evidence Act, when the Court has to determine the point whether a particular person ought to be presumed as dead on the ground that he has not been heard of for more than seven years, there can be no presumption that he was dead at a particular time. The utmost that can be considered is that he was dead at the time when the suit was brought. I cannot, therefore, hold that on the evidence produced in the case it can be presumed that Waris Ali was dead in September 1924, when the mortgage-deed in suit was executed by his widow in favour of the plaintiff. The only presumption, which can justifiably be made, would be that he was dead on the 25th October 1926, the date when the present suit was brought. It, however, appears to me that the plaintiff's mortgage has become a good mortgage under the provisions of S. 43, Transfer of Property Act (4 of 1882). Under that section when a transfer is made by an unauthorized person who subsequently acquires interest in the property transferred, the transfer operates on any interest which the transferrer subsequently acquires during the time that the contract subsists. I, therefore, hold that the mortgage in suit is valid, because Waris Ali must now be deemed as dead at the date of the suit and the mortgage

(1) A. I. R. 1926 P. C. 9=5 Pat. 312=53 I. A. 24 (P. C).

must be considered to be an operative deed at that date.

As to the contention raised on behalf of the appellant that defendant 1 could not mortgage more than two annas-share in the trees in suit, I am of opinion that the mortgage-deed cannot be read in that way. It is admitted that defendant 2, the son of Waris Ali, is a minor and lives under the protection of defendant 1. She must, therefore, be deemed to have executed the deed in the capacity of the guardian of defendant 2. I, therefore, overrule this objection.

As to the plea of escheat, I am of opinion that it has been rightly overruled by the Courts below. The mere fact that a tenant leaves a particular village and goes to take residence in another village, but retains control over his property situate in the village in which he originally resided, can be no indication of the fact that he intended to leave the village permanently. In my opinion defendant 1 cannot be considered to have abandoned the village to give rise to a right of escheat in favour of the defendant-appellant. This plea, therefore, has no force.

The appeal, therefore, fails and is dismissed with costs.

N.D. *Appeal dismissed.*

A. I. R. 1928 Oudh 15

WAZIR HASAN AND RAZA, JJ.

Ram Lal—Accused—Appellant.

v.

Emperor—Opposite Party.

Cr. A. No. 450 of 1927, Decided on 14th October 1927, from the judgment of the Sub-Judge, Rai Bareli, D/- 12th September 1927.

(a) *Penal Code, Ss. 299 and 300—When a person kills a man in excess of the right of private defence, he is guilty of culpable homicide.*

Per Raza, J.—Where a person, in exercise of his right of private defence of property exceeds the power given to him by law and causes the death of a person against whom he is exercising such right of private defence, but without premeditation he is guilty of the offence of culpable homicide not amounting to murder. [P 16, C 1]

(b) *Interpretation of statutes—Illustrations are preferred to marginal notes.*

Illustrations do not stand on the same footing as marginal notes. Marginal notes may not be notes enacted by the legislature and they cannot be referred to for the purpose of construing the enactment ; on the other hand illustration are part and parcel of enactment : *A. I. R. 1926 P. C. 242, Ref.* [P 17 C 1]

(c) *Penal Code, S. 300—Interpretation of.*

Per Wazir Hasan, J.—In interpreting several clauses or explanations in S. 300, aid must be taken from the illustrations enacted in the section. Though there are not express words to show that a particular illustration in a section applies to any particular clause of the same section yet if the clauses and illustrations of S. 300 are read as a whole, it can at once be inferred that a particular illustration applies to no other but a particular clause. [P 16 C 2]

(d) *Penal Code, S. 300—Murder and culpable homicide distinguished.*

The elements which constitute the offence of culpable homicide are expressed and explained in terms of four explanations enacted in S. 300. If an act which an accused person is said to have committed does not fall within any of those explanations, and does not fall within any of the exceptions the act is murder, but if it does fall under one or other of those explanations and also falls within any of the exceptions enacted in S. 300, the act is one of culpable homicide not amounting to murder. [P 16 C 2]

(e) *Penal Code, S. 300, Cls. 1 to 4—The four clauses give a complete and exhaustive definition of culpable homicide.*

Before the exceptions begin and immediately preceding the illustrations, four clauses are enacted. Those clauses must be taken to define the limits and deemed exhaustive in themselves, for the purposes of the Code, of the offence of culpable homicide. [P 16 C 2]

J. Jackson—for Appellant.

H. K. Ghosh—for the Crown.

Raza, J.—Ram Lal, a Brahman of Dumtahar, district Rae Bareli, has been convicted by the learned Sessions Judge of Rae Bareli of having murdered Manna Pasi of Misrankhera, hamlet of Dumtahar on the 18th January 1927. He has been sentenced to death subject to confirmation by this Court. He appeals and the reference in confirmation is also before us.

The accused was committed for trial to the Sessions Court on a charge under S. 304, I. P. C., but the learned Sessions Judge amended the charge and convicted the accused under S. 302, I. P. C.

The facts as found by the learned Sessions Judge are these :

The accused beat the deceased with a heavy lathi and caused his death. The deceased was unarmed at the time and the accused went on ill-treating him with the lathi after he had become insensible.

The accused pretended to think that Manna was shamming and had him carried into the village, slung to a pole saying that he would chalan him. When Manna died the accused absconded.

The accused's defence in this case was that he found Manna stealing *sarson* from his field. He (accused) went up to Manna quietly and tried to catch him. Manna then attacked him with a *hansiya*. A fight ensued and in that fight he accidentally killed Manna with the lathi. He did not know that Manna was seriously hurt and had him taken into the village and wanted to chalan him. However he gave Manna up to Chhabba, maternal uncle of Manna on the request of the villagers. When he heard of the death of Manna he was afraid of the police and absconded. (The judgment then discussed the evidence and proceeded.) There is no doubt that Ram Lal accused is responsible for the fatal injury caused to Manna. I have seen the lathi which was used by the accused in striking Manna. It is a heavy lathi. It is a highly dangerous act to beat a man upon the head with a heavy lathi. Though it is not established in this case that the act by which death was caused was done with the intention of causing death, but having regard to all the facts and circumstances of the case, I think the accused should be held to have had the knowledge that he was likely to cause death. If the offence committed by the accused in this case be held to be culpable homicide amounting to murder, his act would fall within the second or fourth clause of S. 300, I. P. C. But, I think, the accused was not guilty of the offence of murder, but of the offence of culpable homicide not amounting to murder and the case falls within exception (2), S. 300, I. P. C. The accused in the exercise of his right of private defence of property exceeded the power given to him by law and caused the death of Manna against whom he was exercising such right of private defence, without pre-meditation. He is, therefore, guilty of the offence of culpable homicide not amounting to murder punishable under S. 304, I. P. C.

The result is that the appeal is allowed to the extent of altering the section of conviction from 302 to 304, I.P.C. I direct that Ram Lal accused be punished with rigorous imprisonment for five years.

Wazir Hasan, J.—I entirely agree with my learned brother in his conclusion that the appellant Ram Lal is not guilty of the offence of murder, but I feel serious and have grave doubts in my mind as to whether he is guilty even of culpable homicide not amounting to murder. The definition of culpable homicide which includes both culpable homicide which amounts to murder and culpable homicide not amounting to murder is given in S. 299, I. P. C. When that section is analyzed it will be realized that the elements which constitute the offence of culpable homicide are expressed and explained in terms of the four explanations enacted in S. 300 of the same Code. It follows to my mind that if an act which an accused person is said to have committed does fall within any of those explanations and does not fall within any of the exceptions the act is 'murder'; but if it does fall under one or other of those explanations and also falls within any of the exceptions enacted in S. 300, the act is one of 'culpable homicide not amounting to murder.' My learned brother thinks that the case before us might well fall within explanations 2 and 4 and as it further falls within exception (2) of the same section it is a case of culpable homicide not amounting to murder.

It seems to me that in interpreting the several clauses or explanations in S. 300, I. P. C., aid must be taken from the illustrations enacted in that section. In this connexion the first thing to be borne in mind is that the illustrations find place in the body of the section previous to the five exceptions that follow. It is further clear that before the exceptions begin and immediately preceding the illustrations the legislature enacts the four clauses which are intended to give a complete and exhaustive definition of culpable homicide. It cannot be suggested that an act may amount to an offence of culpable homicide even if it does not fall within one or other of the clauses of S. 300. Those clauses must therefore be taken to define the limits and exhaustive in themselves, for the purposes of the Code, of the offence of culpable homicide. This being so, it is significant that the legislature has enacted only as many illustrations as there are clauses to S. 300. I may here be permitted to make a digression and say that illustrations do not stand on the

same footing as marginal notes. Marginal notes may not be notes enacted by the legislature and the commonly accepted view now is that they cannot be referred to for the purpose of construing the enactment.

It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament : per Lord Macnaghten in the case of *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh* (1).

On the other hand illustrations are part and parcel of enactment and it seems to me that when the Court is called upon to interpret a piece of an enactment which comprises both the substantive provision and an illustration of the same the Court is not justified in rejecting the illustration as a guide to the interpretation of the substantive provision. In the case of *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (2), Lord Shaw in delivering the judgment of the Judicial Committee made the following observations :

On the second point their Lordships are of opinion that in the construction of the Evidence Ordinance it is the duty of a Court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the legislature as helpful in the working and application of the statute should not be thus impaired.

It was suggested that there is nothing in S. 300 to support the view that a particular illustration in that section applies to any particular clause of the same section. It is true that there are no express words to that effect, but if we read the clauses and the illustrations together and the section as a whole, we can say at once that a particular illustration can apply to no other but a particular clause. Thus it will be seen that illustration (a) is only applicable to the first clause of the section and similarly illustrations (b), (c) and (d) are applicable to the corresponding clauses in the substantive enactment separately.

When, therefore, I read Cls. 2 and 4 with the help of illustrations (b) and (c) my mind gets filled up with serious doubts as to the applicability of either the one or the other of those clauses to the facts of the present case.

I do not think that it is necessary for me to pursue this matter further. I have said what I have said above only for the purpose of making it clear as to what my own views on the question of the interpretation of the provisions of S. 300 are. But if according to my judgment the appellant is not guilty of the offence punishable by S. 304, I. P. C., he is certainly guilty of the offence punishable by S. 325 of the same Code. I, therefore, agree with my learned brother that the conviction under S. 302 should be set aside and that the appellant should be sentenced to five years' rigorous imprisonment and we accordingly do so.

By Court—We allow the appeal to the extent of altering the section of conviction from 302 to 304 or 325, I. P. C. We direct that Ram Lal, accused, be punished with rigorous imprisonment for five years.

N.D. *Appeal allowed.*

(1) [1904] 26 All. 393=7 C. C. 248=31 I. A. 132=8 Sar 639 (P. C.)
(2) A. I. R. 1916 P. C. 242=43 I. A. 256 (P. C.)

1928/O 3 & 4 Advocate High Court Jammu & Kashmir

A. I. R. 1928 Oudh 17

PULLAN, J.

Jagan and *another*—Plaintiffs—Appellants.

v.

Jagdish and *others*—Defendants—Respondents.

S. A. No. 185 of 1927, Decided on 24th October 1927, from the decree of the Addl. Sub-Judge, Sultanpur, D/- 21st March 1927.

Easements Act, S. 15—Land in occupation of lessee from Government—Sixty years are still necessary.

It is against the land, and thereby its owner, that a right of easement can be claimed: Sixty years user must be proved to acquire a right of way against Government whether the Government land is in occupation of Government or their lessee. *A. I. R. 1921 All. 724, Foll.* [P 18 C 1]

Hyder Husein and *A. C. Mukerji*—for Appellants.

A. P. Sen, R. D. Sinha, H. K. Ghosh and *G. H. Thomas*—for Respondents.

Judgment.—The point raised in this appeal was not one which was considered by the Court below. Briefly the plaintiff's claim now is that he can assert an easement over land which admittedly belongs to Government, although he has not established user for 60 years, on the ground that the land was in the occupation of a lessee. In the lower Courts the plaintiff set up the case that he had been in occupation of the land as a right of way for a period of 60 years, but he failed to establish his case. He has, therefore, fallen back on the plea that it was not necessary for him to establish a period of more than 20 years. But it was admitted throughout that the whole mohalla is the property of Government and the Municipal Board is managing this property on behalf of the Secretary of State. It makes no difference to the ownership of land whether it is or is not leased out to a tenant. It is against the land, and thereby its owner, that a right of easement can be claimed. In my opinion S. 15, Easements Act, is conclusive on this question and, although I am not aware of any authority on the point other than the decision of a single Judge of the Allahabad High Court reported in *Narain Das* v. *Behari Kahar* (1), I have no hesitation in holding that this suit has been rightly decided by the Courts below and I dismiss the appeal with costs, which will be proportioned between the contesting respondents.

N.D. *Appeal dismissed.*

(1) A. I. R. 1924 All. 724.

A. I. R. 1928 Oudh 18

RAZA, J.

Sukhdeo Pande—Defendant — Appellant.

v.

Pragdat Pande and *another*—Plaintiffs—Respondents.

S. A. No. 162 of 1927, Decided on 25th August 1927, from the decree of the Addl. Sub-Judge, Fyzabad, D/- 14th March 1927.

(a) *Civil P. C., S.* 100—*Practice—Findings based upon construction of document cannot be questioned in second appeal.*

The findings based upon construction of or inferences drawn from the documentary evidence, cannot be questioned in second appeal. [P 19 C 1]

(b) *Adverse Possession — Possession for* 12 *years—Circumstances showing intention to hold possession as of right — Adverse possession is constituted.*

Where it is found that a person is in continuous possession of some property for more than 12 years without any right whatever and that, although he did not at any time make any openly avowed claim of right to it, his acts and circumstances attending his possession clearly showed that he intended to hold possession as of right, he must be declared as having acquired title by adverse possession: 7 *O. L. J.* 282, *Foll.* [P 19 C 1]

Naimullah—for Appellant.

Haider Hussein—for Respondents.

Judgment.—This is an appeal from a decree of the Additional Subordinate Judge, Fyzabad, dated 14th March 1927, setting aside a decree of Munsif, Havali, Fyzabad, dated 24th November 1926.

One Tulshi was the under-proprietor of the land in dispute. He died in or about 1910 and was succeeded by his widow, Mt. Sukkha, who died in 1913. It appears that one Mt. Hardei got possession of some portion or portions of the land in dispute on the death of Mt. Sukkha, though she had no right to the property. She was the wife of Tulshi's uncle. The plaintiffs and defendants 2 to 4 are the descendants of one Sri, who was one of the two brothers of Sahai, the grandfather of Tulshi. Defendant 1 is the son of Nand Lal, the other brother of Sahai. The plaintiffs brought the present declaratory suit claiming a one-sixth share in five bighas 11 biswas underproprietary land specified at the foot of the plaint. They based their claim on two grounds: (1) custom, and (2) adverse possession. They failed to establish the alleged custom. Their claim was, however, decreed by the learned Additional Subordinate Judge in respect of certain plots, on the ground of adverse possession.

Sukhdeo, defendant 1, has now come to this Court in second appeal.

So far as I see, there is no substance in this appeal.

The defendants have all along been in possession of the land in dispute since 1913, at least. They have asserted their right to the property as under-proprietors and have paid rent to the superior proprietor as such. They never held the land from Mt. Hardei or from defendant 1 Sukhdeo. It has been found that they

never paid rent to the superior proprietor on behalf of Mt. Hardei or on behalf of the contesting defendant, Sukhdeo. Sukhdeo brought no suit against the plaintiffs within the period of limitation after the death of Mt. Sukkha. The learned Subordinate Judge has carefully considered the whole evidence on record and has found the question of adverse possession in favour of the plaintiff.

The appellant's learned counsel has attempted to question the correctness of the findings of the learned Additional Subordinate Judge based upon construction of or inferences drawn from the documentary evidence on record. The findings based upon construction of or inferences drawn from documentary evidence cannot be questioned in second appeal. The documents which have been considered by the learned Additional Subordinate Judge are mere pieces of evidence. His findings must be accepted by this Court. As pointed out in the case of *Nadir Singh* v. *Anpurna Kunwar* (1), where it is found that a person has been in continuous possession of some property for more than 12 years without any right whatever and that, although he did not at any time make any openly avowed claim of right to it, his acts and the circumstances attending his possession clearly show that he intended to hold possession as of right, he has to be declared as having acquired title by adverse possession.

I think no case has been made out to disturb the judgment of the learned Additional Subordinate Judge. Hence I dismiss the appeal with costs.

N.D. *Appeal dismissed.*

(1) [1920] 7 O. L. J. 282=56 I. C. 759.

A. I. R. 1928 Oudh 19

GOKARAN NATH MISRA, J.

Gauri Shankar—Plaintiff—Appellant.

v.

Nisam-uddin Khan and *another*—Defendants—Respondents.

S. A. No. 219 of 1927, Decided on 1st November 1927, from the decree of the Sub-Judge, Lucknow, D/- 14th March 1927.

Landlord and tenant—Right of tenants in trees planted during their tenancy ceases with the ejectment.

Persons, not in possession of land as groveholders but planting trees thereon during their tenancy, have no right to mortgage the trees. They have only a right to enjoy the produce of the trees as long as they are in possession but cannot have a right of possession over the trees after their ejectment: 2 *O. C.* 280, *Foll.* [P 20 C 1]

Mukund Behari Lal—for Appellant.

Zahur Ahmad and *Zaib-ul-Hasan*—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiff-appellant against the defendant-respondent to recover Rs. 50 by way of damages on account of the cutting down of the trees standing in plots 196, 197 and 198 situate in village Karoni, pergana Bijnor, district Lucknow. The plaintiff alleged that Chokhey, Nohri, Bhikhari and Dayal, sons of one Nanda were originally the owners of the groves standing on these plots and that they had mortgaged them to Ganga Ghulam and Ganga Bishan under the usufructuary mortgage-deeds, dated 20th January 1900, and 8th August 1910, respectively. It was further alleged that the plaintiff had obtained a transfer of the mortgagee rights from these persons by means of a sale-deed dated 4th December 1916 and that he had been in possession since that date of the groves in suit as a mortgagee. It was further alleged that the defendant 1, had illegally cut dhak trees from the said groves on account of which they were entitled to damages amounting to Rs. 150. Defendant 2 was the zamindar of the village; and defendant 1 was his ziledar (collecting agent) acting on his behalf. It was for this reason that he was also impleaded as a defendant in the suit.

It was contended by the defendants that Chokhey, Nohri, Bhikkari and Dayal were not the owners of the groves in suit and that they had no right to mortgage the trees standing on the said plots. It was further contended that the persons mentioned above were merely in occupation of the plots in suit as tenants having planted the trees during their tenancy and that Nohri the survivor of them was ejected in execution of a decree from the Rent Court in the year 1923, the effect of which was that whatever rights he had in the trees were lost to him on his ejectment and that the plaintiff also lost all his rights as mortgagee on the extinction of the rights possessed by Nohri.

The learned Munsif of Hawali, Lucknow, who tried the suit, found that Chokhey and his brothers were the owners of the groves in suit and had a right to mortgage the trees; and that the ejectment of Nohri the survivor of them from the plots in suit did not affect the rights of the plaintiff to the trees as a mortgagee of the said groves. On these findings he passed a decree for damages to the extent of Rs. 15 in favour of the plaintiff.

On appeal the learned Additional Subordinate Judge of Lucknow took a different view. On a consideration of the entire evidence on the record he came to the conclusion that Nohri and his brothers were not in occupation of the plots in suit as grove-holders but were in possession as tenants paying rent for the same and had planted trees on those plots while in occupation thereof as tenants. In this view of the case he held that Nohri and his brothers had no right to mortgage the trees and that the decree for ejectment passed against Nohri was, therefore, binding upon the plaintiff. He, therefore, decreed the appeal and dismissed the plaintiff's suit.

In second appeal it is contended before me that the decision of the learned Subordinate Judge is erroneous. It is again contended that Nohri and his brothers were in occupation of the plots in suit as grove-holders and had a right to transfer the trees standing on those plots and therefore the plaintiff as a mortgagee from them was entitled to remain in possession of the trees and the defendants were not entitled to cut them down.

It appears to me that the finding of the learned Subordinate Judge is binding upon me as a Court of second appeal. I have gone through the entire evidence on the record and I am of opinion that the finding is correct. Nohri and his brothers were not in possession of these plots as grove-holders but had planted the trees thereon during their tenancy. That being the case, it appears to me to be clear that they had no right to mortgage the trees. They had only a right to enjoy the produce of the trees as long as they were in possession of these plots as tenants but could not have a right of possession over the trees after the ejectment. I am supported in this view by a decision of a Bench of the late Court of the Judicial Commissioner of Oudh in the case of *Chandi Singh* v. *Arjumand Ali* (1). It was held in that case that the ejectment of a tenant from his holding extinguished his right in the trees which had been planted in it during the continuance of the tenancy. The question has been exhaustively dealt with by Mr. Spankie, A. J. C., in that judgment, and I am in entire agreement with the view of law taken by him in that case. I, therefore, hold that the mortgages executed by Nohri and his brothers ceased to have any effect in law after the ejectment of Nohri from the plots in suit: and the plaintiff has no right to retain the possession over the trees after the ejectment of the surviving mortgagor. I, therefore, dismiss this appeal with costs.

N.D. *Appeal dismissed.*

(1) [1899] 2 O. C. 280.

A. I. R. 1928 Oudh 20

STUART, C. J., AND RAZA, J.

Sardar Singh and *others*—Defendants—Appellants.

v.

Ganga Bakhsh Singh and *others*—Plaintiffs—Respondents.

F. A. No. 63 of 1926, Decided on 22nd March 1927, from the decree of the Addl. Sub-Judge., Sultanpur, D/- 26th January 1926.

Oudh Civil Courts Act (13 *of* 1879), *S.* 37—*Mortgage of* 1795—*Redemption can take place only if the deed fixes a term of redemption not expiring before* 15*th February* 1856.

A claim to redeem a mortgage of 1795 can only succeed if it is shown that the instrument of mortgage had fixed a term within which the property comprised might be redeemed and the term had not expired before 15th February 1856. [P 25 C 1]

A. P. Sen and *H. K. Ghosh*—for Appellants.

Bisheshwar Nath Srivastava and *Bishambhar Nath Srivastava*—for Respondent.

Judgment.—This is a defendants' appeal against a decree allowing redemption of a 3 annas 6 pies share in the village of Sarmai in the Sultanpur district.

The history of the case is a long one. It appears that at some time about 1795 A. D. some person, whose name is unknown, mortgaged with possession to another person, whose name is unknown, a 3 annas 6 pies share in the village of

Sarmai. There is nothing to show to whom the rights of the mortgagor and the mortgagee descended until the year 1856, when it is admitted that a certain Gajadhar Singh as representative-in-interest of the mortgagee was in possession of the 3 annas 6 pies share in question, the mortgagor's rights being then held by a certain Ajrael Singh, who was the representative-in-interest of the mortgagor. In 1857 during the period of anarchy, when there was no Government of any kind in the Sultanpur district, Ajrael Singh dispossessed Gajadhar Singh and obtained possession of the property ; and we have it that in 1858 Gajadhar Singh and Ajrael Singh referred their claims to possession to the decision of certain arbitrators who made an award (Ex. 5) on the 8th January 1858. It was alleged by Ajrael Singh in subsequent proceedings that on the 22nd February 1858 Gajadhar Singh executed an acquittance under which he renounced all his rights to the mortgaged property which remained with Ajrael Singh. During the first regular settlement, Gajadhar Singh instituted a claim in respect of this 3 annas 6 pies share against Ajrael Singh. The claim was brought in the settlement Courts, the plaint being Ex. 8. His claim was dismissed by the assistant settlement officer in Ex. 10 on the 29th June 1865. Gajadhar Singh appealed to the Commissioner, who on the 25th August 1865 by Ex. 11 allowed his claim and placed him in possession of the 3 annas 6 pies share in question as mortgagee.

In that regular settlement, however, his name was recorded not as mortgagee, but as proprietor, and the name of himself and the names of his successors-in-interest have been recorded as proprietors ever since. The present suit has been instituted by a young man called Ganga Bakhsh Singh, who has established that he is the representative-in-interest of Ajrael Singh. He has sold 6/7ths of his claim to the plaintiff 2, Bhabhut Singh, who does not appear to have any connexion with the family. The claim has been brought against the successors-in-interest of Gajadhar Singh and is a claim for redemption of the property. It has been decreed by the trial Court.

In order to understand the questions for decision in this appeal it is necessary to consider carefully the exact nature of some of the former proceedings. The task of the Courts has been rendered difficult in this respect owing to the fact that the evidence of these proceedings is contained almost entirely in certified copies of documents, many of which were procured a number of years ago. These certified copies, on the face of them, are inaccurate in many places, the copyist having clearly inserted wrong words to an extent which frequently turns a passage into a meaningless collection of words.

But we have sufficient materials before us to arrive at a reasonable construction on everything of importance. The first document that we shall consider is the plaint (Ex. 8) which was presented by Gajadhar Singh to the assistant settlement officer In this plaint he states distinctly that in the year 1265F. (1857-58) Ajrael Singh with the assistance of a certain taluqdar had dispossessed him (Gajadhar Singh) from the possession of the 3 annas 6 pies share, which he held as mortgagee, without redeeming the mortgage ; and he asks that possession should be awarded to him as it was held in times gone by. We can only construe the plaint as showing that Gajadhar Singh was suing on the basis of the mortgage which was executed about 1795 A. D. In his plaint he makes reference to the award (Ex. 5) of 8th January 1858, but only as evidence of the truth of his claim. He in no way bases his claim upon the award. The facts as subsequently found were that although the deed of mortgage of 1795 was in existence on the 8th January 1858 and was shown to the arbitrators, the deed had afterwards passed out of the possession of Gajadhar Singh, and he, therefore, relied upon the award (Ex. 5) in order to prove that such a deed had existed. We now come to the award (Ex. 5). We have checked the translation in the paper book and have noted the criticizm of the learned counsel for the respondents. We find that the following is the correct translation of the passages of importance :

Ajrael Singh and Gajadhar Singh of Sarmai have both come for arbitration in respect to their dispute as to the debt and the share of the village. Having heard what the parties have to say, having read their documents and heard their witnesses, it is decided that the bond in favour of Gajadhar Singh is a completely genuine deed. Ajrael must pay Rs. 1,840-6-6 and give 3,146 maunds 35 seers of grain to Gajadhar Singh. So lang as the money and

grain are not given he is not to have possession of the share. . . . . .

We now come to the decision of Mr. Gibson, the Assistant Settlement Officer (Ex. 10). Mr. Gibson found that the award (Ex. 5) and the acquittance (which is not before us) were both genuine documents. He found that in some manner or other Ajrael Singh had recovered possession of the share in 1857 and that then the arbitrators had made the award (Ex 5), but that after that award was made Ajrael Singh had paid up the full amount which the arbitrators had ordered him to pay, that Gajadhar Singh had then given him a full acquittance, and that thus all liability on the mortgage having been wiped off. Ajrael Singh was entitled to retain possession as full proprietor. Upon these findings he dismissed the claim. Mr. Reid, the Commissioner, accepted the facts that a mortgage of 1795 had been executed and that Gajadhar Singh was holding possession of the 3 annas 6 pies share under the terms of that mortgage in the year 1857. He found that Ajrael Singh had then dispossessed Gajadhar Singh and that Gajadhar Singh had then called in the aid of the arbitrators who framed the award (Ex. 5). Mr. Reid found, however, that Ajrael Singh had not paid anything to Gajadhar Singh ; and on our construction of his judgment he did not find that the deed of acquittance was a genuine document. Holding thus that Gajadhar Singh was entitled as a mortgagee, and holding that the mortgage had not been satisfied he restored Gajadhar Singh to possession.

Now it would be observed that ordinarily the claim of the present plaintiffs to redeem would have been a claim to redeem the mortgage of 1795 ; but such a claim was, on the face of it, a bad claim. Apart from anything else a claim to redeem that mortgage could only succeed under the provisions of S. 37, Act 13 of 1879*, if it were shown that the instrument of mortgage had fixed a term within which the property comprised therein might be redeemed and such term had not expired before the 13th February 1856. It is impossible to say that the mortgage of 1795, which had disappeared before 1865, contained any such term, and thus the provisions of S. 37 effectively prevented a claim to redeem the mortgage of 1795. The plaintiffs-respondents clearly foresaw this difficulty for they have based their claim upon the award (Ex. 5), asserting that that award was in effect a novation which created a new mortgage. The learned counsel for the respondents in support of this view has suggested to us that arbitrators, who made that award, were not concerned only with a single transaction of mortgage, but that they were concerned with a variety of disputes between Gajadhar Singh and Ajrael Singh, only one of which was in respect of the mortgage of 1795, and that they arrived at an arrangement by which the 3 annas 6 pies share was to be placed in possession of Gajadhar Singh in satisfaction of the total amount due to him under these several heads with a fixed amount to be paid by Ajrael Singh for redemption of the property. Even if this were a correct construction of Ex. 5, it would be difficult, in our opinion, to consider that such a transaction created a mortgage, but it is unnecessary to discuss that question as, on our construction of Ex. 5, we do not consider that there was any general dispute before the arbitrators. As we read Ex. 5 we find that all that it says is that Gajadhar Singh, who had been in possession under the mortgage of 1795 had been put out of possession by Ajrael Singh, that Ajrael Singh had justified his action by denying the validity of the deed of 1795, and that the arbitrators, finding the deed of 1795 to be a genuine deed, had ordered Ajrael Singh to restore possession to Gajadhar Singh and had laid down that the amount due under the terms of the deed of 1795 for redemption of the property was Rs. 1,840-6-6 in cash and 3,146 maunds 35 seers of grain. We read the award as creating nothing new. It was no more than a decision that Gajadhar Singh was entitled to hold possession of the property and that the amount due under the deed for its redemption by Ajrael Singh was the amount which we have already stated. In these circumstances the plaintiffs-respondents have no right to redeem.

The defendants hold the property as the successors-in-interest of the original mortgagee under the deed of 1795, and as under the provisions of S. 37, Act 13 of 1879, no suit can be brought for the redemption of that mortgage, the plaintiffs' suit should have been dismissed. We

* Oudh Civil Courts Act (13 of 1879) since repealed by Oudh Courts Act (Act 4 of 1925).

accordingly allow this appeal and direct that the plaintiffs' suit shall stand dismissed. The plaintiffs will pay their own costs and those of the contesting defendants in both Courts.

N.D. *Appeal allowed.*

A. I. R. 1928 Oudh 23

GOKARAN NATH MISRA, J.

Ram Dat and *others*—Appellants.

v.

Chhotak and *others*—Respondents.

S. A. No. 222 of 1927, Decided on 14th October 1927, from the decree of the Sub-Judge, Sitapur, D/- 11th March 1927.

(a) *Oudh Rent Act, S. 126—Managing co-sharer has no authority to grant perpetual leases for the purpose of planting groves.*

The mere fact that a person manages the property belonging to another does not clothe him with authority to grant leases of land for the purpose of planting groves. The ordinary incidence of management would include the power to realize rent and power to give ordinary leases of lands to tenants for the purpose of cultivation but does not include the power to grant perpetual leases for the purpose of planting groves without the express permission of the principal. Where one cosharer in management has granted, without the permission of other co-sharers, a perpetual lease of joint land for planting grove and the lease is declared invalid, as against non-consenting co-sharers the fair arrangement would be to allow the lessee to remain in possession of the land in dispute on which he has already planted a grove and to ask him to pay to the non-consenting co-sharers their share of rent of the land and to allow the burden to fall upon the share of transferring co-sharer at the time of partition.

[P 24 C 1, 2 P 25 C 1]

(b) *Evidence Act, S. 115—Estoppel—Act which is not likely to induce the other side to believe that he is entitled to commit a particular act complained of does not amount to estoppel.*

Unless a person is found guilty of either an overt act or of an act of omission which is likely to induce the other side to believe that he is entitled to commit the particular act complained of, there can be no question of estoppel: Plea of estoppel can be maintained only if the conduct of the person against whom estoppel is alleged, is found to be fraudulent. 21 *All.* 496, (*P. C.*); 30 *Cal.* 539, (*P. C.*) *Foll.*: *A. I. R.* 1927 *Oudh* 66, *Rel on.* [P 24 C 2]

M. Wasim and *Khaliquzzaman*—for Appellant.

S. M. Ahmad—for Respondents.

Judgment.—This appeal arises out of a suit for possession of 1 bigha 14 biswas land in village Sheopuri, district Sitapur, by uprooting trees and for damages. The facts alleged by the plaintiffs are that the land in dispute is the joint land belonging to plaintiff 1 Ram Dat, plaintiff 2 Ram Ghulam and defendants 2 and 3 Bhagwati Prasad and Ram Autar respectively; that the said defendants wrongfully gave a lease of the said land to defendant 1, Chhotak, for planting a grove thereon without their consent; and that the plaintiffs are, therefore, entitled to recover possession of the land by uprooting trees planted by defendant 1 thereon. The plaintiffs also claimed a sum of Rs. 50 as damages.

The defence put forward by defendant 1 was to the effect that defendants 2 and 3 managed the share of the village in which the land in dispute lies on behalf of the plaintiffs and therefore the lease granted by defendants 2 and 3 was a good and valid lease binding on them. It was also contended by him that the plaintiffs were stopped from claiming possession of the land in suit since they had not objected to defendant 1's planting trees on the land in dispute when he had obtained the lease of the said land. Defendants 2 and 3 admitted the fact of having given the lease of the land in suit to defendant 1, but alleged that while giving the lease they had told him that he must obtain the consent of the plaintiffs in respect of their share.

The learned Munsif of Biswan, district Sitapur, who tried the case, held that defendants 2 and 3 used to manage the share of the plaintiffs in the village Sheopuri and were therefore justified in giving the lease of the land for the purpose of planting a grove thereon. He, however, held that the plea of estoppel could not be maintained. In this view of the case he dismissed the plaintiff's suit.

In appeal the learned Subordinate Judge of Sitapur agreed with the learned Munsif's finding that defendants 2 and 3 used to manage the share of the village in which the land in dispute lies on behalf of the plaintiffs and that they were, therefore, competent to grant the alleged lease to defendant 1. He, however, differed from the Munsif on the question of estoppel and held that the plaintiffs not having objected to defendant 1's planting the trees at the time when the lease was granted to him were now estopped from bringing the present suit. Upon these findings he confirmed the decree passed by the learned Munsif and dismissed the appeal.

The plaintiffs have now come up to this Court in second appeal, and the learned pleader on their behalf has urged two points in support of the appeal : Firstly, that there is no proof on the record that the plaintiffs had authorized defendants 2 and 3 to grant a lease of the land in dispute for the purpose of planting a grove and that the mere fact that the said defendants managed the property on the plaintiffs' behalf would not be a sufficient ground in law to give them an authority to grant a lease of the land for the purpose of planting a grove thereon. Secondly, that the finding of the learned Subordinate Judge on the question of estoppel was erroneous.

As to the first point I am of opinion that the contention urged on behalf of the appellants is sound and must be given effect to. I do not find any evidence on the record showing that the plaintiffs had expressly authorized defendants 2 and 3 to give a lease of the land in suit on their behalf for the purpose of planting a grove thereon. The Courts below, it appears to me, have inferred this authority from the fact that defendants 2 and 3 used to manage the property on the plaintiffs' behalf and also from the fact that the plaintiffs did not object to the planting of the trees at the time when the alleged lease of the land in dispute was given to defendant 1. I do not agree with this view of the Courts below. In my opinion the mere fact that a person manages the property belonging to another does not clothe him with authority to grant leases of land for the purpose of planting groves. The ordinary incidence of management would include the power to realize rent and power to give ordinary leases of land to tenants for the purpose of cultivation. I am unable to agree with the view taken by the Courts below that the power of management also includes the power to grant perpetual leases for the purpose of planting groves. It has been held in several cases that a lambardar has no power to grant a perpetual lease on behalf of his co-sharer, and I am, therefore, inclined to think that land cannot similarly be let by a manager for the purpose of planting a grove thereon without the express permission of the principal. Plaintiff 1 further gave his own evidence to the effect that when defendant 1 proceeded to plant trees on the land in dispute he at once objected. His story has not, however, been believed by the Courts below. Apart from that fact it appears to me that even if we assume that plaintiffs did not object to defendant 1's planting trees on the land in suit at the time of the grant of the lease, that would not be any evidence of the fact that they had authorized defendants 2 and 3 to give such a lease on their behalf. There being no presumption that the authority to manage would also imply the authority to give lands for the purpose of planting grove. it was the bounden duty of defendant 1 to give clear proof of such authority. There being no such proof I am unable to infer such authority from the facts proved in the case. I, therefore, hold that defendants 2 and 3 had no authority to give defendant 1 lease of the land in dispute for the purpose of planting a grove thereon.

As to the second point, I am of opinion that the plea of estoppel cannot be maintained. The law on the subject is laid down very clearly by their Lordships of the Privy Council in *Beni Ram* v. *Kundan Lal* (1) and *Mohori Bibee* v. *Dharmodas Ghose* (2). The principle enunciated by their Lordships in those cases is that unless a person is found guilty of either an overt act or an act of omission which is likely to induce the other side to believe that he is entitled to commit the particular act complained of, there can be no question of estoppel. In one of the cases recently decided by a learned Judge of this Court in *Mustafa Husain* v. *Saidul Nisan* (3), it was held that a plea of estoppel in such cases can only be maintained if the conduct of the person against whom the estoppel is alleged, is found to be fraudulent. I am unable to find such elements proved in the case. I, therefore, overrule the plea of estoppel.

It now remains to be seen whether on the above findings the plaintiffs are entitled to a decree for possession. At the last hearing of the case after I had heard arguments on both sides I intimated to the parties that I had come to the conclusion that the fair arrangement which should be arrived at in this case would be to allow defendant 1, Chhotak, to remain in possession of the land in dispute on which he has already planted a grove and

(1) [1906] 21 All. 496=26 I. A. 58=7 Sar. 523 (P. C.).
(2) [1903] 30 Cal. 539=30 I. A. 114=7 C.W. N. 441=8 Sar. 374 (P. C.).
(3) A.I.R. 1927 Oudh 66.

to ask him to pay to plaintiffs 1 and 2 their share of rent of the land and to allow the burden of the transfer made by defendants 2 and 3 to fall upon their share at the time of partition. The plaintiffs not having come to Court at once and the land being a joint one, I intimated to the parties my opinion that they must seek their remedy at the time of partition. To this arrangement the parties agreed. In view of such agreement I thought it proper that I should myself determine the amount of rent which defendant 1 should pay to the plaintiffs for the use of the land in dispute. With this object I ordered the patwari of the village to be summoned before the Court. The evidence of the patwari was recorded and after he had been examined the learned pleader for the plaintiffs and the learned counsel for defendant 1 agreed that the fair and equitable rent for the land in suit would be at the rate of Rs. 3 per pucca bigha. The land in dispute consists of four plots, namely, No. 701-1 (11 biswas), No. 701-2 (10 biswas) and No. 702-1 (3 biswas). all measuring 24 biswas; and No. 708-2 (10 biswas). The share of plaintiff 1 in the first three plots is one-third and the share of plaintiff 2 in them is one-sixth ; and the share of plaintiff 2 in the fourth plot is 5/18ths, there being no share of plaintiff 1 in the said plot. Calculating the rent at the aforesaid rate the share of plaintiff 1 comes to Rs. 1-3 odd but for facility of account I fix the rent at Rs. 1-4. The share of plaintiff 2 comes to about Re. 1 but for facility of account I fix it exactly at Re. 1. Defendant 1 will, therefore, pay Rs. 2-4 on account of rent of the land in dispute in this way that he will pay Rs. 1-4 to plaintiff 1 and Re. 1 to plaintiff 2. Defendant 1 will be allowed to remain in possession of the plots in suit as long as he continues to pay the said rent. If at any time he fails to pay the rent to plaintiffs 1 and 2 he will be liable to ejectment from the land in suit to the extent of .their shares. Plaintiffs 1 and 2 will also be entitled to get a decree for Rs. 5 as damages.

I, therefore, allow the appeal to the extent indicated above. As to costs my order is that owing to the circumstances in the case the parties should bear their own costs throughout.

N.D. *Appeal allowed.*

A. I. R. 1928 Oudh 25

STUART, C. J., AND RAZA, J.

Ajodhya and *another*— Defendants—Appellants.

v.

Sheo Shankar and *others* — Plaintiffs and Defendant—Respondents.

S. A. No. 208 of 1926, Decided on 22nd December 1926, from the decree of the Dist. Judge, Fyzabad, D/- 23rd March 1926.

(a) Deed — Construction — Each document should be construed on its own merits.

The practice to endeavour to obtain assistance in construing a document from the construction of different documents arrived at by other Courts is unprofitable [P 26, C 1]

(b) Oudh Laws Act, S. 10—Pre-emption—It is not illegal for parties to avoid the law by making the transfer something short of sale.

It is not forbidden to a person to circumvent the law of pre-emption by taking a transfer which falls short of a sale which may eventually have the same effect as a sale : *A. I. R.* 1927 *Oudh* 40 ; 16 *O. C.* 9 and 18 *O. C.* 109, *Foll.* [P 26, C 1]

St. G. Jackson—for Appellants.

Ali Zaheer for *Hyder Husein*—for Respondents.

Judgment.—Mt. Bibi Umul Bani executed a deed in favour of Ajudhia and Mahabir Tiwari in consideration of the receipt of a sum stated to be Rs. 2,500. She transferred to them by what she called a *birt pater* certain revenue free land reserving to herself Rs. 10 annual rent. The plaintiff-respondent Sheo Shankar instituted a suit to obtain possession of this land by exercise of a right of pre-emption. The Courts below have awarded him a decree against which the transferees Ajudhia and Mahabir appeal. The first question which we have to consider in this case is whether there is anything in S. 10, Act 18, 1876 which justifies the exercise of a right of pre-emption to obtain property transferred by the transaction in question. S. 10 declares that a right of pre-emption shall arise, and shall arise only, when a person proposes to sell any property or when he forecloses a mortgage upon any property ; and in order to ascertain in any particular case whether a right of pre-emption exists it is necessary first to see whether there has been a sale or the foreclosure of a mortgage. Unless it is established that there has been a sale or the foreclosure of mortgage no right

of pre-emption arises under S. 10. In each individual case the document has to be construed by the Court.

There has been a practice in the past for certain Courts to endeavour to obtain assistance in constructing a document from the construction of different documents arrived at by other Courts in previous cases. Their Lordships of the Judicial Committee referred many years ago to this practice as unprofitable. It does not appear to us to be a matter of moment how single Judges or Benches of the Judicial Commissioner's Court construed particular documents. It is our concern to see whether this document, which is called a *birt pater* is or is not a sale. If it is a sale a right of pre-emption exists, and if it is not a sale a right of pre-emption does not exist. A sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. There was no transfer of ownership in this case but only a transfer of a limited right subject to an annual payment of rent. But it is argued before us that the annual payment of rent was so small that it was clearly the object of the transferer to effect the transfer in such manner as to avoid the possibility of pre-emption, and obtain the same results as would be obtained by the execution of a deed of sale. This may well have been so, but it does not alter the fact. The law does not say that a right of pre-emption arises when a person transfers the property after a manner which produces the same results as a sale without being a sale. The law says that the property must be transferred by sale and in our opinion this transfer is not a sale and that concludes the appeal. We have further to note that a Bench of this Court on 24th November 1925, in *Shamshad Ali Khan* v. *Dharam Singh* (1), accepted the view taken previously in *Majida Bibi* v. *Malik Fazl Karim* (2) and *Lachhman Prasad* v. *Mir Fida Husain* (3), which was as follows :

> Nor is it forbidden to a person to circumvent the law of pre-emption by taking a transfer which falls short of a sale which may eventually have the same effect as a sale.

We, therefore, allow this appeal. The plaintiff's suit will stand dismissed. The plaintiff will pay his own costs and those of Ajudhia and Mahabir in all Courts.

J.V. *Appeal allowed.*

(1) A. I. R. 1927 Oudh 40=29 O. C. 101.
(2) [1912] 16 O. C. 9=19 I. C. 679.
(3) [1915] 18 O. C. 109=30 I. C. 282=2 O. L. J. 220.

A. I. R. 1928 Oudh 26

STUART, C. J., AND RAZA J.

Debi Prasad and *others*—Defendants—Appellants.

v.

Mt. Krishna Kunwar and *others*—Plaintiff and Defendants—Respondents.

F. A. No. 151 of 1926, and Execution Decree Appeals Nos. 55, 56, and 60 of 1926, Decided on 6th September 1927, from a decree of the Sub-Judge, Lucknow, D/- 4th September 1926.

(a) *Hindu Law—Will—A rule of succession in favour of unborn persons cannot be created.*

Where a testator made a gift of his self-acquired property in moieties to his sons without power of transfer and upon the son's death life interest was created in favour of sons' sons who were alive at the time of making the bequest and upon the conclusion of the life-estates other life-estates were to arise in favour of grandsons who were not in existence :

Held : that those provisions of will which purport to create a rule of succession in favour of unborn persons were void, and the provisions creating a rule of succession in favour of born persons were good. [P 27, C 2]

(b) *Hindu Law—Joint family—Self-acquisition.*

Property going into the hands of sons' sons under a bequest from their grandfather after the cessation of life estate created in their father's favour is not joint in their hands. [P 27, C 2]

P. L. Banerji, M. N. Chak, Ali Zaheer and *Ganga Prasad*—for Appellants.

M. Wasim, Hakim Uddin and *Girja Shankar Srivastava*—for Respondents.

Judgment.— The decision of appeal No. 151 of 1926 is connected with the decision of execution appeals Nos. 55, 56 and 60 of 1926. The decision proceeds in all four upon exactly the same facts and law. They are being decided together. The case stands in this way. Debi Prasad, Ajudhia Prasad and Govind Prasad, who are appellants in three of these appeals, obtained on the 22nd December 1916, a decree for Rs. 10,000 against Raja Bhaiyan, alias Bal Krishna, Lalji, and Mahadeo Prasad, sons of the deceased Ganesh Prasad, Rameshwar Prasad, son of Raja Bhaiya, and Nageshwar Prasad, son of Lalji. The decree contained a direction that the amount

was to be realizable from "the entire joint family property of Ganesh Prasad and the defendants." In execution of this decree the decree-holders have scught to attach certain property known as the Durjanpur Estate. Objections have been made on behalf of the judgment-debtors and also on behalf of Krishna Kuar, wife of Lalji. The latter objection is on the basis of a transfer alleged to have been made in her favour. The objections are that this property is not the joint family property of Ganesh Prasad and the judgment-debtors in the decree. The question having been decided against the decree-holders both in Krishna Kuar's regular suit and in the objections brought by the judgment-debtors in execution the appellants have come to this Court in appeal. Before we proceed to decide the questions of fact and law involved it is necessary to state a few circumstances which are admitted in evidence between the parties. The family is of Kayasthas. Gouri Shankar, the grandfather of Ganesh Prasad, worked in the office of the Treasurer to a certain Fateh-ud-daula Bahadur in the Nawabi. He died according to the respondents before 1857 and according to the appellants shortly after 1857. It is unimportant whether he died on the first or the second date. His son Gajadhar Prasad had attained in the Nawabi the position of general agent to Chandi Sahai the Private Secretary to Ali Naqi, Prime Minister to King Wajid Ali Shah. Gajadhar Prasad died in 1904. We are satisfied upon the evidence, as was the learned trial Judge, that Gouri Shankar left practically nothing, and that there was no nucleus of joint family property when Gajadhar Prasad commenced to amass the considerable estate which he founded. There was a very small landed property owned by Gauri Shankar which brought in a few rupees a year. There is abundant evidence that Gauri Shankar died an impoverished man heavily in debt. His son Gajadhar Prasad appears to have made full use of his opportunities and to have acquired a reasonably handsome fortune. He acquired the Durjanpur Estate and we find that he acquired it out of his separate funds and that it was his self-acquired property. It was thus property which under the law he could devise by will.

This brings us to the next point. We find that Gajadhar Prasad executed four testamentary dispositions during his lifetime. The first of these was a will Ex. 1 dated the 5th December 1884, the second Ex. 2, dated the 1st May 1885, the third Ex. 3, dated 31st October 1898, and the fourth Ex. 4, dated 4th November 1900. We find it proved that he executed all these documents and that at the time that he executed them he was of sound disposing mind. We need refer only to Ex. 4 as, on our construction, Ex. 4, in so far as it laid down anything effective revoked all his previous testamentary dispositions. We do not, of course, suggest that where there were testamentary dispositions in the previous documents which are not affected by Ex. 4 that there was any revocation. The effect of Ex. 4, as we construe it was as follows: It devised officers of lambardar and the corpus of the Durjanpur properties in moieties to the testators's sons, Ganesh Prasad and Bisheshar Prasad, without power of transfer. This can only mean that Ex. 4 made a gift of a life-estate in one-half to each son, and we construe the deed to continue that on the deaths of Ganesh Prasad and Bisheshar Prasad, in each instance a life-interest is created in favour of the sons of Ganesh Prasad and the sons of Bisheshar Prasad. Upon the conclusion of these life-estates other life estates were to arise in favour of grandsons and the will undoubtedly purports to create a rule of succession in favour of unborn persons. In so far as it purports to create a rule of succession in favour of unborn persons its provisions are void. But, in our opinion, so far as it creates life-estate in favour of Ganesh Prasad and Bisheshar Prasad, the disposition is good and in so far as it creates life-estates on the death of Ganesh Prasad and Bisheshar Prasad in favour of persons who were in existence at the time, such persons being the sons of Ganesh Prasad and Bisheshar Prasad, the bequest is also good. Raja Bhaiya alias Balkrishna Lalji, and Mahadeo Prasad were all born before 1900. How does the case then stand? On the death of Ganesh Prasad a life-estate came into being in favour of Raja Bhaiya, Lalji and Mahdeo Prasad the sons of Ganesh Prasad. This is a life-estate in self-acquired property and by no stretch of language can their interests in the same be said to be

the joint family property of Ganesh Prasad and the defendants.

Lalji was entitled to transfer his life interest to his wife and on the evidence he did so transfer it. To what extent the grandsons of Ganesh Prasad enjoy a life-interest in this property it is not necessary for us to decide. It is not necessary for us to decide whether they have any interest in the property during the lifetime of their fathers. We are only concerned here with one point. Is the property in question property which can be attached and sold in execution of the defendants-appellants' decree? We decide that it cannot be attached and sold in execution of the appellants' decree, The learned trial Judge has, therefore, arrived at a correct conclusion in all cases. As a result we dismiss first appeal No. 151 of 1926, and execution of decree appeals Nos. 55, 56 and 60 of 1926.

Cross-objections were filed in No. 55. Those cross-objections are not pressed and have been withdrawn. We, therefore, dismiss those cross-objections. The appellants will pay their own costs and the costs of the respondents in all these appeals. Respondents in execution appeal No. 55 of 1926 will pay their own costs of the cross-objections.

N.D. *Appeals dismissed.*

A. I. R. 1928 Oudh 28

WAZIR HASAN AND PULLAN, JJ.

Jugul Kishore and *others*—Defendants—Appellants.

v.

Mt. Gaura and *others*—Plaintiffs—Respondents.

F. A. No. 70 of 1926, Decided on 25th July 1927, from the judgment of the Addl. Sub-Judge, Hardoi, D/- 31st March 1925, in Regular Suit No. 44/120 of 1925.

Benami—Test of—He who pays the consideration and enjoys possession and profits is presumed to be the owner.

Where A, alleging that the property standing in the name of B. was purchased benami for A, has proved the motive for such benami transaction and also that the consideration came from his (A's) purse and that he has been in the enjoyment of the profits of that property, the fact that B's name appears in all the public records is not sufficient to disprove that A was the real owner, such fact being consistent with the theory that B was the benamider.

[P 29, C 2]

A. P. Sen, *Radha Krishna* and *Ali Zaheer*—for Appellants.

Bishesharnath, *Mohan Lal*, *Kedarnath Tandon* and *Ishri Prasad*—for Respondents.

Judgment.—This is the defendants' appeal from the decree of the Additional Subordinate Judge of Hardoi, dated the 31st March 1926. The original defendant to the suit, out of which this appeal arises, was one Ganga Ram, who died soon after the decree of the Court of first instance. The three appellants, Jugal Kishore, Chandra Kishore and Brij Kishore are his sons.

Ganga Ram was the brother of the plaintiff, Mt. Gaura. Mt. Gaura is the widow of one Nanhemal, who died in the year 1890. It appears that soon after the death of Nanhemal the defendant, Ganga Ram, came to Hardoi and was invested with the status of the general agent of the plaintiff. There was a mukhtearnama executed in his favour on the 1st May 1890, and there is nothing in the evidence to show that it was ever put an end to afterwards. Some years after the death of Nanhemal certain properties were acquired in the district of Hardoi. The deeds of title in relation to those properties are in the name of Ganga Ram. Seven of such properties are stated in a schedule attached to the plaint of the suit. On the finding of the trial Court the second of them has no existence. This finding has not been challenged in appeal by any of the parties. The earliest deed, therefore, is one of the 4th February, 1909, and the last is one of the 9th September 1913. The plaintiff's case is that the property acquired by means of these deeds was her property and that Ganga Ram's name was used in the deeds of title fictitiously and benami. Ganga Ram alleged title in himself. The issue which thus arose for decision has been decided by the learned Judge of the trial Court in favour of the plaintiff and a decree has accordingly been made.

The learned Judge has approached the decision of the question from several points of view. He first considers the question as to which of the two parties was in a position to advance money for the acquisition of the properties in question. On a careful consideration of the evidence on both sides he finds that the defendant Ganga Ram was a man of very limited pecuniary means and that on the

other hand, the plaintiff had inherited a large sum of cash and other property from her husband, Nanhemal.

It is common ground that Nanhemal had started and carried on during the whole of his life an *arath* business at Railwayganj in the town of Hardoi. The firm bore the name of Nanhemal-Ganga Ram. The defendant wants to take advantage of the addition of his name in the name of the firm. This is explained by the learned Judge of the Court below on the basis of the evidence produced in the case by the fact that there was another co-existing firm of the name of Nanhemal-Ramdas. Nanhemal, the deceased husband of the plaintiff, was, therefore, the sole owner of this firm and this was the main source of income in the hands of Nanhemal, and in the ordinary course it devolved upon his widow, the plaintiff. Nanhemal had also executed a will some time before his death by which he bequeathed all his assets to the plaintiff. It was in those circumstances that Ganga Ram appeared on the scene. Nanhemal's father, on the death of Nanhemal, claimed title to the estate of his deceased son though he did not succeed. This, however, according to the opinion of the learned Additional Subordinate Judge, with which we agree, induced the plaintiff in agreement with Ganga Ram to acquire property not in her own name but in the name of Ganga Ram, the intention obviously being to defeat by this means the rights of the reversioners of her husband. This is what the learned Judge of the Court below calls the motive for the conduct of the parties in obtaining the property in suit as benami in the name of Ganga Ram.

The next point, which is of a more serious character, with which the Court below deals, is the question of the source from which the money came with which the properties, in suit were acquired. It examines every one of these transactions in its details, refers to the evidence, both oral and documentary, bearing thereon, and comes to the conclusion that the money both for the advances on mortgages and for the consideration of purchases came from the purse of the plaintiff. The learned pleader for the appellants has taken us through those details but has not succeeded in inducing us to hold that the finding of the Court below is erroneous. The fact, therefore, that the money with which these properties were acquired came from the purse of the plaintiff goes a long way towards the proof of the case.

The second point, which he considers and which is of a very substantial character, is as to the possession or enjoyment of the profits of these properties. Here again the finding is in favour of the plaintiff and it is founded on evidence which the Court below accepts as reliable and which mainly consists of the testimony of a large number of tenants and co-sharers of the villages in which these properties are situate. Obviously there can be no documentary evidence of any reliable character in relation to the question as to the real condition of things beyond the papers which it may generally be said are all in the name of Ganga Ram. The learned pleader for the appellants has not endeavoured to challenge the veracity of the evidence upon which the learned Judge of the trial Court has based his finding. He has tried to explain it and the explanation is that it might be that the tenants paid the rent to the plaintiff herself while the defendant Ganga Ram had left Hardoi and had gone to live at Qaemganj in the district of Fatehgarh, where his ancestral house is situate. We are not satisfied that this explanation is sufficiently strong to overcome the effect of the voluminous evidence on the question of the actual enjoyment of the profits of the properties in question.

There is no suggestion in the evidence that Ganga Ram ever received any portion of the rent which was thus admittedly realized by the plaintiff. Ganga Ram himself went into the witness-box and he did not attempt to put forward any such explanation which has now been urged by his learned pleader on his behalf. The result is that there was a strong motive to take these deeds in the name of Ganga Ram, that the money to acquire the properties covered by these deeds came from the purse of the plaintiff, and that she has been in enjoyment of the profits thereof. On those findings we must uphold the decree under appeal.

The argument on behalf of the defendants-appellants has all along been that the khewats are all in the name of Ganga Ram, that pattas are also in his name and that kabuliyats and kirayanamas also stand in his name. This argument is

of little avail in a case of this nature That the public records are all in the name of Ganga Ram is consistent with the theory of his being benamidar. They could not be otherwise if the mask was to be maintained. The learned pleader also referred to certain transactions standing in the name of the plaintiff herself. They are of a very trivial nature and do not in any manner turn the scale in the appellant's favour. The plaintiff gave evidence in support of her case and none of those transactions was put to her so that she could explain the circumstances in which she entered into them. Reliance was also placed on a statement made by the plaintiff in a suit in the year 1919 and also on her statement contained in a written defence in another suit. They are contained in Exs. 117 and 117-A respectively. The statement was made by the plaintiff in a suit instituted in the name of Ganga Ram against one Kubashar Singh and others in respect of a building which they had constructed on a portion of one of the properties now in question. One of the defences to the suit was that the property belonged to the plaintiff and consequently Ganga Ram had no right to sue. To support the maintainability of the suit Ganga Ram examined the plaintiff as a witness and it is but natural that she would support the plea on which the title was ostensibly founded.

We, therefore, in agreement with the learned trial Judge attach very little importance to that statement. The same may be said with respect to the written statement. The very nature of the defence which the plaintiff was called upon to make in that suit imposed the necessity of supporting Ganga Ram's title. The Court holds that it was a false defence and we agree with the trial Court.

The appeal fails and is dismissed with costs.

N.D. *Appeal dismissed.*

A. I. R. 1928 Oudh 30

STUART, C. J., AND RAZA, J.

Mirza Mohammad Sadiq Ali Khan—Decree-holder—Appellant.

v.

Sajjad Mirza—Judgment-debtor—Respondent.

Execution of Decree Appeal No. 42 of 1927, Decided on 23rd September 1927, from the order of the 1st Addl. Sub-Judge, Lucknow, D/- 30th April 1927.

(*a*) *Civil P. C., O.* 21, *R.* 16—*An application made by one legal representative of a deceased decree-holder takes effect in favour of all.*

There is no rule under which the legal representative of a deceased decree-holder can or should apply merely for substitution of names. The application should be for execution. An application made by one of them takes effect in favour of all : *A. I. R.* 1927 *All.* 165 (*F. B.*). *Foll.* [P 31 C 1 ; P 32 C 1]

(*b*) *Limitation Act, S.* 182—*An application made by a legal representative for execution more than three years after the decree-holder's death is not time-barred when it is within three years of an application made previously by other representatives.*

Where one of the legal representatives of the deceased decree-holder did not obtain substitution of his name by a formal order and he applied for execution more than three years after the decree-holder's death but within three years from the application of another representative,

Held : the application was not time barred. [P 31 C 2]

Ali Zaheer—for Appellant.

Hyder Husein—for Respondent.

Judgment.—The late Nawab Baqar Ali Khan obtained a decree on the 23rd November 1918. He applied for execution on the 1st March 1919. He died on the 17th January 1921. On the 30th January 1921 certain of his heirs applied for substitution of names. In their application they stated that Nawab Sadiq Ali Khan, son of Nawab Baqar Ali Khan, was also an heir. Notice was issued to Nawab Sadiq Ali Khan. His counsel stated to the Court that Nawab Sadiq Ali Khan claimed to be the sole heir of Nawab Baqar Ali Khan. He denied the title of Nawab Fakhar Jehan Begam to be wedded wife of Nawab Baqar Ali Khan and he denied the title of Nawab Taqi Khan and Nawab Abid Jehan Begam to be the legitimate children of Nawab Baqar Ali Khan, but he admitted that Nawab Sharaf Jehan Begam was his mother and that Nawab Kazim Ali Khan and Nawab Naqi Ali Khan were his own brothers. The counsel stated, however,

that Nawab Sadiq Ali Khan claimed under a family custom to be the sole heir of his father. The position which he took in the matter of execution was this : He said that the question of inheritance to his deceased father's estate was being decided in a separate suit and until that suit was decided he agreed provisionally that the applicants should be permitted to execute the decree provided that any proceeds of execution should be deposited in Court to be distributed according to the decision in the regular suit as to who were the heirs of the deceased Nawab Baqar Ali Khan. In the evidence which the Court took, it was clearly admitted by the applicants' witnesses that Nawab Sadiq Ali Khan was a son of Nawab Baqar Ali Khan. The Subordinate Judge decided on the 25th April 1922 that the application which he calls an application under O 21, R. 16 for substitution of names should be decided in favour of the applicants. It has been laid down in a Full Bench decision of the Allahabad High Court in *Baij Nath* v. *Ram Bharose* (1), that there is no rule under which the legal representative of a deceased decree-holder can or should apply merely for substitution of names. The application should be for execution. We take the same view. There was thus no necessity for these persons to have applied for substitution and we can only look upon their application as an informal method of bringing to the notice of the Court the death of the decree-holder and the circumstance that the interest of the decree-holder had been transferred by operation of law resulting from his death to his heirs. But in these circumstances the application was sufficient to bring Nawab Sadiq Ali Khan on the record as one of those heirs.

The case then stood that after the death of Nawab Baqar Ali Khan the persons entitled to execute the decree were his widow, Nawab Sharaf Jehan Begam, her three sons, Nawab Sadiq Ali Khan, Nawab Kazim Ali Khan and Nawab Naqi Ali Khan and his widow Nawab Fakhar Jehan Begam and her son Nawab Taqi Ali Khan and her daughter Nawab Abid Jehan Begam. Any one of those persons could take action in execution. The decree then became a decree jointly in favour of more persons than one and an application made by one of them took effect in favour of all.

We have to see the history of the subsequent execution. There was an application for execution on the 1st March 1919. The next matter was the informal application of the 30th January 1922 for substitution of names. Unless this is treated as a step-in-aid of execution, the present application would be time barred. In our opinion, however, the application, though it was not required by law, was a step taken by persons entitled to execute the decree and it certainly was in aid of execution as it advanced their position somewhat. In Art. 182, Sch. 1 Act 9, 1908 applications in accordance with law to the proper Court for execution are distinguished from steps-in-aid of application. There was no necessity, as we have said, for these persons to have applied for substitution under the provisions of O. 21, R. 16 and their application for substitution was certainly not an application for execution, but we consider that it was a step-in-aid. There was another step-in-aid when on the 28th April 1923, Nawab Taqi Ali Khan's heirs applied after his death to have their names brought on the record. In these circumstances the application made by Nawab Sharaf Jehan Begam on the 19th July 1923, which was an application in accordance with law for execution, was within time. It was not suggested in the Court below that this application was not within time.

We now come finally to the application of Nawab Sadiq Ali Khan on the 16th July 1926 against the rejection of which the present appeal is preferred. The learned Subordinate Judge took the position that as Nawab Sadiq Ali Khan had not obtained substitution of his name by a formal order and as he had applied for execution within more than three years after his father's death, his application for execution was time barred. He took the position that Nawab Sadiq Ali Khan could not benefit by the action of the other heirs of Nawab Baqar Ali Khan. We do not agree with this view. In the first place we consider that the effect of the order of the 25th April 1922, read with the previous proceedings, was effective in showing that the interest of the decree-holder in the decree had been transferred by operation of law after his death to all his heirs of whom Nawab Sadiq Ali

(1) A. I. R. 1927 All. 165=49 All. 509 (F.B.).

Khan was one, and we further take the view that in a matter such as this, in which there are several persons entitled to take out execution any one of these may take out execution, and that the action of any one will take effect in favour of all. Holding these views we reverse the decision of the learned trial Judge. We find that the application in execution of Nawab Sadiq Ali was within time and a valid application. The appeal therefore succeeds. The judgment-debtor will pay his own costs and those of the decree-holder.

N.D. *Appeal allowed.*

A. I. R. 1928 Oudh 32

STUART, C. J., AND WAZIR HASAN, J.

Maslahuddin—Plaintiff—Appellant.

v.

Ram Kishen and *another*— Defendants —Respondents.

S. A. No. 365 of 1926, Decided on 28th February 1927, from the decree of the 2nd Addl. Dist. Judge, Lucknow, D/-15th September 1926.

Civil P. C., S. 148 *and O.* 41, *R.* 32—*Pre-emption suit—Conditional decree on payment of certain sum within certain time passed—Appeal within time for payment preferred—Appellate Court can extend time for payment under Civil P. C., O.* 41, *R.* 32.

The jurisdiction with which a Court is invested by the provisions of S. 148 in the matter of enlargement of time is restricted to cases where time for doing an act is fixed by the Court, otherwise than by its decree in a suit. But once an appeal is preferred from a decree, the appellate Court becomes seised of the entire proceedings and becomes vested with the jurisdiction of confirming, varying or reversing the decree from which the appeal is preferred, and it follows that the appellate Court has jurisdiction to extend the time though not under S. 148 but under the provisions of R. 32, O. 41, by varying the decree of the Court of first instance in that behalf. [P 33 C 1]

Where the Court of first instance passed a decree in favour of the plaintiff in a suit for pre-emption, conditional on payment into Court of a certain sum directing further that in default of such payment the suit would stand dismissed with costs and the plaintiff preferred an appeal before the expiry of the period fixed for the deposit of the sale consideration:

Held : that the appellate Court can extend time for deposit under O. 41, R. 32 : 7 *O. C.* 359 and 11 *O. C.* 144, *Rel. on.* [P 33 C 1]

Ali Muhammad and *Syed Muhammad* —for Appellant.

Bisheswar Nath and *Salig Ram Sinha* —for Respondents.

Judgment.—This is the plaintiff's appeal from the decree of the Additional District Judge of Lucknow at Unao, dated the 15th September 1926, affirming the decree of the Additional Subordinate Judge of Unao, dated the 7th May 1926.

The suit, out of which this appeal arises, was laid for the relief of pre-emption in respect of a sale dated the 30th June 1925 of a certain zamindari share situate in village Jhalotar in the district of Unao. The consideration for the sale is stated in the sale-deed to be the sum of Rs. 6,355. The plaintiff impeached the validity of the consideration and stated that the market-value of the property in suit was no more than Rs. 3,000. He accordingly prayed for a decree for possession on payment of Rs. 3,000. The plaintiff's title to pre-empt was accepted in defence but his challenge directed against the validity of the sale consideration was disputed.

The Court of first instance held that the entire consideration was valid and passed a decree in favour of the plaintiff conditional on payment into Court of the sum of Rs. 6,355 less the plaintiff's costs of the suit on or before the 7th July 1926. The decree of the Court further contained the direction that in default of such payment the suit would stand dismissed with costs. This judgment was pronounced as already stated on the 7th May 1926.

The plaintiff preferred an appeal from the decree of the Court on the 5th July 1926, that is to say, two days before the expiry of the period fixed for the deposit of the sale consideration. On the date of the filing of the appeal the plaintiff made also an application to the appellate Court praying for extension of time for payment of the sum of money decreed against him by the Court of first instance. The application purported to have been made under the provisions of S. 148, Civil P. C. The Court heard the application in the absence of the respondents and made an order on the 6th July 1926, permitting the plaintiff to deposit the money within one month from the 7th July 1926. The money was accordingly deposited within the extended period.

When the appeal came up for hearing in due course in the presence of the respondents a preliminary objection was taken that the decree made by the Court

of first instance in favour of the plaintiff-appellant had lapsed by reason of his failure to deposit the decretal amount within the 7th July 1926 and that the order of extension of time made by the appellate Court was ultra vires. The Court gave effect to this objection and dismissed the appeal without modifying the decree of the Court of first instance by extending the period prescribed for payment.

The sole point urged in appeal is that in the circumstances of the case the lower appellate Court should have extended the period for payment by its own decree. No other point was urged in the appeal.

The lower appellate Court is of opinion that it had no jurisdiction to extend the time as it had done on the application under S. 148, Civil P. C. and in support of that opinion has referred to certain decisions of the late Court of the Judicial Commissioner of Oudh. Those decisions are *Narendra Bahadur Singh* v *Ajudhia Prasad* (1), *Latifun-nisa* v. *Achambhit Lal* (2) ; *Hasibunnisa* v. *Mahmudunnisa* (3) and *Imam Din Khan* v. *Abdul Sattar Khan* (4). The ratio decidendi of these decisions is that the jurisdiction with which a Court is invested by the provisions of S. 148 in the matter of enlargement of time is restricted to cases where time for doing an act is fixed by the Court, otherwise than by its decree in a suit. The basis on which this opinion rests lies in the fact that when once a decree has been made it cannot be varied or set aside except on appeal or on review. But once an appeal is preferred from a decree the appellate Court becomes seised of the entire proceedings and becomes vested with the jurisdiction of confirming, varying or reversing the decree from which the appeal is preferred : vide R. 32, O. 41, Civil P. C. It follows that the appellate Court had jurisdiction to extend the time though not under S. 148, but under the provisions of R. 32, O. 41, Civil P. C., by varying the decree of the Court of first instance in that behalf. To the same effect are the decisions in the cases of *Ram Dial* v. *Mt. Jafri Begam* (5) and *Ganga Dhar* v. *Anrudh Singh* (6).

Having regard to the order of the lower appellate Court passed on the 6th July 1926 already referred to, there can be no question that that Court was of opinion that the present case was a fit case in which an extension of time might be made. The only error which the lower appellate Court committed was its refusal to incorporate that order into its decree.

We accordingly allow this appeal and modify the decree of the lower appellate Court and that of the Court of first instance by extending the period of payment to the date on which the payment was actually made by the plaintiff-appellant in pursuance of the order of the appellate Court passed on the 6th July 1926. The appellant will receive his costs from the respondents in this Court. As regards the costs in the lower Courts we affirm the order of those Courts.

R.D. *Decree modified.*

(1) [1910] 13 O. C. 88=5 I. C. 443.
(2) [1911] 14 O. C. 85=10 I. C. 721.
(3) [1914] 17 O. C. 377=27 I. C. 419.
(4) A. I. R. 1924 Oudh 102.
(5) [1901] 7 O. C. 359.
(6) [1908] 11 O. C. 144.

A. I. R. 1928 Oudh 33

RAZA AND PULLAN JJ.

Bishunath Saran Singh — Plaintiff — Appellant.

v.

Suraj Pal Singh and *others* — Defendants—Respondents.

S. A. No. 142 of 1927, Decided on 21st October 1927, from the decree of the Dist. Judge, Rae Bareli, D/- 20th January 1927.

(a) *Landlord and Tenant — Compromise granting theka of whole village to under-proprietor does not affect his under-proprietary rights.*

Where the under-proprietor obtained by compromise, a lease or theka of the whole village,

Held : his rights as under proprietor in respect of the plots shown to be held by him as *Sir* holder were not affected. [P 34 C 2]

(b) *Evidence Act, S. 116—Kabuliyats by some members of tenant's family can have no effect upon the under-proprietary title of the tenant.*

Where some of the members of the tenant's family under misapprehension of their title executed kabuliat but the tenant was not put into possession by such kabuliyat or by any lease executed by the landlord and remained in possession of his own *Sir* plots, the execution of the kabuliat having no effect upon his possession or title,

Held : no question of estoppel would arise under S. 116 : *A. I. R.* 1915 *P. C.* 96, *Foll.* [P 34 C 2]

Radha Krishna—for Appellant.

Mahabir Prasad—for Respondent 1

Judgment.—This appeal arises from a suit brought by a taluqdar for a declaration that the defendants are not under-proprietors in certain specific plots in the

village of Asapur in the Rae Bareli district. It appears that the ancestors of the defendants were at one time proprietors in the village. We do not know when they ceased to be proprietors, but we do know that in the year 1861 they were able to show that they were *sir* holders in these plots, and the Court decided that the taluqdar could not enhance their rents. We also know that in the year 1868 they applied to be given a sub-settlement, but a compromise was entered into in that year, which was incorporated in a decree, by which they were given a theka, or lease of the whole village until the end of the settlement but without rights of transfer. In the year 1899 the taluqdar ejected them by suit from the theka, but they retained possession of the *sir* land as is shown by a report made by the qanungo in March 1901. In August of that year certain members of the family executed a kabuliyat which is a bare agreement to pay rent on these plots, for a period of years, written on a printed form. This kabuliyat was succeeded by another kabuliyat, but no kabuliyat exists after the year 1917.

In the year 1918 the taluqdar issued a notice of ejectment on the defendants, and in reply the latter filed a suit claiming under-proprietary title in these plots. The revenue Court decided in favour of the defendants, and that decision has become final. This suit was filed in the civil Court in the year 1923 and both the Subordinate Judge and the lower appellate Court have held that the defendants are under-proprietors. The taluqdar has come to this Court in second appeal and pleads that the under-proprietary title of the defendants has never been established. Now there is a clear finding of fact in both the Courts below that the defendants were under-proprietors in the year 1861 and in the year 1868 when they brought their claim for sub-settlement. We are not prepared to go behind that finding in second appeal, but we have assured ourselves that the finding is based upon admissible and prima facie sufficient evidence. It is, however, argued that, even if the under-proprietary title existed in 1868, it was brought to an end by the execution of the compromise filed in Court. The effect of that compromise was, as we have stated above, to give the defendants a theka of the whole village until the end of the settlement. We see no reason why an under-proprietor should not enter into an agreement of this sort with the taluqdar without in any way damaging his own rights as under-proprietor in the *sir* plots. When the theka came to an end by the ejectment of the defendants they were, as has been pointed out by the Courts below, ejected only from their rights as thekadar but retained possession of the *sir* plots, and this possession has continued till the present day. Thus in our opinion the compromise of 1868 had no effect upon the defendants' rights to be regarded as under-proprietors in the specific plots.

There remains the question of the effect of the kabuliyats entered into by some members of the family. Upon this point there is a concurrent finding of fact by the Courts below that these kabuliyats were entered into by certain members of the defendants' family on account of a misapprehension or mistake as to their legal position, but whether this be so or not it is only by estoppel, as laid down in S. 116, Evidence Act, that the defendants' title as under-proprietors could be affected by the execution of these kabuliats. S. 116 is designed to meet the case of a tenant who has been put in possession by his landlord and it was based on the provisions of English law which enacted that a tenant who has been so let into possession could not deny his landlord's title. This has been held by their Lordships of the Privy Council in *Bilas Kunwar* v. *Deshraj Ranjit Singh* (1). In the present case the defendants were not put into possession by these kabuliyats or by any lease executed by the landlord. They remained in possession of their own *sir* plots, and the execution of these kabuliyats had no effect upon their possession or upon their title. Moreover it is not the case that the landlord's title was impugned during the tenancy. It was not impugned until the suit was brought by the defendants two years after the last kabuliyat has expired. Thus on this point also we are prepared to agree with the view of the Court below, and to find that the under-proprietary title of the defendants has been established and has never been lost.

The Court of first instance held that the civil Court had jurisdiction in this matter and it does not appear that this

(1) A.I.R. 1915 P.C. 96=37 All. 557=42 I.A 202 (P.C.).

question was argued in the lower appellate Court. In view of our findings above, we do not think it incumbent upon us to enter into a discussion on this question. We dismiss the appeal with costs.

N.D. *Appeal dismissed.*

A. I. R. 1928 Oudh 35

RAZA, J.

Sibta Din and *another*—Defendants—Appellants.

v.

Mt. Braj Rani—Plaintiff—Respondent.

S. A. No. 178 of 1927, Decided on 8th August 1927, from a decree of the 1st Sub-Judge, Kheri, D/- 29th March 1927, in Civil Appeal No. 4 of 1927.

Transfer of Property Act, S. 123—*Gift of land in which the donor has a "shanklapdari" heritable non-transferable right is valid as against donor's heirs.*

Where a person obtained a decree in the settlement Court declaring that he had "shanklapdari" heritable non-transferable right in the land as against the talukdar and subsequently executed a registered deed of gift in favour of defendants and the heir of that person brought a suit to recover the land questioning the validity of the gift:

Held: that the deed of gift was valid. The restriction on the right of transfer in the decree of the settlement Court was intended for the benefit of the talukdar and his heirs and not of the decree-holder and his heirs: 14 *O. C.* 144; 2 *O. C.* 252 and 15 *O. C.* 67, *Foll.*

[P 35 C 2, P 36 C 1]

Pearey Lal Varma—for Appellants.

R. N. Shukla and *G. S. Bajpai*—for Respondent.

Judgment.—This is an appeal from a decree of the First Subordinate Judge, Kheri, dated 29th March 1927, setting aside a decree of the Additional Munsif, Kheri, dated the 22nd December 1926.

The plaintiff is the daughter of one Baldeo Prasad, deceased. Baldeo Prasad died in 1916. The plaintiff brought the present suit for possession of certain plots situate in village Saidipur Harriaya alleging that her father Baldeo Prasad was an occupancy tenant of the land in suit and that she was entitled to the same as the heir of the deceased.

The defendants are the grand-nephews of Baldeo Prasad. They resisted the claim on various grounds, and set up a registered deed of gift executed by Baldeo Prasad in their favour on the 2nd December 1915. They alleged that Baldeo Prasad was the under-proprietor of the land in suit. It was further alleged that even granting that Baldeo Prasad had a non-transferable qabzadari right in the land in suit under the settlement Court decree, the condition forbidding transfer contained in the decree was only for the benefit of the superior proprietor and the plaintiff was not entitled to the assistance of the Court.

The learned Munsif accepted the defence and dismissed the plaintiff's suit, but on appeal the learned Subordinate Judge rejected the defence and decreed the plaintiff's claim with costs. The defendants have now come to this Court in second appeal.

I think this appeal should be allowed. The settlement Court had given Baldeo Prasad a decree declaring that he had 'shanklapdari' heritable non-transferable rights in the land as against the taluqdar of Mahewa. The taluqdar's agent had admitted in that litigation that Baldeo Prasad had qabzadari heritable non-transferable rights in the land. It must be held, therefore, that Baldeo Prasad had 'qabzadari' or 'shanklapdari' heritable non-transferable rights in the land in suit. He executed a registered deed of gift in favour of the contesting defendants on the 2nd December 1915. The defendants are in possession of the land under that deed. The plaintiff brought the present suit questioning the validity of the said deed. In my opinion she is not entitled to the assistance of the Court under the circumstances of the case. In the case of *Hirday Behari* v. *Prag Tiwari* (1) the plaintiff who held certain lands under a decree of the settlement Court, granting 'qabzadari' without the rights of transfer, mortgaged them with possession to the defendant and subsequently brought a suit to recover possession thereof on the ground that the mortgage, being of an occupancy holding, was invalid. It was held that the mortgage in breach of the conditions of the settlement decree was not a tranfser for an illegal purpose within the meaning of S. 6, Transfer of Property Act, or for an unlawful object or consideration within the meaning of S. 23, Indian Contract Act. It was held further that the condition forbidding transfer contained in the settlement decree was only for the

(1) [1911] 14 O. C. 144=11 I. C. 527.

benefit of the superior proprietor and that the plaintiff was not entitled to the assistance of the Court in undoing his own act. The case of *Rampher Singh* v. *Ram Khelawan Singh* (2), was followed in *Hirday Behari* v. *Prag Tiwari* (1). In *Rampher Singh* v. *Ram Khelawan Singh* (2) the plaintiff had brought the suit questioning the validity of the transfer made by his father in respect of certain land for which the latter held a settlement Court decree under which he had a heritable but not a transferable right in the property. It was held that it was not open to the plaintiff to question the transfer made by his father in a suit against the transferee. The restriction on the right of transfer in the decree of the settlement Court was intended for the benefit of the taluqdar and his heirs and not of the decree-holders and their heirs. The ruling in the case of *Wazir Mohammad* v. *Har Prasad* (3) also helps the appellants in this case.

It is clear that Baldeo Prasad himself could not question the validity of the deed of gift which was duly executed by him in favour of the defendants. The plaintiff, who is his heir, cannot be in a better position.

The result is that I allow the appeal, and setting aside the decree of the lower appellate Court restore the decree of the first Court. The appellants will get their costs from the respondent in all the three Courts.

N.D. *Appeal allowed.*

(2) [1899] 2 O. C. 252.
(3) [1912] 15 O. C. 67=13 I. C. 613.

A. I. R. 1928 Oudh 36

KING, J.

Bhure Khan and *others*—Appellants,
v.
Emperor—Opposite Party.

Cr. A. No. 133 of 1927, Decided on 16th March 1927, against the order of the Session Judge, Gonda, D/- 16th February 1927.

Penal Code, Ss. 304 *and* 325—*Accused not knowing that injuries were likely to cause death—No intention of causing death or injury likely to cause death—Injuries not directly responsible for death—Conviction under S.* 304 *is not proper, but should be under S.* 325.

Where the accused could not have known that they were inflicting such injury as would be likely to cause death and the intention of causing death or of causing such bodily injury as was likely to cause death was not even imputed to them and the injuries were not directly responsible for the death, but the death was only an indirect consequence of the wounds.

Held : that the accused cannot be convicted under S. 304, but the conviction should be under S. 325. [P 37 C 2]

St. G. Jackson—for Appellants.
H. K. Ghosh—for the Crown.

Judgment.—Fifteen men were put on their trial before the learned Sessions Judge charged under S. 304 with having caused the death of Munne Khan. The evidence shows that Munne Khan was thekadar of the village and that he had left a box containing ornaments with one Mahabir, a tenant of the village. Apparently this box had been left in Mahabir's custody so as to escape an attachment which Munne Khan apprehended. About a month before the assault in question a burglary occurred in Mahabir's house and this box was stolen. Mahabir made a report at the thana and was accompanied by Munne Khan deceased. In this report they named three of the present accused, namely, Bhairon, Dwarka and Nirhu (besides some other persons) as suspected. The result was that the police in making their investigation searched the houses of the persons named. This fact is said to furnish the motive for the assault upon Munne Khan on the 22nd of August.

The evidence for the prosecution shows that on that day when Munne Khan was returning from his fields to his house at midday a gang of 15 men who were lying in wait for him in *juar* field set upon him with lathis and beat him very severely. The appellants were members of this gang and took an active part in the attack. His brother Mohammad Sharif came to his rescue, but was also attacked and beaten by some of the accused. One Goli, a ploughman, also intervened to protect Munne Khan, but himself was attacked and received injuries. Two other witnesses Bhagwan Din and Razak profess to have been eye-witnesses of the assault.

All these four witnesses name all the accused who are appellants before me. I may mention that the learned Sessions Judge acquitted three of the accused giving them the benefit of doubt and released two of them under the provisions

of S. 562. One of the accused is absconding. The remaining 9 were convicted and sentenced to various terms of imprisonment under S. 304, I. P. C., and they are the appellants before me.

All the appellants were named in the first report made by Ibrahim at the thana. They are all named by every one of the 4 witnesses also as having taken a more or less active part in the assault. The statement of Munne Khan deceased was taken in hospital when he was in a weak state, but still able to make a statement. He expressly named Bhairon, Bhure Khan, Qutub Khan, Dwarka and Nirhu among his assailants, but his statement shows that there were also other persons.

It has been urged for the appellants that if the motive for the attack was the fact that Munne Khan had mentioned certain persons as suspected of the burglary in Mahabir's house then that would no doubt explain why those persons should attack Munne Khan, but it furnishes no explanation why other persons such as Bhure Khan and Qutub Khan should join in the assault. The evidence shows that there has been some ill-feeling between Bhure Khan and Qutub Khan on the one hand and Munne Khan and his brothers on the other, because the former had ejected his sister-in-law from a holding and this sister-in-law is an aunt of Munne Khan and his brothers. The ejectment took place some years ago and although it must have caused some ill-feeling between the parties it does not furnish a very convincing motive for an attack of this nature by Bhure Khan upon Munne Khan since the grievance due to the ejectment would seem to have been felt rather by Munne Khan than by Bhure Khan, who was the person who caused the grievance.

The witnesses have, however, stated that all the accused are associates and combine with each other and it is also stated that Munne Khan being thekadar of the village used to take *beger* from the tenants thereby bringing himself into unpopularity. This would furnish a reason for the other villagers joining with Bhairon, Dwarka and Nirhu in the assault upon Munne Khan.

Whatever the motive may be, the evidence at least is perfectly clear that all the appellants did join in the assault upon Munne Khan and did hammer him mercilessly. They also beat Muhammad Sharif and Goli who came to the rescue. These prosecution witnesses have been believed both by the Judge and by the assessors and I see no reason for discrediting their evidence. The attack took place in broad day light and the witnesses knew all the appellants from beforehand.

The learned counsel for the appellants has argued that no case has been made out under S. 304, I. P. C., since the medical evidence shows that the accused could not have known that they were inflicting such injury as would be likely to cause death. The intention of causing death or of causing such bodily injury as was likely to cause death is not even imputed to them since it is perfectly obvious that they had Munne Khan completely at their mercy and they did not do more than inflict a very severe beating, breaking certain bones in the arms and hands, but they evidently did not intend to kill him. The Civil Surgeon deposes that death was due to blood poisoning due to toxic absorption from the blood. He also states that these injuries are not directly responsible for the man's death.

It is the poison that killed him.

This means that the injuries inflicted would not in the ordinary course of nature have caused death. Blood poisoning was an unfortunate complication. Death from blood poisoning might result even from very minor injuries that could not conceivably cause death in the ordinary course of nature when inflicted upon a healthy man. Munne Khan lived for two months after the assault and then died from blood poisoning which was only an indirect consequence of his wounds.

In my opinion the accused in the circumstances cannot be convicted under S. 304, but the conviction should be under S. 325, I. P. C., although the alteration of the sentence makes very little difference. The only practical difference is in the case of Bhure Khan, who has been sentenced to 8 years' rigorous imprisonment, whereas the maximum term under S. 325 is 7 years. As the assault was premeditated and unprovoked and the deceased had been hammered very severely I think Bhure Khan who seems to have been the ringleader and who has according to P. W. 8 been

imprisoned three times before for marpit deserves the maximum sentence. The other accused have received lesser sentences and I see no reason to interfere with the sentences imposed.

The result is that I alter the conviction from one under S. 304, I. P. C., to one under S. 325, I. P. C., and reduce the sentence of Bhure Khan from 8 years to 7 years rigorous imprisonment. The sentences of the other appellants are maintained.

R.D. *Conviction altered.*

A. I. R. 1928 Oudh 38

WAZIR HASAN AND RAZA, JJ.

Taluqdar Khan and *others*—Plaintiffs—Appellants.

v.

Mt. Khairulnisa and *others* — Defendants—Respondents.

S. A. No. 193 of 1927, Decided on 13th October 1927, from the decree of the Addl. Sub-Judge, Gonda, D/- 28th March 1927.

Civil P. C., S. 47—Previous objection in execution dismissed as premature — Subsequent suit in respect of the same plots is not barred—Civil P. C., S. 11.

Plaintiffs in the present suit were some of the defendants in a previous suit. That suit was decreed against the other defendants but dismissed as against the present plaintiffs. The decree-holder in that suit started execution proceedings and the present plaintiffs objected as regards execution in respect of their plots but their objections were disallowed as premature. They sued for declaration and also prayed for possession of the same plots in the event it were found they were not in possession. The Courts below dismissed the suit on the ground that it was barred by the provisions of S. 47, Civil P. C. In the lower appellate Court, the plaintiffs asked that the plaint in the present suit might be treated as proceedings under S. 47. The Court below refused the prayer on the ground that proceedings under S. 47 were barred by the rule of res judicata arising out of the previous order in execution.

Held : that the suit was not barred by the rule of res judicata and it should be treated as proceedings under S. 47. [P. 39, C. 2]

Radha Krishna—for Appellants.

Ali Raza—for Respondents 1-6.

Judgment.—This is the plaintiff's appeal from the decree of the Additional Subordinate Judge of Gonda, dated the 28th March 1927, affirming the decree of the Munsif of the same place, dated the 12th August 1926.

In the suit, out of which this appeal arises, the plaintiffs asked for a relief of declaration for a 2/3rds share in certain plots of land situate in village Baundhar, pargana Ufrala, in the district of Gonda. They also prayed for possession of the same plots in the event it was found that they were not in possession. The Courts below dismissed the suit on the ground that it was barred by the provisions of S. 47, Civil P. C., 1908.

In the lower appellate Court the plaintiffs asked that the plaint in the present suit might be treated as proceedings under S. 47. The Court below has refused the prayer on the ground that proceedings under S. 47 were barred by the rule of res judicata arising out of a previous order, to which reference shall hereafter be made.

We are of opinion that there is no bar of res judicata and the plaint in the present suit should have been returned to the plaintiffs for being presented as an application in execution proceedings to to the proper Court.

The facts are as follows :

One Bismillah Khan had a son, Muhammad Khan, and four daughters. Muhammad Khan entered in course of time into the possession of the entire estate of his father, Bismillah Khan, on the death of the latter. Eventually the three sisters and the representative of the deceased sister brought four suits for the recovery of their shares in the inheritance of their father Bismillah Khan. Naturally Muhammad Khan was the foremost defendant in the suits. But while Muhammad Khan was in possession of the estate he had made several alienations. These alienees were made party defendants to the four suits. They were large in number and amongst them were the present plaintiffs. Muhammad Khan confessed judgment and there was another defendant who compromised with the plaintiffs of those suits. The suits were decreed against Muhammad Khan and the said defendants but they were dismissed against the present plaintiffs and also against other defendants. They were instituted on the 13th July 1915 and the decrees were passed on the 5th August 1918. All this happened in the Court of the Subordinate Judge of Basti in the Province of Agra. The suits and the decrees included certain items of property which were situate in the district of

Gonda. In that class of property were included the plots now in question. On the date of the suits mentioned above the plaintiffs of the present suit held a possessory mortgage of the plots in suit dated 16th February 1915, executed by Muhammad Khan. During the pendency of those suits, that is on the 8th March 1916, they had obtained a sale deed of the same property from the same Muhammad Khan.

It is agreed that the sale being pendente lite is wholly inoperative against the interests of the decree-holders of those suits ; but there is no doubt that the mortgage subsists and the decrees of the four suits mentioned above had not the effect of wiping off the said mortgage for the simple reason that the plaintiffs of those suits were granted no relief against the present plaintiffs. In other words, their suit was dismissed against the latter. The mortgage, therefore, subsists.

It appears that execution proceedings were taken by the decree-holders first in the Basti Court and afterwards in the Court at Gonda. We have before us the four applications which were made in the four suits mentioned above in the Court of the Subordinate Judge of Basti for execution (Exs. 24 to 27). There were two distinct reliefs for which prayer was made in those applications. One was for possession of the properties situate within the jurisdiction of the Basti Court. The second was for a certificate of transfer to the Gonda Court for execution proceedings being taken in that Court in respect of the properties situate in the district of Gonda. It follows that the reliefs did not embrace any proceedings against the present plaintiffs because the properties in which they were interested were not situate within the jurisdiction of the Basti Court but were situate within the jurisdiction of the Court at Gonda. The plaintiffs, however, misconceived the scope of the execution applications and filed certain objections in the Gonda Court which were rightly thrown out by that Court on the ground that there were no execution proceedings being taken against them. The order is dated 7th February 1925 and is as follows :

> The report of the execution clerk shows that the decree has not been executed against these objectors. They have, therefore, no grievance at present in the execution department. Their objection is, therefore, disallowed on this ground.

It is the above order which the Courts below in the present case consider to have the effect of res judicata in respect of the present proceedings. To our mind that order has no such effect. In the first place, as already pointed out, there was no relief sought in the applications with reference to which this order was passed against the present plaintiffs nor was any relief sought to be obtained in respect of the property situate in the Gonda district, as already said. In the second place, in the column relating to the name of the persons against whom execution was being applied for the only name entered is the name of Muhammad Khan and the confessing defendant of those suits. In the third place, the order under consideration rightly and clearly does not decide the merits of the objections which the present plaintiffs had laid before the Court responsible for that order. Indeed the effect of the order is simply this : that the objections were premature and uncalled for. This leads clearly to the inference that the right to object would arise at a proper time in a proper Court. We accordingly think that this was a fit case in which the plaint of the present suit should have been treated as proceedings under S. 47, Civil P. C. As such it could not be entertained by the Munsif into whose Court the plaint was filed. The proper Court was the Court of the Subordinate Judge of Gonda to whose Court the decrees were transferred for execution by the Court at Basti.

We accordingly allow this appeal, set aside the decrees of the Courts below and direct that the plaint of the present suit be returned to the plaintiffs-appellants for the purpose of being presented as an application under S. 47, Civil P. C., to the Court of the Subordinate Judge of Gonda. In the matter of costs, we direct that the parties shall bear their own costs all through. The plaintiffs have at every stage of the proceedings until to-day seem to have taken a wrong course of conduct and they are, therefore, not entitled to any costs.

N.D. *Appeal allowed.*

A. I. R. 1928 Oudh 40

STUART, C. J., AND WAZIR HASAN, J.

Nawab Sharaf Jahan Begum—Decree-holder—Appellant.

v.

Mohammad Sadiq Ali Khan—Judgment-debtor—Respondent.

Execution of Decree Appeal No. 45 of 1926, Decided on 16th December 1926, from the order of the Sub-Judge, Sitapur, D/- 17th September 1926.

(*a*) *Civil P. C., S. 52—Rents and profits arising out of debtor's immovable property are his assets.*

Rents and profits are legal incidents of immovable property and must bear the same character as the property itself, i. e., rents and profits accruing from immovable property of the deceased debtor are his assets: 1 *I. A.* 268 and *A. I. R.* 1924 *Mad.* 530, *Foll.* [P 40 C 2]

(*b*) *Civil P. C., O. 40, R. 1—Money decree to be realized from assets of the deceased debtor—Decree-holder proceeding against assets in possession of one of the heirs only and not willing to leave anything for his family's maintenance—Appointment of receiver would not be just.*

Where a money decree against the assets of the deceased debtor was sought to be executed only against the property of the deceased in possession of only one of the many heirs holding deceased's assets and the decree-holder asked for the appointment of a receiver in respect of the whole of the property of such heir so as not to leave anything for the maintenance of his family, although the heir was willing to place certain property under the management of the receiver and allow the appropriation of the profits thereof towards payment of the decree.

Held: that it would not be just or convenient to appoint a receiver in respect of the whole of the property in possession of the heir.

[P 41 C 1]

Ishari Prasad, Habib Ali Khan and *Girja Shankar*—for Appellant.

Bisheshwar Nath, Bishambhar Nath and *Mujtaba Husain*—for Respondent.

Judgment.—This is the decree-holder's appeal from the order of the Subordinate Judge of Sitapur, dated the 17th September 1926, in proceedings relating to the execution of the decree dated the 3rd January 1923, obtained by the appellant, Nawab Sharaf Jahan Begam, against the respondent, Nawab Mirza Mohammad Sadiq Ali Khan, and several others from the Court of the Subordinate Judge of Lucknow, for a sum of rupees three lacs and interest. The decree was transferred to the Court of the Subordinate Judge of Sitapur for execution under an order, dated the 30th April 1924, passed by the Court of the Subordinate Judge of Lucknow.

The decree-holder is the widow of late Nawab Mirza Mohammad Baqar Ali Khan, resident of the city of Lucknow and taluqdar of the estate of Kanwa Khera, situate in the district of Sitapur. The decree is for the dower debt, and its satisfaction is directed to be made from the assets of the deceased Nawab Mirza Mohammad Baqar Ali Khan. Besides the respondent Mirza Mohammad Sadiq Ali Khan, who is the eldest son of the deceased Nawab and the heir-at-law to the taluqdari estate, there are several other judgment-debtors, who were sued in the character of heirs to the estate of the late Nawab.

The application for execution, out of which this appeal arises, asks the relief of the appointment of a receiver in respect of 53 villages, constituting the taluqa of Kanwa Khera and held in possession by the respondent Nawab Sadiq Ali Khan. On an objection raised by the respondent, the learned Subordinate Judge has rejected the application of the decree-holder on the main ground that the profits of the estate, as they would accrue from year to year, are not assets of the deceased Nawab Mirza Mohammad Baqar Ali Khan.

We do not agree with the learned Subordinate Judge. It is admitted that the villages, in respect of which an order for appointment of a receiver is prayed for, are the assets of the deceased Nawab. It follows, according to our judgment, that the rents and profits accruing from the villages are also his assets. Rents and profits are legal incidents of immovable property and must bear the same character as the property itself. The matter is concluded by the decision of their Lordships of the Judicial Committee in the case of *Oolagappa Chetty* v. *D. Arbuthnot* (1). Their Lordships observed:

> Prima facie the polliem was hereditary. If it was hereditary and descended to the minor son as the heir of his father, the income of the zamindary was liable to pay the debts incurred by the deceased zamindar.

This decision was followed in the Full Bench case of *Kadirvelusami Nayagar* v. *Eastern Development Corporation Ltd., London* (2), decided by Sir W. S. Schwabe, C. J., and C. Trotter and Ramesam JJ. Now remains the question as to whether

(1) [1874] 1 I. A. 268=14 B. L. R. 115=3 Sar. 318 (P.C.).

(2) A.I.R. 1924 Mad. 530=17 Mad. 411 (F.B.).

this is a fit case in which an order of appointment of a receiver should be passed. We have come to the conclusion that it is not. The respondent is only one of the many judgment-debtors. Substantial portions, other than the taluqa in possession of the respondent, of the assets of the deceased Nawab, are held by or adjudged in favour of the other heirs. Amongst such portions are the Government promissory notes of the value of Rs. 2,13,000. Besides, the decree-holder by asking for the appointment of a receiver of the whole taluqa asks for the dispossession of the respondent from the same. Admittedly the taluqa has devolved exclusively on the respondent by right of succession under the provisions of the Oudh Estates Act, 1869. The decree-holder does not ask for the appointment of a receiver in respect of only a portion of the taluqa. At the hearing of the appeal the learned counsel for the respondent, on instructions from his client, expressed his readiness to place under the management of a receiver 6 villages yielding a net profit of Rs 21,640 per annum to be appropriated towards the satisfaction of the decree till it was satisfied in its entirety. The pleader for the decree-holder refused to accept the arrangement. It will thus appear that the decree-holder is not willing to leave any margin in the assets even for the maintenance of the respondent and his family and for his daily necessaries Had she done so it would have been consistent with the course pointed out by their Lordships of the Judicial Committee in the case of *Lal Rajindra Narain Singh* v. *Sundara Bibi* (3).

Having regard to the above circumstances, therefore, we do not consider that it would be just or convenient to make an order for the appointment of a Receiver in respect of the whole taluqa. On these grounds we dismiss this appeal. As regards costs we would direct that each party shall bear her and his costs in both the Courts.

G.B. *Appeal dismissed.*

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(3) A. I. R. 1925 P. C. 176=47 All. 385=52 A. 262 (P.C.).

A. I. R. 1928 Oudh 41

PULLAN, J.

Abdul Ghafoor Khan—Defendant—Appellant.

v.

Karamat Khan—Plaintiff — Respondent.

S. A. No. 250 of 1927, Decided on 24th October 1927, from the decree of the Sub-Judge, Sultanpur, D/- 21st April 1927.

Oudh Rent Act, S. 5, Proviso—Tenancy covered by the proviso can be mortgaged by the original tenant.

The representative of an occupancy tenant who has mortgaged his occupancy holding cannot challenge the mortgage on the ground that it is void in law if the tenancy is one covered by the proviso to S. 5: 15 *O. C.* 67 *Foll: A. I. R.* 1925 *Oudh* 401 and *A. I. R.* 1925 *Oudh* 457, *Diss. from.* [P 41, C 2]

Hyder Husein and *A. C. Mukerji*—for Appellant.

R. D. Sinha—for Respondent.

Judgment.—The question for decision in this appeal is whether the representative of an occupancy tenant who has mortgaged his occupancy holding can challenge the mortgage on the ground that it is void in law. The answer to the question depends on whether the tenant was an occupancy tenant by statute under S. 5, Oudh Rent Act, 1886, or whether he obtained his occupancy right in some other way. In the present case occupancy rights were conferred by a settlement decree subsequent to the year 1868 as the result of an agreement between the landlord and the tenant. The tenancy, therefore, is one covered by the proviso to S. 5, which says that nothing contained in the former part of the section shall affect the terms of any agreement in writing entered into between a landlord and tenant after the 22nd July 1868. In my opinion there is ample authority of the Judicial Commissioner's Court to establish the principle that, in a case of this kind, the tenant cannot challenge the mortgage executed by the original tenant. It may be that the rights given to the tenant were not transferable, but this was a matter of contract between landlord and tenant, and though the landlord could object to a transfer on the ground that it was contrary to the agreement, the transfer itself was not contrary to law as would be the case if the tenant were one, whose occupancy rights had been

obtained under the provisions of S. 5, Oudh Rent Act. The previous rulings on this point were considered by a Bench of the Judicial Commissioner's Court in 1911 and their decision is published in *Wazir Mohamad* v. *Har Prasad* (1). The rulings cited by learned counsel for the appellant are published in *Umrao* v. *Narain* (2) and *Pratab Bali* v. *Suresh Dat* (3). Neither of these rulings appears to me to be an authority for the claim made by the appellant that he is entitled to challenge this mortgage and so resist the possession claimed by the mortgagee. The lower Courts have rightly followed the ruling cited in *Wazir Mohamad* v. *Har Prasad* (1). I dismiss the appeal with costs.

N.D. *Appeal dismissed.*

(1) [1911] 15 O. C. 67=13 I. C. 613.
(2) A. I. R. 1925 Oudh 401.
(3) A. I. R. 1925 Oudh 457=29 O. C. 77.

A. I. R. 1928 Oudh 42

STUART, C. J., AND WAZIR HASAN, J.

Deputy Commissioner of Hardoi—Defendant—Appellant.

v.

Syed Mairaj Rasul—Plaintiff—Respondent.

S. A. No. 382 of 1925, Decided on 24th September 1926, from the decree of the 4th Additional District Judge., Lucknow, D/- 28th April 1925.

Grant—Annuity in the nature of maintenance is not heritable.

Where an annuity to a daughter given under a will of her father is clearly in the nature of a maintenance allowance the annuity is not heritable : 23 *All.* 194 (*P. C.*), *Foll.* [P 42 C 2]

Niamat Ullah and *G. H. Thomas*—for Appellant.

M. Wasim—for Respondent.

Judgment.—This is the defendant's appeal from the decree of the 4th Additional District Judge of Lucknow, dated the 28th April 1925, reversing the decree of the 1st Additional Subordinate Judge of Lucknow, dated the 31st January 1925.

The defendant-appellant is a minor, whose estate is held under the management by the Court of Wards and the Deputy Commissioner of Hardoi is the manager. The plaintiff-respondent claims title to an annuity of Rs. 30 per month granted to his deceased sister, Mt. Sardarunnisa under the will of their father, Syed Fazal Husain, taluqdar of Jalalpur in the district of Hardoi, dated 5th November 1900. Mt. Sardarunnisa died unmarried on the 2nd November 1925, and the plaintiff-respondent, her full brother, is her sole heir under the Hanafi Mahomedan law. The defence to the claim is that the annuity was not heritable.

The decision of the question thus raised depends on the construction of the will of Syed Fazal Husain. The Court of first instance construed the will against the plaintiff's claim and dismissed the suit. On appeal by the plaintiff the learned Additional District Judge has accepted the plaintiff's case, reversed the decree of the Court of first instance and decreed the suit.

In second appeal it is argued that the decision of the Court of first instance to the effect that the annuity granted to Mt. Sardarunnisa under the will of her father was not heritable is correct and should be restored.

We are of opinion that the argument must be accepted. The annuity is clearly in the nature of a maintenance allowance. It is so described in the will. The rule of construction applicable to such a grant was stated by their Lordships of the Privy Council in the case of *Rameshar Bakhsh Singh* v. *Arjun Singh* (1). The rule is that where the purpose of a grant is the maintenance to the grantee it is a prima facie intention that the grant was intended to be for life.

The learned Additional District Judge has distinguished the case just now referred to from the present case on the ground that the grant in that case was by means of a document which was not a will. We think that this is a distinction without any substance. It is the purpose of the grant and not the form of the document on which the rule of interpretation as stated by their Lordships of the Privy Council is founded. We have carefully considered the will as a whole and have discovered nothing in it which can have the effect of displacing the obvious construction.

The learned Additional District Judge and the learned counsel on behalf of the plaintiff-respondent insisted on two

(1) [1901] 23 All. 194=28 I. A. 1=7 Sar. 804 (P. C.).

features of the will which according to them prove the intention of the testator to make the annuity in question heritable. The first is that there are no words of inheritance in respect of the annuities granted to the sons of the testator and yet they must be held to be heritable. The second is that the annuity made in favour of the widow of the testator expressly restricts it to her life, while there is no such restriction in respect of the annuity in question.

In the present case we deliberately refrain from expressing any opinion as to the nature of the annuities made in favour of the sons of the testator. It may be that when the question arises in respect of such annuities it will be decided in favour of the construction that they are heritable, but we give no decision on that matter. As regards the restriction for life expressly placed on the annuity granted to the widow, it may be that the testator had reasons to place such a restriction, which reasons are not applicable to the case of a daughter. The inquiry as to why he expressly imposed that restriction in one case and omitted to do so in the other will clearly lead us into the region of conjectures.

We, therefore, allow this appeal, set aside the decree of the lower appellate Court, and restore the decree of the Court of first instance with costs in all Courts.

D.D. *Appeal allowed.*

A. I. R. 1928 Oudh 43

STUART, C. J., AND WAZIR HASAN, J.

Jang Bahadur Lal and *others*—Defendants—Appellants.

v.

Bhaya Raghunath Singh and *another*—Plaintiffs—Respondents.

S. A. No. 473 of 1925, Decided on 8th November 1926, from the decree of the District Judge, Gonda, D/- 4th July 1925.

(a) *Hindu Law—Alienation by father to pay off prior mortgage—Sons are not bound merely by force of pious obligation.*

Where the alienation in suit is wholly a renewal of the previous mortgage made by the father, sons cannot be bound by the alienation made by the father on the sole ground of pious obligation: *A. I. R.* 1925 *Oudh* 9, *Foll.* [P 45 C 1]

(b) *Hindu Law—Debts—Grandson and great-grandson are bound by alienation made to pay grandfather's and great-grandfather's debt.*

An alienation of the joint ancestral family property in satisfaction of the debts of an ancestor when such debts were neither immoral nor illegal and when the ancestor was the father of the member making the alienation and the grandfather of another member sought to be bound and the great-grandfather of another member, is an alienation for legal necessity: *A. I. R.* 1926, *P. C.*, 105, *Foll.* [P 45 C 1]

A. P. Sen and *K. P. Misra*—for Appellants.

Bisheshwar Nath Srivastava—for Respondents.

Wazir Hasan, J.—This is the defendants' appeal from the decree of the District Judge of Gonda, dated 4th July 1925, reversing the decree of the Subordinate Judge of the same place, dated 3rd July 1924.

It is necessary to state the following pedigree at the outset of this judgment:

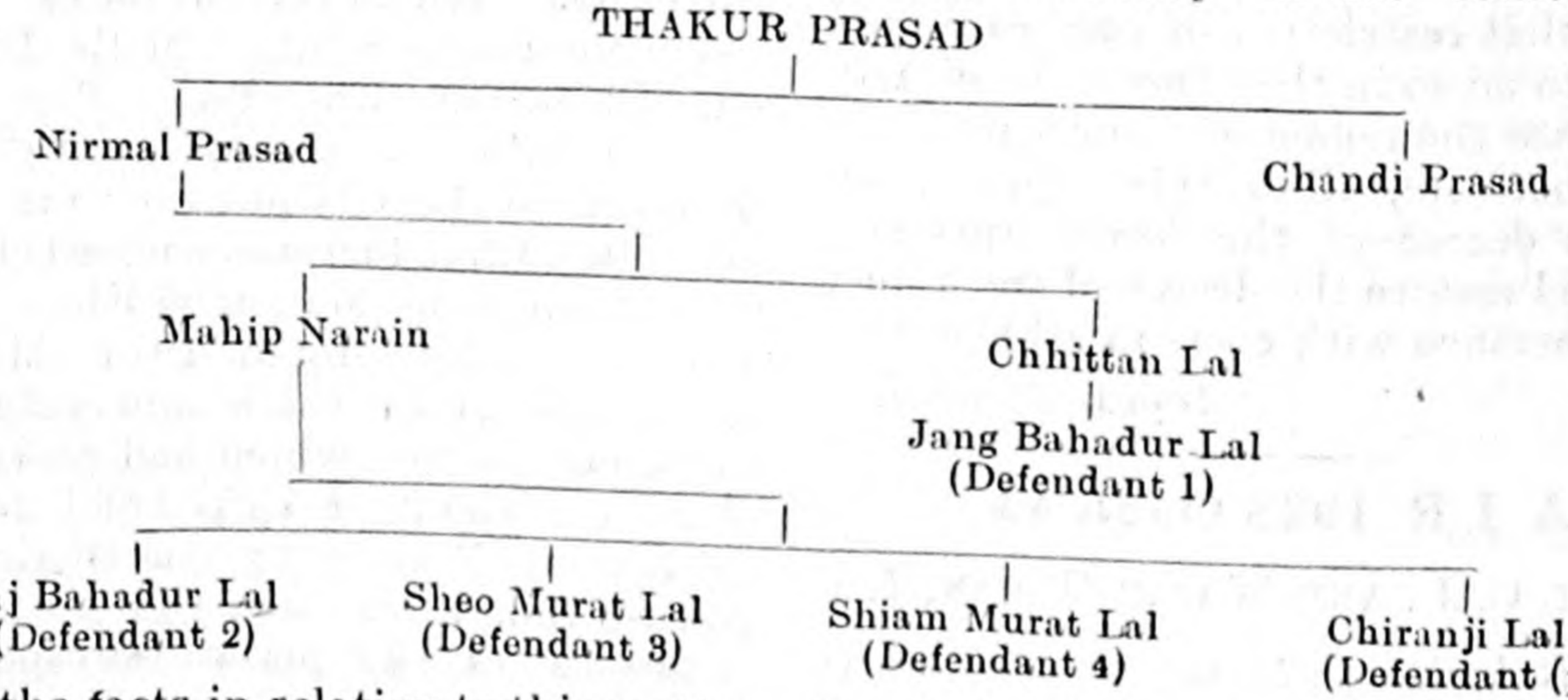
(See p. 44 for pedigree)

The two brothers, Chandi Prasad and Nirmal Prasad, were separate in estate and each was the owner of a three annas eight pies five kirants zamindari share situate in mahal Pura Gur Dayal, patti Mahomed Khan in Utraula in the district of Gonda. On the 23rd April 1898 they sold the entire seven annas four pies 10 kirants share for a consideration of Rs. 10,000 to one Bismillah Chaudhri. The vendee entered into the possession of the share by virtue of the sale just now mentioned. Bismillah Chaudhri was succeeded on his death by his son, Mahomed Khan. Under a deed of 21st March 1914, Mahomed Khan mortgaged three annas eight pies five kirants share, which had previous to the sale of the 23rd April 1898, belonged to Nirmal Prasad, to one Bhaiya Sital Bakhsh Singh, who was the predecessor-in-interest of the plaintiffs-respondents. The mortgage was a simple mortgage. Subsequently the mortgage was put in suit and a decree for sale was obtained. In pursuance of that decree three annas eight pies five kirants share was sold by auction and purchased by the plaintiffs on 23rd October 1920. Formal delivery of possession was made in favour of the purchasers on 8th August 1921.

Meanwhile the defendants by means of certain proceedings in Court taken against the heirs of the vendee, the details of which are not necessary for the purposes of this judgment had obtained possession of the share in question. The object of the present suit is to recover possession of three annas eight pies five kirants share from the hands of the defendants.

The chief defence, with which we are concerned in the present appeal, is that the property in suit being the ancestral joint family property of Nirmal Prasad and his descendants under the law of the Mitakshara did not validly pass out of the family by the sale of 23rd April 1898 effected by Nirmal Prasad in favour of Bismillah Chaudhri.

On the above question in controversy the trial Court held that the sale was invalid and on the basis of that finding dismissed the plaintiffs' suit. On appeal the learned District Judge of Gonda came to the conclusion that the sale of 23rd April 1898, was valid for the reason that it was effected in lieu of antecedent debts and was, therefore, binding on the defendants' interests in the family property. He, therefore, allowed the appeal, reversed the decree of the Court of first instance and gave a decree for possession in favour of the plaintiffs-respondents. The sole question for decision in the appeal is as to whether the sale of 23rd April 1898 was a valid alienation of the family property by Nirmal Prasad.



Now the facts in relation to this matter are as follows:

Under the sale of 23rd April 1898, Nirmal Prasad sold his share of three annas eight pies five kirants for a consideration of Rs. 3,333-5-4. This amount of Rs. 3,333-5-4 was appropriated according to the finding of the lower appellate Court in the following manner:

1. Rs. 1,111 in part payment of a mortgage dated 10th June 1886, made by Thakur Prasad.

2. Rs. 55-10-8 in part payment of a mortgage dated 10th June 1886, made by Thakur Prasad.

3. Rs. 579-2-0 in part payment of a mortgage dated 6th June 1889, made by Thakur Prasad.

4. Rs. 420-3-0 in part payment of a mortgage dated 27th July 1889, made by Thakur Prasad.

5. Rs. 100-7-0 in part payment of a simple money bond executed by Nirmal Prasad himself on 29th November 1889.

(6) Rs. 100 left with the vendee for the purpose of being paid to one Basant Lal on account of a zarpeshgi lease executed by Nirmal Prasad and Chandi Prasad on 14th April 1895.

(7) Rs. 966-4-8 received by Nirmal Prasad as his share of the cash payment of the purchase-money.

In respect of items Nos. 5 and 6 the Courts below are agreed, and the finding was not challenged in appeal before us, that they constitute antecedent debts of Nirmal Prasad for the satisfaction of which he could make a valid alienation of the ancestral family property.

As regards items Nos. 1 to 4 the Court of first instance on the authority of a decision of a Bench of the late Court of the Judicial Commissioner of Oudh, to which I was a party, came to the conclusion that they do not constitute antecedent debt, and as regards the last item No. 7 that Court found that the validity of it was not established. The lower appellate Court in respect of the first four items has held that they were antecedent debts, and as regards the last item No. 7 its opinion is that in the circumstances of the case it should be presumed that the amount was borrowed for legal necessity. The correctness of the opinion of the Court below is challenged in appeal before us.

Now, according to the decision in *Gajadhar Bakhsh Singh* v. *Baij Nath* (1), the first four items of the consideration on which the sale of the 23rd April 1898 rests do not constitute antecedent debt as

(1) A. I. R. 1925 Oudh 9=27 O. C. 133.

the trial Court had held, but the learned District Judge thinks that they do. I still adhere to the opinion expressed in the case just now mentioned that they do not constitute antecedent debt and I have nothing to add to the reasons in support of that opinion to what I stated in that case. The further question decided in that case was as to the validity of the alienation on the pure ground of pious obligation on the part of the sons to satisfy the debts of their deceased father. The fact that the alienation in suit was wholly a renewal of the previous mortgage made by the father had an important bearing on the decision of that question. In the circumstances the essence of the matter lay in the fact that the sons were sought to be bound by the previous mortgage made by the father on the sole ground of pious obligation. It was held that they were not so bound. I am still of the opinion that that was a right decision.

Now the question which has arisen for decision in the present appeal is as to whether an alienation of the joint ancestral family property in satisfaction of the debts of an ancestor when such debts were neither immoral nor illegal and when the ancestor was the father of the member making the alienation and the grandfather of one of the defendants and the great-grandfather of the other defendants is an alienation for legal necessity or not. This question was neither raised nor decided in the case mentioned above. That case, therefore, is no authority for a decision in the present case. In the case of *Secretary of State* v. *Moment* (2), Viscount Haldane, L. C., in delivering the judgment of the Privy Council observed:

> It was suggested in the course of the argument for the appellant that a different view must have been taken by this Board in the case of *Vasudev Sadashiv Modak* v. *The Collector of Ratnagiri* (3). The answer is that no such point was raised for decision.

The answer to the question set forth above must be given in the affirmative having regard to the recent decision of their Lordships of the Privy Council in the case of *Masit Ullah* v. *Damodar Prasad* (4). As observed in that case:

> The law of the Mitakshara proceeds on a logical basis; rights are created by birth up to the third generation, viz., son, grandson and great-grandson. The son of a grandson is entitled equally with his father to question the validity of debts contracted by the ancestor after his death. His obligation to discharge the valid debts of that ancestor is therefore co-extensive with the rights.

No argument was addressed to us on the ground that the great-grandsons of Thakur Prasad have received no assets from the deceased ancestor.

As regards the last item of Rs. 966-4-8, received in cash by Nirmal Prasad from the vendee at the execution of the deed of sale of the 23rd April 1898, I agree with the lower appellate Court that in the circumstances of the case it is a reasonable presumption to make that it formed a valid consideration in part of the purchase. This view is also supported by the decision of their Lordships of the Privy Council just now mentioned. There is no evidence that the money was used for immoral or unauthorized purposes. Direct testimony as to its appropriation is no longer available for the reason that a long time has elapsed since and the vendor, Nirmal Prasad, and the vendee, Bismillah Chaudhri, are both dead.

On the above grounds I would dismiss this appeal with costs.

Stuart, C. J.—Whatever doubts there may have been upon the point in the past, the recent decision of their Lordships of the Judicial Committee in *Masit Ullah* v. *Damodar Prasad* (4), has now clearly established the law as to the binding nature of an alienation of joint family property made by the father to satisfy the debts of the grandfather as against the grandson when such debts are neither immoral nor illegal. The item of Rs. 966-4-8 was, in the circumstances of the case, a valid consideration in part for the purchase. I, therefore, agree with my learned brother in dismissing this appeal with costs.

D.D. *Appeal dismissed.*

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(2) [1912] 40 Cal. 391=18 I. C. 22=40 I. A. 48 (P. C.).
(3) [1877] 2 Bom. 99=4 I. A. 119 (P. C.).
(4) A. I. R. 1926 P. C. 105=48 All. 518=53 I. A. 201 (P. C.).

A. I. R. 1928 Oudh 46

PULLAN, J.

Subhkaran Singh and *another*—Defendants—Appellants.

v.

Ganesh Bakhsh Singh and *others*—Plaintiffs—Respondents.

S. A. No. 258 of 1927, Decided on 24th October 1927, from the decree of the Sub-Judge., Sitapur, D/- 4th June 1927.

Co-sharers—Partition effected—Small plot left for joint use—Some co-sharers planting trees on such plot—Others need not file a suit for portion of such plot but can get joint possession.

Where a partition has already been effected and all that the parties wish to do is to subdivide a small portion of land left for the joint use of the co-sharers and on which some co-sharers have planted trees in an attempt to incorporate it in their own grove, the other co-sharers are fully entitled to get joint possession of the plot without a suit for partition and the trees along with the land remain in the joint possession of the parties and all rights formerly exercised by the co-parcenary body of the land, such as the rights to irrigation, shall remain intact; *A. I. R.* 1924 *P. C.* 144, *Dist.*

[P 46 C 2]

Ali Zaheer—for Appellants.

Bishambhar Nath Srivastava—for Respondents.

Judgment.—The appellants in this case are co-sharers in the village who have taken exclusive possession of a plot which is recorded as being in the shamilat patti of all the co-sharers. The appellants have planted trees in this plot in an attempt to incorporate it in their own grove. The plaintiffs in the suit are members of the co-parcenary body who put forward the reasonable plea that they should be given joint posssession in the land which was actually given them as joint land by the partition. The suit has been resisted on many grounds, but it is evident that the appellants' main interest is to retain their trees. In argument I have been referred to the decision of their Lordships of the Privy Council reported in *Midnapur Zamindari Co.* v. *Naresh Narain Roy* (1). Their Lordships in that case remarked that

> in India each co-sharer in common land is entitled to cultivate in his own interests in a proper and husbandlike manner any part of the lands which is not being cultivated by another of his co-sharers . . . . . Such an exclusive use of lands held in common by a co-sharer is not an ouster of the co-sharers . . . . . When co-sharers cannot agree how any land held by them in common may be used, remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain a partition of lands.

On the basis of this ruling I am asked to hold that the proper course for the plaintiffs to have adopted was to file a suit for partition. Obviously such a course is impossible in a case where partition has already been effected, and all that the parties wish to do is to subdivide a small portion of land left for the joint use of the co-sharers. In my opinion this is a case in which the other co-sharers are fully entitled to get joint possession of the plot and so far the decree of the lower appellate Court is correct. I do not, however, understand from that decree whether the lower appellate Court meant to uphold the decision of the Court of first instance, to the effect that joint possession was to be given by uprooting the trees, nor do I see how joint possession can be given by uprooting the trees; rather it appears to me that by planting trees on joint land the appellants must be assumed to have been acting in the interests of all the co-sharers who will all alike profit from the planting of these trees. How they can enforce their rights to the profits of the trees by uprooting them is not clear to me. All that, in my opinion, the plaintiffs are entitled to is a further declaration of their rights in the enjoyment of the land, that is to say, it should be made clear that they are entitled to the use of the land. It was the finding of the lower Court that the land was used for irrigation purposes and if it is found that the appellants' trees interfere with irrigation it might be necessary to remove them, but there is no such finding of the Courts and I have no reason to suppose the planting of trees interferes in any way with the use of the land for irrigation. I, therefore, uphold the judgment of the lower appellate Court but add to his decree these words, that

> the trees along with the land remain in the joint possession of the parties and that all rights formerly exercised by the coparcenary body of the land such as the rights to irrigation, shall remain intact.

Under the circumstances the parties will bear their own costs in this appeal. The orders as to costs in the Courts below are maintained.

N.D. *Decree varied.*

(1) A. I. R. 1924 P. C. 144=51 Cal. 681=51 I. A. 203 (P. C.).

A. I. R. 1928 Oudh 47 (1)

WAZIR HASAN AND RAZA, JJ.

Kalicharan and *another*—Defendants—Appellants.

v.

Ganeshi Lal—Plaintiff—Respondent.

S. A. No. 163 of 1927, Decided on 15th September 1927, from the judgment of the Sub-Judge, Lucknow, D - 25th January 1927.

Limitation Act, Art. 49 — Detention becomes wrongful when defendant fails to return plaintiff's articles even on demand.

Plaintiff gave two necklaces to the defendant on condition that their price would be paid if they would be approved and they would be returned if they were not approved. The defendant failed to return the necklaces in question to the plaintiff, though the latter demanded them by telegram.

Held : that the defendant's possession of the necklaces became unlawful within the meaning of Art. 49 on his failure to return the same after the receipt of the telegram. [P 47 C 2]

M. N. Chak—for Appellants.

Makund Behari Lal and *Manohar Lal*—for Respondent.

Judgment.—This is an appeal from a decree of the Subordinate Judge, Lucknow, dated the 25th January 1927, affirming a decree of the Munsif, South Lucknow, dated the 28th August 1926.

The dispute in this case relates to two necklaces which the defendants had got from the plaintiff on condition that their price would be paid if they would be approved and that they would be returned if they were not approved. The defendants failed to return the necklaces in question to the plaintiff and hence the present suit was brought by the plaintiff to recover the price of the necklaces by way of compensation. The plaintiff has allowed credit for the amount which was due from him to the defendants on a pro-note executed by him in favour of the defendants.

The claim was resisted by the defendant on various grounds.

It has been found by the lower appellate Court that the necklaces were not pledged as security, as alleged by the defendants ; but were given to them on condition that their price would be paid if they would be approved of. There is no dispute about the price of the necklaces or the amount which the defendants should pay to the plaintiff on account of the price of the necklaces by way of compensation. The only question which has been argued before us is the question of limitation. The appellants' learned counsel has argued that the suit is barred by time. The learned Subordinate Judge has found that the suit is governed by Art. 49, Sch. 1, Limitation Act of 1908. The appellants' learned counsel does not contend that the learned Subordinate Judge was wrong in holding that the suit is governed by Art. 49, Limitation Act. He contends, however, that the suit is barred by time under that article, as it was brought more than three years after the defendants' possession became unlawful. We think this contention is not well founded. We agree with the learned Subordinate Judge that the defendants' possession of the necklaces became unlawful on the 31st January, 1923, on their failure to return the same after the receipt of the telegram. The suit was brought on the 27th January, 1926. It must be held, therefore, that the suit is within time.

No other point has been argued in this appeal. We think no case has been made out to disturb the judgment of the learned Subordinate Judge. The result is that the appeal fails and must be dismissed. We dismiss the appeal with costs. The decree of the lower appellate Court is confirmed in all respects.

N.D. *Appeal dismissed.*

A. I. R. 1928 Oudh 47 (2)

STUART, C. J.

Suraj Pershad and *another*—Defendants Nos. 1 and 2—Applicants.

v.

Ram Adhin and *another*—Plaintiff and Defendant No. 3—Opposite Party.

Civ. Rev. Application No. 32 of 1927, Decided on 1st September 1927, from the decree of the first Addl. Small Cause Court, Judge, Lucknow, D/- 3rd May 1927.

Provincial Small Cause Courts Act, Sch. 2, Art 38—Suit for maintenance.

A suit to be not cognizable by Small Causes Court under Art. 38 must be both in form and substance a suit for maintenance: 2 *A. L. J* 697, *Foll.* [P 48 C 1]

Moti Lal Saksena—for Applicants.

Ram Adhin and *Radha Krishna*—for Opposite Party.

Judgment.—There has been a difference of opinion on the question whether a

suit, such as this, is cognizable by a Court of Small Causes. Some learned Judges consider that wherever the question of maintenance is involved, however, indirectly, a Court of Small Causes has no jurisdiction to try a suit. Other learned Judges are of opinion that, unless the claim is directly for maintenance, a Court of Small Causes has jurisdiction. In this conflict, the view which I accept is the view contained in a decision of *Mahadeo Rai* v. *Deo Narain Rai* (1). This was a decision of two learned Judges of the Allahabad High Court one of whom was Sir Promoda Charan Banerji. In their view Art. 28, Sch. 2, Act 9, 1887, refers to a suit which is, both in form and substance, a suit for maintenance. I agree with that view. In my opinion the present suit is not a suit which is in form and substance a suit for maintenance. I, therefore, dismiss this application with costs.

N.D. *Application dismissed.*

(1) [1905] 2 A. L. J. 697=(1905) A. W. N. 137.

A. I. R. 1928 Oudh 48

PULLAN, J.

Firm Ram Lal Bihari Lal—Defendants—Appellants.

v.

Sundar Lal and *another*—Plaintiffs—Respondents.

S. A. No. 117 of 1927, Decided on 24th October 1927, from the decree of the Sub-Judge, Hardoi, D/- 20th December 1926.

Civil P. C., O 23, R. 3—Decree passed after an adjustment by lawful compromise is lawful —Fact that decree-holder's expectations were frustrated is no ground to invalidate the decree.

Where there is an adjustment by lawful compromise of the suit, the Court is bound by R. 3, O. 23, Civil P. C., to pass a decree. The fact that when the compromise was entered into the decree-holder was unaware that certain property from which he expected to realize his decree had been mortgaged by registered deed to a third party, does not affect the rights of the opposite party to get a decree when there is nothing to show that they concealed the knowledge of the mortgage from the decree-holder. [P 48 C 2]

Kashi Prasad—for Appellants.

Hyder Husein and *A. C. Mukerji*—for Respondents.

Judgment.—The plaintiffs in this suit obtained a declaration that the decree obtained by the answering defendants against a certain firm was not binding on them. For reasons, which need not be specified, the case was remanded to the lower Court for findings on certain issues. When the case came before the lower Court the parties filed a compromise in the following terms:

In the above-noted suit on the intervention of some gentlemen, a settlement has been arrived at between the parties in this way that the disputed property attached in the execution of decree case No. 984 of 1923 of the Court of the Judge of Small Causes, Cawnpore, on 14th August 1923, be exonerated from the decree and that the plaintiffs and any property of theirs shall not be liable to pay off the aforesaid decree and that parties shall bear their respective costs.

This compromise covers the questions in issue between the parties, was duly signed by the parties and was accepted by the Court to whom the suit had been remanded. Prima facie it is an adjustment by lawful compromise of the suit. To-day the learned counsel for the appellant, namely the decree-holder, has asked this Court not to pass a decree according to the terms of the compromise, because when the compromise was entered into he was unaware that certain property, from which it appears that he expected to realize his decree, had been mortgaged by registered deed to a third party in the year 1923, and that the third party in question had filed a suit impleading himself, the appellant, as a party. Now it does not appear that this mortgage, whether it was or was not known to the appellant before, has any significance in the case which is under appeal before me. Its existence or non-existence does not affect the rights of the plaintiffs to get a decree and there is nothing to show that the plaintiffs concealed the knowledge of this mortgage, which, as I have pointed out, was a registered document from the appellant. In my opinion this is a case where the Court is bound by R. 3, O. 23, Civil P. C., and no case has been shown why a decree should not be passed in accordance with that rule. I, therefore, direct that a decree be drawn up in terms of the compromise filed by the parties. Costs in this Court also will be on parties.

N.D. *Appeal allowed.*

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* * A. I. R. 1928 Oudh 49

Full Bench

STUART, C. J., WAZIR HASAN, GOKARAN NATH MISRA, RAZA, AND PULLAN, JJ.

Jagmohan Singh — Plaintiff — Appellant.

v.

Sheoraj Kuar and *others*—Defendants —Respondents.

F. A. No. 121 of 1926, Decided on 1st November 1927, from the decree of the Sub-Judge, Lucknow, D/- 20th August 1926.

* * (a) *Will—Construction—Absolute estate conferred — Subsequent clause reducing the estate must be rejected as repugnant (Per Full Bench).*

Where the testator has devised what is on the face of it an absolute estate and has subsequently added a clause, which has the appearance of reducing the powers of an owner of an absolute estate, it is necessary to decide what were his real intentions. If he meant to grant an absolute estate he cannot reduce the powers of the owner and an attempt to reduce those powers will be repelled on the ground of the repugnancy of the restraint: but if on the other hand it appears that his full intention has been directed towards restriction it will have to be held, if the restriction is good, that the estate is not absolute: 22 *O. C.* 7 and *A. I. R.* 1921 *Oudh* 25, *Expl.* and *Appr.* (*English & Indian case law discussed.*) [P 51 C 1]

Where it is found that the testator had intended to give an absolute estate and has attempted to limit the rights of the holder owing to an erroneous view of his powers so to limit those rights, the attempt to limit the rights must be rejected on the ground of repugnancy. [P 53 C 1]

* (b) *Will—Construction—Full proprietary estate conferred—Possession of hereditary rights follows.*

The possession of hereditary rights follows as a consequence of full proprietorship. It is not necessary to state explicitly that a donee has hereditary rights when the donor intends that he should have them, provided the donor has made his meaning absolutely clear to the effect that the donor is to have a full proprietary estate. The ownership of a full proprietary estate includes the possession of hereditary rights. [P 52 C 2]

Per Misra, J.—In certain cases a testator may confer a life estate and may also give to the donee power of appointment or power of transfer. Yet where clear words have been used in a will indicating that the donee has been made malik and complete powers of transfer have been conferred upon him, it is not necessary in order to give effect to the full powers conferred upon the donee that there must also be a provision in the will to the effect that the estate conferred upon him is a heritable one. [P 54 C 2]

* (c) *Will—Construction—Will drafted by un-skilled persons.*

Where the document has been prepared by persons unskilled in conveyancing, the construction should follow the meaning of the words as found to be meant by the testator. [P 53 C 1]

* (d) *Will — Construction — Defeasance clause. (Misra, J.)*

In order to operate as a valid clause of defeasance, the clause must amount to a definite gift in favour of a definite individual in existence at the time of the gift. [P 56 C 2]

Ali Zaheer, Niamatullah and *Bisheshwar Prasad Misra*—for Appellant.

P. L. Banerji, Kameshari Dayal and *Bisheshwar Nath Srivastava*—for Respondents.

Opinion of the Full Bench

Stuart, C. J.—This is a reference to a Full Bench of the Court made under the provisions of S. 14, Local Act 4 of 1925. The reference was made on the 9th August, 1927, by a Divisional Bench of which I was a member; and as it was considered that the questions involved in the reference were of considerable importance it was directed that the Full Bench should consist of all the Judges of the Court. The facts upon which the reference is based are as follows: A certain Baldeo Singh executed on the 24th February 1911, a will (Ex. 17), a translation of which will be found at p. 5 of Part 3 of the printed paper book. The plaintiff-appellant Thakur Jagmohan Singh and the defendants-respondents Sheoraj Kuar, Janki Kuar and Suraj Kuar are agreed that this will was executed by Baldeo Singh, and that the testator was of sound disposing mind. The first portion of the will is devoted to a devise of certain property to the testator's daughters. In this it is clearly declared that the property in question is to be given at the time of the testator's death to his daughters and their heirs and in no circumstances is that property to return to the testator's family. The reference is only concerned incidentally with this portion of the will.

The portion of this will with which the reference is concerned explicitly is in respect of the following devise: The testator had a son Ambar Singh and a grandson Anrud Singh. Both Ambar Singh and Anrud Singh had died before the date of the execution of the will. The testator made dispositions of certain property in favour of Mahraj Kuar, widow of

Ambar Singh and of Param Kuar, widow of Anrud Singh. This portion of the will commences by stating that the property which is to come into the possession of Mahraj Kuar and Param Kuar at the time of the testator's death is to be considered the estate proper, and that the property devised to the daughters and their heirs is to be considered as property separated from the estate. The will directs that Maharaj Kuar and Param Kuar are to maintain the status of the estate and the house as they exist, and are not to alter them. The disposition in favour of Mahraj Kuar and Param Kuar in respect of the property devised to them is stated to be that Mahraj Kuar is to become proprietor (Malik) and possessor of the entire ancestral property with the exception of the property devised to the daughters) without any right to sell or mortgage it except to meet the charges of land revenue, the expenses of marriages, or other necessary expenses. Mahraj Kuar was to retain the management of the property and to meet from the income disbursements in respect of the payment of servants, marriages, and family ceremonies, and other expenses of management. She was to support Param Kuer if Param Kuar agreed to live with her. But in event of Param Kuar refusing to live with Mahraj Kuar the net balance left over from the income after the payment of all charges was to be divided into two moieties one of which was to be enjoyed by Param Kuar. Their estate was of a limited nature. This portion of the will presents no difficulty.

I now come to the portion of the will which presents difficulty and which constitutes the main portion on which the reference is based. The will continues, that on the death of Mt. Mahraj Kuar or Param Kuar the other will become the proprietor of the property detailed at the end of the will with any additional property that may exist upon the death of the lady who predeceased the other ; and then follows a condition that such property is to be given to the survivor as proprietor with power to transfer, that she is to have the power to transfer the property in question by sale, mortgage, gift or by a testamentary devise. The next clause states that, should such lady die without having nominated a successor by will, the property is to pass to the heirs of Baldeo Singh.

Mahraj Kuar predeceased Param Kuar and Param Kuar succeeded as survivor to the property in question. Param Kuar is now dead. It does not appear that Param Kuar transferred any property in her life-time. The learned trial Judge has found that Param Kuar died intestate. Jagmohan Singh the plaintiff-appellant is admitted by the defendants-respondents to be the heir under the Mitakshara law of Baldeo Singh, and Mt. Sheoraj Kuar, Janki Kuar and Suraj Kuar are admitted by the plaintiff-appellant to be the heirs under the Mitakshara law of Mt. Param Kuar. The questions which arose in the appeal before the Divisional Bench that have been referred to the Full Bench for decision are these : What is the construction to be placed upon the portion of the will to which I have adverted and what is the law which should be applied to that portion of the will when construed ? I take first the question of construction.

The principles which I consider should be applied in a case like this are these : The will must be read as a whole, and it must be decided what the testator actually meant in respect of the particular disposition. In arriving at this conclusion different considerations will arise. The will in question has clearly not been drafted by a trained conveyancer. It is drafted loosely and carelessly, and it can be asserted with confidence that the words are used in a popular sense. Remembering that the document is drafted not by a trained conveyancer and that the words are used in a popular sense, it is necessary to decide what Baldeo Singh intended to give to Param Kuar upon the death of Mahraj Kuar, in the circumstances which have now occurred. According to my reading of the terms of the will I consider that he intended Param Kuar to be the absolute owner of the property in question. I should not attach undue importance to the use of the word malik or proprietor by which he describes the recipient, if that word stood alone, for I find that in an earlier part of the will the same word malik is used when only a limited estate has been granted to the recipient. Reading together the word *malik kul jaedad ba ikhtiyar intaqal* the said words meaning proprietor of the whole estate granted with power of transfer with the subsequent words that the recipient is to have full power to transfer

by sale, mortgage or will, I can only draw the conclusion that Baldeo Singh intended to make the recipient a full proprietor.

That is the first point. It is true that he adds a condition that should the recipient have died without making a will the property is to devolve, not to the recipient's heirs, but to his heirs. This is the difficulty and this is the principal point upon which the reference has been made. In a case such as this in which the testator has devised what is on the face of it an absolute estate and has subsequently added a clause, which has the appearance of reducing the powers of an owner of an absolute estate, it is necessary to decide what were his real intentions. Did he mean to grant an absolute estate? If he has done so, he cannot reduce the powers of the owner; and an attempt to reduce those powers will be repelled on the ground of the repugnancy of the restraint. But, if on the other hand, it appears that his full intention has been directed towards restriction it will have to be held, if the restriction is good, that the estate is not absolute This is the law both in England and in India. I do not think it necessary to refer to authority as the question, in my opinion, does not admit of argument. The Court has frequently difficulty in such a case in construing the testator's intentions, but the difficulty here is not altogether one of construction. There have been two previous decisions of the Judicial Commissioner's Court which have treated this subject in view of the decision in *Hanbury* v. *Fisher* (1) the decision of the House of Lords in appeal in the same case contained in *Comiskey* v. *Bowring Hanbury* (2) and a judgment of a single Judge of the Court of Chancery in *Comiskey* v. *Hanbury* reported in (3). The first decision of the Judicial Commissioner's Court was a decision of my own in 1918 when I was officiating as Judicial Commissioner. It is reported in *Indar Kuar* v. *Chheda Singh* (4). That decision was considered in a subsequent appeal decided by a Bench of the Judicial Commissioner's Court in 1921. This is reported in *Mt. Rajeshuri* v. *Mathura Singh* (5). It largely was owing to the apparently divergent views in these two decisions, that this reference was made by the Divisional Bench of which I was a member.

I need not repeat the facts in *Hanbury* v. *Fisher* (1) and *Comiskey* v. *Bowring Hanbury* (2), as those facts are stated at length in the Oudh decisions in question. But I wish to explain what I meant in my previous decision. All that I wished to decide upon the point was that where an estate had been granted absolutely, subject to an executory gift of the same at the death of the recipient, the executory gift was effective. In the case which I then tried, I was of opinion that an absolute estate had been conferred subject to an executory gift. I might have expressed myself better in that judgment, and I do not contend in favour of every statement I made therein. I consider that I overstated the power of Mrs. Hansbury to dispose of the property, and I wish to withdraw the somewhat loose statement that in cases such as this there is a necessary antagonism between the gift of an absolute estate and the gift over. I am of opinion now that the true meaning of the decision of the House of Lords was that Mrs. Hanbury had obtained an estate which would become absolute if the executory gift failed. The subjection of the absolute nature of the estate to the executory gift, if the executory gift prevailed, was in effect to limit the estate to a certain extent. This was the view taken by Eve J. in *Comiskey* v. *Hanbury* (3). In the well-known treatise Jarman on Wills, 6th Edition, the editor considers the decision in *Comiskey* v *Bowring Hanbury* (3) to be authority for the proposition that it was

> a gift to the wife with a power of appointment among the nieces and a gift to the surviving nieces in default of appointment, and if no niece survived, the wife shall take absolutely: page 1185;

and he further at page 1323 stated that Mr. Hanbury's will gave to his wife:

> an absolute interest defeasible in the event of any niece surviving her.

I consider that this is the correct interpretation of the decision. In the particular case of *Indar Kuar* v. *Cheda Singh* (4), I laid down nothing more. I found that the recipient of the estate

(1) [1904] 1 Ch. 415.
(2) [1905] A.C. 84=74 L.J. Ch. 263=53 W. R. 402=92 L.T. 241=21 T.L.R. 252.
(3) [1909] W.N. 157.
(4) [1918] 22 O.C. 7=50 I.C. 197=3 O.L.J. 88.
(5) A.I.R. 1921 Oudh. 25=24 O.C. 187.

Mt. Mithana had received an absolute estate subject to an executory gift in favour of Indar Kuar. If Indar Kuar had predeceased Mt. Mithana the absolute estate in favour of Mt. Mithana would have become a perfect estate, but as Indar Kuar survived Mt. Mithana the executory gift held good. I do not think that the learned Judges who decided *Rajeshuri* v. *Mathura Singh* (5) appreciated my position. In the particular case which they decided they found that an absolute estate had been granted, and that there was no executory valid gift. Holding that view they rightly decided against the person who asserted the executory gift. I think it sufficient to say that what I consider to be the law on the subject is the law as known before the decision in *Comiskey* v. *Bowring Hanbury* (3), which laid down nothing to the contrary.

I can now approach the conclusion. Mr. Niamat Ullah, who has argued very ably on behalf of the appellant, has asked us to construe the will as giving to the survivor of Mahraj Kuar and Param Kuar nothing more than a life estate with a power such as is known in English law as a power of appointment. He would have us take the view that Baldeo Singh did not grant under this portion of the will a full proprietary estate, that he granted only a power of enjoyment and in addition a power of appointment. If I accepted the view that on the construction of the will he had granted only a power of enjoyment together with a power of appointment I should accede to his argument, but I do not accept that view. In my opinion Baldeo Singh devised in this portion of the will a full estate, but superadded to it a direction that the intestate succession of the holder of the full estate should be succession other than the succession known to the Hindu Law. Mr. Niamat Ullah would have us take the words

> owner with power of transfer by sale, mortgage, gift or will.

as nothing more than conveying a power of appointment. But as I read the words they made the recipient a full owner; and the words denoting the power of transfer were descriptive of full ownership. I cannot find in the deed that there was any good executory gift to Baldeo Singh's heirs. I cannot find that there was any executory gift at all. My construction of the will is that Baldeo Singh created the recipient a full proprietor, and that he added words by which he endeavoured to substitute for the succession known to the Hindu law a succession which appealed to him. It is true that in the will he does not state the recipient is to have hereditary rights, and from this Mr. Niamat Ullah argues that he meant she was not to have hereditary rights. In my opinion the possession of hereditary rights follows as a consequence of full proprietorship. In my opinion it is not necessary to state explicitly that a donee has hereditary rights when the donor intends that he should have them, provided the donor has made his meaning absolutely clear to the effect that the donor is to have a full proprietary estate. The ownership of a full proprietary estate includes the possession of hereditary rights. I consider that Baldeo Singh intended to give an unfettered absolute estate, and being ignorant of the law which prevented him, when he had made such a gift, from controlling the intestate succession of the donee endeavoured to control it by laying down a rule of succession contrary to the rule of the law.

Mr. Niamat Ullah commenced with the argument that no absolute estate was granted. I have already decided that on my construction of the will an absolute estate was granted. He next took up the position that, even if an absolute estate were granted there was a good executory gift in favour of his client that had taken effect. I have already found that on my construction of the document there was no executory gift. He then took a third alternative plea. His case was that all that Param Kuar acquired was an absolute estate defeasible in the event of her not making a will, and that inasmuch as she did not make a will the estate reverted to the heirs of the testator, that is to say, to his client. This argument is similar to the argument which I have previously considered. I cannot construe the will in this manner. Upon its wording it is in my opinion impossible to draw the conclusion that Baldeo Singh intended that if the recipient died without making a will, the portion of the estate which she had not disposed of during her life-time would be forfeited. This is purely a question of construction.

I consider that he had no thought of a forfeiture of the estate granted. He has

endeavoured, according to my view, to lay down a line of intestate succession contrary to the succession known to the law. There was no intention of forfeiture in any circumstances. What I consider him to have intended is that if the recipent did not make will the portion of the estate which she had not disposed of during her life-time should be diverted according to a line of succession unknown to the Hindu law.

I now summarize my views. I consider that this case and all other cases of the same nature should be determined upon a construction of the document as a whole relating to the disposition. I consider that in cases such as this the actual intention of the testator should be sought from the words of the document keeping in mind the circumstances in which it has been prepared. Where, as here, the document has been prepared by persons unskilled in conveyancing, the construction should follow the meaning of the words as found to be meant by the testator. When, as here, it is found that the testator had intended to give an absolute estate and has attempted to limit the rights of the holder owing to an erroneous view of his powers so to limit those rights, the attempt to limit the rights must be rejected on the ground of repugnancy. I would, therefore, return the case to the Divisional Bench with a finding that Mt. Param Kuar succeeded to an absolute estate and that upon her death intestate the property would devolve upon her heirs. On this view the appeal would fail.

Gokaran Nath Misra, J.—(After stating facts his Lordship proceeded.) In appeal the various findings arrived at by the learned Subordinate Judge were challenged, and one of the questions referred by the Bench, before which the case originally came for hearing, to the Full Bench was whether on a proper interpretation of the will of Baldeo Singh, Mt. Param Kuar got an absolute estate or only a life estate in the property in suit.

In order to be able to determine the said question I should like to quote paragraph 3 of the will as it stands in the original :

Yeh ki Mt. Mahraj Kuar wo Param Kuar men se ek bewah marjawegi to dusari malik kul jaedad mansarrah zail ya us waqt jo ho baikhtiyar intiqal ho jawegi aur usko jami ikhtiyarat bai wo rahen wo hibba wa wasiyat hasil honge aur bad wafat uske jo jaedad ki bila namzad karne kisi qayam muqam chhor jawe wo wirsa jaez manmuqir ko pohonchegi magar bamuqable musammatan mazkur ya uske qayam ke jisko tahrer namzad kare kisi ko koi haq no hoga.

The above clause of the will when translated runs as follows :

On the death of either Mt. Mahraj Kuar or Mt. Param Kuar, the survivor will become the absolute owner of the property detailed in the will or of that portion of the property which may be found to exist at the time with power of transfer and that she will have all powers to sell, mortgage or to make a gift or will of the said property ; after her death whatever property she will leave undisposed of without nominating a successor, will devolve upon the legal heirs of the testator, but as against the said ladies or their successors whom they might choose to nominate in writing no one will be entitled to lay any claim to the property.

After giving my best consideration to the terms of the will quoted above I have arrived at the conclusion that the estate conferred on Mt. Param Kuar was an absolute estate and not merely a life-estate. The words used in the will, as will appear from the clause quoted above, are "*malik.....baikhtiyat intiqal*" (owner.....with powers of transfer). In order to make his intentions clear the testator further provided in the same clause that the survivor shall have all powers to sell, mortgage, to make a gift or will the property. In several cases their Lordships of the Privy Council have recently held that the word "malik" when used in a will or a gift imports full proprietary rights unless there is something in the context to qualify it. In the case of *Surajmani* v. *Rabi Nath Ojha* (6) the words used in the deed of gift were '*malik wo khud ikhtiyar*,' and their Lordships held that the words implied a gift of full proprietary rights. In the case of *Fateh Chand* v. *Rup Chand* (7) the words used in a will of a Hindu testator were '*malik wa qabiz*' (owner in possession), and their Lordships held that the will conferred full ownership on the devisee.

In *Baidas Shivdas* v. *Bai Gulab* (8), a Hindu testator had made a gift to his widow by means of constituting her 'malik' (owner) of his property and by further providing that she would have power to leave whatever property might remain after her death to her daughters

(6) [1908] 30 All. 81=35 I. A. 17=5 A. L. J. 67 (P. C.).
(7) A. I. R. 1916 P. C. 20=38 All. 446=43 I. A. 183 (P. C.).
(8) A. I. R. 1922 P. C. 193=46 Bom. 153=49 I. A. 1 (P. C.).

named in the will as she liked. Their Lordships held that the will conferred an absolute estate on the widow.

In *Sasiman Chowdhrain* v. *Shib Narain Chowdhury* (9), a Hindu by his will gave his moveable and immovable properties to his two widows, and provided that after his death they should have in every way full power and proprietary rights over the properties devised. The word used in the will was 'milkiyat.' Their Lordships referred to the previous cases decided by them and held that the word 'milkiyat which meant all proprietary rights was enough to confer full and complete rights as proprietors including the full rights of alienation. The same rule of interpretation was accepted by their Lordships in *Rama Chandra Rao* v. *Rama Chandra Rao* (10).

In *Tikaram Singh* v. *Mt. Chet Kunwar* (11) a Bench of the late Court of the Judicial Commissioner of Oudh consisting of Chamier, J. C., and Tudball, A. J. C., decided that where a property is given or devised though to a Hindu female, the use of the word 'malik' imported full proprietary rights unless there was something in the context to qualify it.

It was contended by the learned advocate for the appellant that although full power of transfer was given to the survivor of the two widows, yet because there was no provision in the will that the property was to go by inheritance to the heirs of Mt. Param Kuar, it could not be said that the testator intended to confer an absolute estate upon her. The argument was to the effect that in order to confer an absolute estate not only full powers of transfer should be given but also it should appear from the terms of the will that the property was to go to the heirs of the devisee. It was pointed out that a person to whom a life-estate was given could also be given a power of transfer; and the mere fact that the power of transfer was given would not imply that it was intended to confer an absolute estate carrying with it heritability also. I do not dispute the proposition that in certain cases a testator may confer a life estate and may also give to the donee power of appointment or power of transfer. I am not, however, inclined to accept the argument that where clear words have been used in a will indicating that the donee has been made 'malik' and complete powers of transfer have been conferred upon him, it is further necessary in order to give effect to the full powers conferred upon the donee that there must also be a provision in the will to the effect that the estate conferred upon him is a heritable one.

In *Jutendromohan Tagore* v. *Ganendromohan Tagore* (12) their Lordships of the Privy Council have clearly laid down that if an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry with it an estate of inheritance. This case was decided by their Lordships in 1872, and it was followed by the Calcutta High Court so far back as the year 1875: vide *Mt. Kollany Kooer* v. *Luchmee Pershad* (13).

In Lalit Mohan Singh Roy v. *Chukan Lal Roy* (14), their Lordships of the Privy Council laid down that the word "malik" conveyed an idea of a heritable and alienable estate. The same view was taken by a Bench of the late Court of the Judicial Commissioner of Oudh in *Karimdad Khan* v. *Ghafuran* (15).

I am, therefore, of opinion that the estate conferred upon Param Kaur under the will was an absolute estate carrying with it the idea of heritability as well as of complete powers of disposal.

The next point for our interpretation is how far the provision in the will providing for the succession of the heirs of Baldeo Singh, the testator, in case of the surviving widow dying without nominating any successor to the property, was a valid provision.

On behalf of the appellant it was contended that the estate conferred upon the surviving widow was a life estate and consequently the provision was valid and good in law. It was further contended that even if the estate conferred upon

(9) A. I. R. 1922 P. C. 63=1 Pat. 305=49 I. A. 25 (P. C.).
(10) A. I. R. 1922 P. C. 80=45 Mad. 320=49 I. A. 129 (P. C.).
(11) [1909] 12 O. C. 157=2 I. C. 924
(12) [1872-73] I. A. Supp. Vol. 47=9 B. L. R. 377=18 W. R. 359=2 Suther. 692=3 Sar. 82 (P. C.).
(13) [1875] 24 W. R. 395.
(14) [1897] 24 Cal. 834=24 I. A. 76=1 C.W.N. 387=7 Sar. 155 (P. C.).
(15) A. I. R. 1922 Oudh 42.

the surviving widow be considered to be absolute, the said provision amounted to an executory devise and was a valid one. It was also valid if it be looked upon as a clause in defeasance. On behalf of the respondents it was, however, contended that the said provision was invalid, because it amounted to the testator's laying down a course of inheritance to be followed after the death of the surviving widow in certain eventualities.

I have already given my opinion that on a true construction of the will the estate conferred upon the surviving widow was an absolute one. We have, therefore, to see how far the subsequent provision relating to the succession of the heirs of the testator is valid. It was argued on the strength of a decision of the House of Lords reported in *Comiskey* v. *Bowring Hanbury* (2), that an absolute gift coupled with an executory devise of the testator's property was a valid one. It appears to me that although in the decree appended at the end of the judgment on p. 92 it is stated that on a true construction of the will of the testator, Mr. Hanbury, there was a gift of his real and personal estate to his wife absolutely, yet it is evident from the body of the judgment that their Lordships did not desire to lay down such a proposition. Lord Halsbury observed (p. 88) as follows:

> To my mind it is clear that he (the testator) is contemplating that she (his wife) shall have the full use of the property during her lifetime and that after her death one or more of his nieces is to be the object of his bounty, and if his widow does not select one or more, then they are all to share alike.

Lord Davey observes (p. 89) as follows:

> Reading the will without paying any attention to legal rules, and for the purpose only of seeking the testator's intention and the meaning of the words he used, it is obvious that he did not intend that his wife should have an absolute power to dispose of the estate in her lifetime or otherwise than by her will.

Lord James observed (p. 91) as follows:

> I think the meaning of the testator from a commonsense point of view is clear enough He wished his widow to have a life estate in his property, and he then wished after that life estate that it should be left to his nieces, to those of his own blood.

It would thus appear from the observations quoted above that what their Lordships decided was that the nature of the estate, though stated in the will to be absolute, was really of a qualified nature, and consequently the executory devise in favour of the nieces was held to be valid. I am supported in this interpretation by a decision of the late Court of the Judicial Commissioner of Oudh reported in *Mt. Rajeshuri* v. *Mathura Singh* (5). I am of opinion that that case was rightly decided when it laid down the rule that where an absolute estate was granted, the grant of an ulterior disposition was void. The learned Judges referred to the decision of the House of Lords quoted above and expressed that the ground of decision of their Lordships in that case was that on a true construction of the will it did, not confer upon the donee an absolute power of disposition of the property, and, therefore, there was no repugnance between the estate conferred upon her and the gift over. But even assuming that the true interpretation of the aforesaid decision of the House of Lords is that an executory devise can be validly engrafted to an absolute estate, we have to determine whether there is a good and valid executory devise in favour of a particular individual in the will before us. I am clearly of opinion that the will cannot be interpreted to contain any provision which may be considered to be a valid executory devise. The real meaning of the testator appears to be that in case the property was not left to any person by the surviving widow, it would devolve on his heirs. He did not make any executory devise or gift over in favour of any particular individual or individuals, but he only laid down what he considered to be the course of succession which his property should take in a certain contingency. In my opinion, the true meaning to be attached to the clause is that the testator was laying down a course of inheritance, but was not making any bequest in favour of any particular individual or individuals to take effect in future.

It is a settled rule of law that a gift over would be void for repugnance where the estate conferred was of an absolute nature. The limitation whether by way of gift over or by way of executory devise would be invalid, because it would be inconsistent with the absolute estate or power of disposition expressly given by the will. There are a large number of decisions of English and Indian Courts which support this principle. In *Ross* v. *Ross* (16) it was held that where there was a bequest of a particular sum of money

(16) 20 W. R. 263.

absolutely to a certain individual and there was a further condition inserted by the testator to the effect that in case the donee did not dispose of the said sum by will or otherwise during his lifetime, the said sum should be payable to the heir in tail of the testator, the said condition was void.

In the case reported in *Watkins* v. *Williams* (17) the House of Lords laid down the same principle. In that case a certain money fund was given to a person absolutely and a condition was attached to the gift over that so much as he shall not dispose of, should go over to another person. It was held that the condition was invalid and could not be enforced.

In *Barton* v. *Barton* (18), it was held that where there was an absolute devise or bequest of real or personal property followed by a gift over in the event of the donee dying intestate, the gift over was repugnant and void.

In *Holmes* v. *Godson* (19) the same rule was laid down. A testator had directed that his property was to vest in his son on his attaining the age of 22 years but if he attained the said age but did not make a will then the property was to be sold and the proceeds thereof applied on other trusts. It was held that the property vested in the son absolutely and gift over was repugnant and void.

In *Sures Chandra Palit* v. *Lalit Mohan Dutta* (20) the same principle of law was affirmed. In that case a Hindu testator had given his property, moveable and immovable, absolutely to his widow and had given her rights of gift, sale and of all other kinds of transfer. He had also authorized her to adopt a son and also provided that in the case she did not adopt or if the son adopted by her was not alive at the time of her death, the testator's heirs according to Hindu law alive at the time of the death of the widow were to get the property which remained after disposal by the widow by way of gift or will of the same. It was held by their Lordships of the Calcutta High Court (Mookerjee and Roe, JJ.) that the widow having taken an absolute interest in the estate devised to her, the gift over in favour of the testator's heirs of what might remain undisposed of by her, was void and inoperative in law. The judgment deals with this question most exhaustively, and I entirely agree with the conclusions arrived at by their Lordships of the Calcutta High Court in that case and have nothing to add.

As to the argument that this clause should be treated as a clause in defeasance, it appears to me that it cannot be so interpreted. The estate given to the widow is not anywhere stated in the will to be liable to be defeated on the happening of a particular contingency. As stated above, what the testator actually provided for was that in case the surviving widow did not leave the property to a successor nominated by her by a will the property such as was left by her was to go to the heirs of the testator. He merely prescribed a course of succession which his property was to take if such a contingency happened ; he did not provide for the defeasance of the estate held by the widow.

In *Krishtormoni Dasi* v. *Narendra Krishna Bahadur* (21) their Lordships of the Privy Council held that it was competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently upon the happening of a future event but the clause relating to defeasance must comply with certain conditions ; firstly that the event must be one that will happen, if at all, at latest immediately upon the close of a life in being at the time of the gift; and secondly, that a defeasance by way of gift over must be in favour of some person in existence at the time of the gift. It would thus appear that in order to operate as a valid clause of defeasance, the clause must amount to a definite gift in favour of a definite individual in existence at the time of the gift. In my opinion the provision in the will which is before us, providing for the passing of the property to the heirs of testator, cannot be interpreted as a gift in favour of a specified individual in existence at the time and cannot, therefore, be construed to be a valid provision.

My interpretation of the will, therefore, is as follows:

The will conferred upon Mt. Param Kuar an absolute estate and the condi-

(17) 87 R. R. 228.
(18) 112 R. R. 266.
(19) 114 R. R. 73.
(20) [1916] 20 C. W. N. 463=31 I. C. 405=22 C. L. J. 316.
(21) [1889] 16 Cal. 383=16 I. A. 29=5 Sar. 285 (P. C.).

tion entered therein that in case she did not nominate a successor the property such as was left undisposed of by her was to pass to the heirs of the testator, was an invalid condition being inoperative and unenforceable in law.

Raza, J.—The relevant and material clauses of the will dated 24th February 1911 are the second and third clauses which are as follows:

(2) That after my death Mt. Mahraj Kuar shall become proprietor and possessor of the entire ancestral property, acquired property, moveable property, groves, trees and houses together with all the rights and things without exception of anything and right with this condition that if Mt. Param Kuar and Mt. Mahraj Kuar may not live together amicably then after deduction of—all the household expenses and expenses of the servants and guests and visitors and weddings of daughters and other ceremonies in which it may be necesssary to give them, in the way in which they are incurred now—whatever profit is left half of it Mt. Param Kuar will get from Mt. Mahraj Kuar. Besides this she will have no other power. And Mt. Maharaj Kuar shall have no power to contract debts and to sell or mortgage the property in order to pay the revenue and meet the expenses of weddings of daughters and other necessary expenses.

(3) That on the death of Mt. Mahraj Kuar or Mt. Param Kuar the survivor will become the proprietor of all the property detailed below or that property which exists then with power of transfer and she will have all the powers to sell, mortgage or give away by gift or will. And after her death whatever property she may leave without nominating any successor will devolve on the legal heirs of the declarant (testator). But as against the said Musammats or their successors whom they will nominate in writing no one will have any right.

It is on the third clause that contest has turned in this case. It is contended on behalf of the plaintiff-appellant that on the proper construction of the will the last surviving widow (Mt. Param Kuar) was given only a life estate and, assuming that she was given an absolute estate, that estate was defeated on the happening of the contingency mentioned in the will, namely, her failure to nominate her successor.

Thus two points arise for determination in this case:

(1) Was Mt. Param Kuar given only a life estate by the will?

(2) If she was given an absolute estate, is the plaintiff-appellant still entitled under the will to claim the property in dispute after her death, as the heir of Baldeo Singh, testator, as she died without nominating a successor?

I have considered the provisions of the will very carefully. In my opinion Mt. Param Kuar was given an absolute estate and not merely a life estate by the will. She became the absolute owner of the property under the will and no trust was created in favour of any person. She took the property absolutely for her own benefit. The testator intended to give her an unfettered absolute property and this is what he actually gave her by his will. The testator has of course attempted, after giving the property to Mt. Param Kuar absolutely, to say how the property shall go if she died leaving any property without nominating a successor, but that is a provision which the law will not allow and it is invalid being repugnant to the prior absolute gift. When the property vested in Mt. Param Kuar absolutely, the gift over was repugnant and void.

In the case of *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury* (9) a testator by his will provided as follows:

I, the declarant, of my own accord and free will in order to avoid future disputes and to perpetuate my name, give all the mauzas in entirety or in part, both ancestral and purchased, theka properties and all goods and assets . . . and all other properties to both my first and second wives, Mt. Subast Chowdhurain and Mt. Sasiman Chowdhurain, who after my death will be heirs to all the moveable and immovable properties . . . The said Musammats after my death shall have, in every way, full power and all proprietary rights over all the moveable and immovable properties and they should under the deed executed by me pay annually Rs. 360 to Mt. Lachhmi Chowdhurain, widow of my brother Dular Chowdhury, until her death for her maintenance, and by this deed the said Musammats should get their names recorded in the Government Sheristá in the columns of properties.

In a suit for declaration that the widows took only the ordinary widow's estate under the Hindu law it was held by their Lordships of the Privy Council that the widows had an absolute estate in the property covered by the testament. The term "malik" when used in a will or other document as descriptive of the position which a devisee or donee is intended to hold has been held apt to describe an "owner" possessed of all proprietary rights including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred.

B. M. DAR, ... Vakil High Court

In the case of *Bhaidas Shivdas* v. *Bai Gulab* (8) a Hindu testator gave the whole of his immovable estate to his wife as " malik " and directed that she should leave the property to his two daughters in such manner as she might like. The will was divided into clauses. By Cl. (2) the testator appointed his wife as the sole executrix. In the next clause after stating that he had no son he appointed his wife to be his heir and the clause continued in these words :

And I constitute her the owner. And as to whatever property there may remain after her death my wife shall leave the said property to my two daughters in such manner as she may like (either) by making a ' will ' or by making (some) other instrument. Of my two daughters one named Bai Jamnabai was married to Shah Haridas Hemchand, but as he subsequently died she has now become a widow. To her and to (my) other daughter Bai Dewali who has been married to Shah Bhaidas Shivdas (i. e.) to both of them my wife shall give (my) property in such manner as (she) may like.

By later clauses of the will the testator referred to powers that he desired his wife to enjoy, for example, by Cl. (6) he expressly stated that he gave his wife authority to do what she thought right with profits and the ready moneys of a shop where he carried on business and further to continue any partnership with the partners if she so desired. By Cl. (18) he provided that after there had been defrayed out of the rents of certain specific immovable property, the expenses in connexion with a religious object, for which he had made provision, the wife should apply the surplus for her maintenance and use and for the maintenance and use of the daughters if they were living with her, and if the surplus were insufficient she would deal with the moveable and immovable properties in such manner as she thought fit. By Cl (20) again he gave express power to his wife to mortgage, lease, sell and use the properties. Finally by Cl. (23) he provided that after the death of his wife his daughters should be named executrixes and he gave them authority to deal or manage the whole of his property and effects. The following observations were made by their Lordships of the Privy Council in their judgment in that case :

There is no dispute that the word that was used in Cl. 3 as the original word of gift was the word ' malik ' which would be appropriately used to constitute the wife absolute owner. It is not that the word is a term of art ; it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be ; and in the context of the present will their Lordships think the estate was absolute. At the time when the will was executed it may well have been that whoever drew the will was aware that at that time words of absolute gift in favour of a Hindu widow might not be supposed capable of conferring upon her a power of alienation, for in the case of *Mt. Surajmani* v. *Rabi Nath Ojha* (6) we find that the High Court had ruled :

"That under the Hindu law. as interpreted up to the present in the case of immovable property given or devised by a husband to his wife, the wife has no power to alienate unless the power of alienation is conferred upon her in express terms"

The decision in *Mt. Surajmani* v. *Kabi Nath Ojha* (6) showed that that provision was no longer sound and that if words were used conferring absolute ownership upon the wife the wife enjoyed the rights of ownership without their being conferred by express and additional terms unless the circumstances or the context were sufficient to show that such absolute ownership was not intended. If Cl. 3 stood by itself it would, their Lordships think, be difficult to dispute that whatever the testator desired with regard to the disposition of his property after the death of his wife, he had not expressed his wishes in such a manner that they bound the property. The words under which the appellant claims are words which only attach to whatever property there may remain after the death of the wife. Without for the moment considering whether the desire expressed by the testator is expressed in a form that makes her disposition of it mandatory or no, it is sufficient to say that if that clause stood alone the principle stated in the case of *Harwood* v. *West* (22) would be applicable to this will as it would to a will in England. The Vice-Chancellor says at page 387:

"It is essential to the execution of a trust that the subject should be certain and if this testator intended that his wife should, at her pleasure, during her life, dispose of the property which he left to her, and that his recommendation should extend only to what, if anything happened to remain of his property at her death undisposed of by her, then there is no trust to be administered by this Court....."

Their Lordships therefore think that these subsequent clauses in the will are not sufficient to displace the language of Cl. 3 fortified by the powers given in Cl. 20, and by that language there is no trust created in favour of the two daughters of the testator.....Even assuming it was intended to create a trust and the words were sufficient for that purpose the subject-matter on which the trust is to operate is by the terms of this will too uncertain to enable the Court to give it administration.

In the case of *Tripurari Pal* v. *Jagat Tarini Dasi* (23) a testator by his will provided as follows :

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(22) 1 L. J. (O. S.) Ch. 201=1 Sim. & S. 387=24 R. R. 199.

(23) (1913) 40 Cal. 274=17 I. C. 696=40 I. A. 37 (P. C.).

My present begotten son Makunda Murari will be shebait for the performance of those ceremonies. If during the minority of the said Makunda Murai Pal I die, then my second wife Srimati Brajamati Dasi who gave birth to Makunda Murari, will be shebait as his guardian, during the time of the said Makunda Murari's minority, and Makunda Murari, on attaining majority, will personally conduct the work of the sheba. God forbid, if during my life-time or after my death the said Makunda Murari dies, then the said Brajamati Dasi will be shebait, and after her death, Srimati Nistarini Dasi and Srimati Jagat Tarini Dasi, daughters born of the said Brajamati Dasi and of my loins, will be shebait.

Makunda Murari survived the testator and died after attaining majority and leaving a son. It was held by their Lordships of the Privy Council that there was an absolute gift of the shebaitship to Makunda Murari on his attaining majority. There were provisions in the case of his death as a minor, but no provision cutting down the absolute gift to him. It was further held that Makunda Murari's son succeeded him in the shebaitship. Thus the gift over after the estate had once vested in Makunda Murari was held to be contrary to law.

In my opinion the judgment of the House of Lords in the case of *Comiskey* v. *Bowring Hanbury* (2) is no authority for the proposition that a testator can make a gift over, after a vested bequest of an absolute estate. The judgment in that case has, I think, been rightly interpreted and explained in the case of *Mt. Rajeshuri* v. *Mathura Singh* (5) decided by the late Court of the Judicial Commissioner of Oudh in 1921. I may also refer to the case of *Sures Chandra Palit* v. *Lalit Mohan Dutta Choudhuri* (20) It was held in that case that where a devisee takes an absolute interest, a gift over on his failure to dispose of the property or whatever part of the property he does not dispose of is void. The judgment of the Calcutta High Court in that case is very instructive. It is an elaborate judgment in which almost all the authorities including *Comiskey* v. *Bowring Hanbury* (2) are referred to.

In my opinion the words in the will under consideration on which the plaintiff-appellant relies are not sufficient to cut down the gift which according to my construction is absolute in favour of Mt. Param Kuar in the first instance. She took absolutely and not subject to any executory gift over. So far as I see the estate given to her is not anywhere stated in the will to be liable to be defeated on the happening of a particular contingency. Having given the property absolutely to Mt. Param Kuar, the testator could not alter the line of succession allowed by law, for the purpose of carrying out his wishes or views of policy (if any). The power of disposition having been given, the widow took an absolute estate and the creation of further estate after the termination of the donee's interest which in terms was absolute, did not cut down the absolute estate, but was void. I would, therefore, decide both the points mentioned above against the plaintiff-appellant.

Wazir Hasan, J.—(After stating facts His Lordship continued.) Cl 3 of the will of the 24th February 1911 is unfortunately not in such a happy state of lucidity as to enable us to ascertain the intention of the testator without any difficulty. This being so, the principles of construction which eminent Judges have on former occasions enunciated for arriving at a conclusion as to the intention of the testator are to my mind of great and abiding value and I confess that I ordinarily take light from such principles in construing documents where language employed to express the intention is ambiguous, equivocal or to say the least not clear. To my mind the saying

> to construe one man's nonsense by another's

is nothing but pedantry. It seems to me that to apply the same rules of sound judgment as have been applied by former Judges to the interpretation of a document is but common-sense.

In *Grey* v. *Pearson* (24) Lord Wensleydale observed that it was the universal rule of construction that the

> grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.

The second principle which I should bear in mind may best be expressed in the language of Lord Moulton in the case of *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* (25). His Lordship made the following observations:

> In all cases the primary duty of a Court is to ascertain from the language of the testator what

(24) [1857] 6 H. L. C. 61=26 L. J. Ch. 473=5 W. R. 451.

(25) [1914] 37 Mad. 199=23 I. C. 166=41 I. A. 51 (P. C.).

were his intentions, i. e., to construe the will. It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure: 'The Court is entitled to put itself into the testator's armchair.'

But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon the construction is settled, the duty of the Court is to carry out the intentions as expressed and none other. The Court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to law which provides for succession of property in the absence of testamentary directions applying thereto. But the Court never adds to a will anything which needs to be done by testamentary disposition. In all cases it must loyally carry out the will as properly construed, and this duty is universal and is true alike of wills of every nationality and every religion or rank of life . . . . . That native testators should be ignorant of the legal phrase proper to express their intentions, or of the legal steps necessary to carry them into effect, is one of the most important of the 'surrounding circumstances,' which the Court must bear in mind, and it is justified in refusing to allow defect in expression in these matters to prevent the carrying out of the testator's true intentions.

To the observations of Lord Moulton I would add the following observations of Wilson, J., in *Ram Lal Sett* v. *Kanai Lal Sett* (26), quoted with approval by Lord Macnaghten in the case of *Bhagabati Barmanya* v. *Kali Charan Singh* (27):

It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designated to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently, from Englishmen, and who have never heard of the rules in question.

The third principle upon which I rely is this:

We are not at liberty to speculate upon what the testator may have intended to do, or may have thought that he had actually done. We cannot give effect to any intention which is not expressed or plainly implied in the language of his will; Per Lord Watson in *Jullia Josephine Scale* v. *Rawlins* (28).

The fourth and the last principle of which I want to make use in this case is stated by Sir John Edge in the case of *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury* (9)

that it is always dangerous to construe the words of one will by the construction of more or less similar words in a different will, which was adopted by a Court in another case.

I now proceed to the task of interpreting the will before us. In the first part of this will the testator recites the fact that he has no male issue and that he had made a previous will. He then expresses his desire to alter the nature of the devise which he had made in his previous will in favour of his granddaughter and alters it. By this will there is no doubt that he gives absolute "proprietary" estate to them and emphasizes it by saying that

under any circumstances and at any time it shall not revert to my family.

The estate so conferred on those daughters is clearly an estate of inheritance in terms of the will itself. He, however, restricts the inheritance, in case of issue, to male issue only as is also clear from Cl. 6 of the will. This, it is not disputed, he could not do. It is clear, therefore, that the testator was labouring either under ignorance or forgetfulness of the rule of law that he had no power to prescribe a course of inheritance different from the course prescribed by law. After this appear manifestations of the testator's intention to make devise in favour of Mt. Mahraj Kuar and of Mt. Param Kuar. The first devise in favour of these ladies is made and expressed by the following passage:

As to my remaining property at first Mt. Mahraj Kuar . . . . and after her Mt. Param Kuar . . . . will become proprietors. Nothing will be done against this that they will maintain the status of the family and the estate which exists at present and will not alter it, only the

(26) [1886] 12 Cal. 663.
(27) [1911] 38 Cal. 468=10 I. C. 641=38 I. A. 54 (P. C.).
(28) [1892] A. C. 342=61 L. J. Ch. 421=66 L. T. 542.

land granted to the daughters shall be separated from the estate.

I regard the words just now quoted the main and the real words of disposition and what follows as "conditions" annexed to the said devise as the will itself says. I construe these words as constituting the two ladies full and complete owners (malik), successively of the property of the testator except the property bequeathed to the granddaughters. The absolute ownership is emphasized by the words

Nothing will be done against this

which clearly mean that nothing will affect their status of full owners.

That they will maintain the status of the family and the estate . . . . and will not alter it

is an expression of wish or at the most, is a direction, as to the mode of enjoyment conveying the desire of impartibility of the estate. Here again the futility of the testator's wish is apparent and the same wish permeates through all the subsequent clauses of the will which the testator describes as "conditions." In condition No. 2 he again makes Mt. Mahraj Kuar proprietor (malik) of the estate

together with all the rights and things without exception of anything and right,

and again imposes a restriction on her power to sell and to mortgage limited by the need of paying the revenue, meeting the expenses of the daughters' marriages and for other necessary expenses. There is much force in the arguments advanced by Mr. Niamatullah, advocate for the appellant, that the status of a "proprietor" conferred on Mt. Mahraj Kuar in Cl. 2 is subjected to such disabilities as appertain to the status of a Hindu female and, therefore, the estate conferred is not higher than the usual Hindu female's estate. I think, however, that the argument loses all its force when it is considered in relation to the main words of the devise and the first portion of Cl. 2 and lastly Cl. 3. From the language employed in the whole of the will and in the several clauses when separately considered I am irresistibly led to the conclusion that the dominating idea in the testator's mind was that he could confer full ownership on a person and could also validly impose restraints on mode of enjoyment, on power of alienation and on the course of inheritance. This is by no means an uncommon failing of Indian testators.

Now comes Cl. 3 of the will. It may be translated as follows:

That on the death of Mt. Mahraj Kuar or Param Kuar the survivor will become the proprietor of the entire property or of that property which exists then (that is at the time of the death of the lady who dies first) with power of transfer and then she will have all the powers of sale, mortgage, gift and bequest; that after the death of the last survivor the property which she will leave without nominating a successor will devolve on the legal heirs of the declarant. But as against the said musammats and their successors whom they will nominate no one will have any claim.

The construction of this clause is not free from difficulty. The intention of the testator as evidenced by the language of Cls. 2 and 3 is, however, clear in one respect and it is this that the fetters as to the mode of enjoyment and power of alienation are removed as soon as one of the two ladies dies and the property passes into the hands of the survivor. This shows that the fetters placed on one of the conditions were intended to be placed for the benefit of the other.

Now the words

will devolve on the legal heirs of the declarant

are either words of limitation appertaining to the estate of the survivor or words of purchase, in other words they either prescribe a line of inheritance which the testator wished to follow on the death of the survivor of the two ladies intestate or they constitute a direct gift by the testator in favour of his legal heirs in the same event. If the latter construction is the true construction then there is a gift over in favour of a class to be ascertained at the death of the survivor. It seems to me, however, that the former construction is more supported by the language of the clause under consideration and by the general scheme of the will. In the first place, there are no words of gift in favour of the heirs. In the second place there is no specified individual as the object of the testator's bounty. Be that as it may, if the preceding estate is an absolute estate the subsequent direction treated either as laying down as a course of inheritance or as a gift over to a class must fail as will be shown hereafter. Is there then a gift of absolute estate to the survivor? I am of opinion that the estate in dispute was devised in favour of the two ladies successively in absolute ownership under the first part of the will of Baldeo Singh. In legal phraseology the devise amounts to the

devise of an absolute estate in favour of one subject to an executory devise of the same estate in favour of the survivor. Clause 3 now under consideration is intended to explain and amplify the nature of the estate in the hands of the survivor. I find nothing in the language of Cl. 3 to disclose the intention on the part of the testator of cutting down in any respect the absolute estate already devised. To my mind the nature of the estate in the hands of the survivor as expressed in this clause is precisely the same as is conferred upon her by the devise contained in the first part of the will. The language employed on the first occasion for the purpose of indicating the nature of the estate is

> at first Mahraj Kuar....and after her Param Kuar will become proprietors (malik).

In Cl. 3 the words used are:

> On the death of Mt. Maharaj Kuar or Param Kuar the survivor will become the proprietor (malik).

The grammatical and ordinary sense of the word "malik" is well understood. Expressed in English language it means "owner of property" and this is the sense in which the testator must be taken to have used it, having regard to the language spoken and written by the testator, to the modes of expression prevailing amongst persons of his class and to the entirely inartistic frame of this will. As observed by Lord Buckmaster in *Bhaidas Shivdas* v. *Bai Gulab* (8) the word "malik" is not

> a term of art ; it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be.

This will is the will of my countryman and is couched in the language which is my language. I strongly feel that I can say with confidence that the word "malik" in the setting in which it is placed here means nothing less than the status of a full owner embracing within it and connoting the incidents of an estate of inheritance and of power of alienation. In this particular will, however, the two incidents of absolute ownership just now mentioned do not rest on implication alone. They are both expressly stated as will be presently shown.

It is argued by Mr. Niamatullah that the power of alienation is added by devise to the limited estate conferred on the survivor and in support of the argument reference is made to powers of appointment in English wills and deeds. To my mind the analogy is misleading. Power of appointment, as understood in English law of real property was not, I am convinced, within the mental vision of the testator at all. I presume that he was wholly ignorant of it. According to my judgment the testator speaks of the power of alienation and testamentary disposition not by way of a gift of such power in addition to the gift of a limited estate but simply by way of explanation and amplification of what was implied as an inseparable incident in the status of a malik. There are no words connoting the gift of such a power and we cannot create one. I should not be understood to mean that the testator was under any legal disability to make a devise of a power of appointment if he intended to make one. All I say is that he had no conception of it and he has not made such a devise. The decision of their Lordships of the Judicial Committee in *Bai Motivahoo* v. *Bai Mamoobai* (29) is, if I may respectfully say so, instructive in this connexion. In this case their Lordships held that the testator had substituted his daughter Mamoo in his own place and in that character had given her power to designate the person by her will in whom the estate was to vest absolutely. They held that there was nothing contrary to any principle of Hindu law in the testator making a gift of such a power. They said that there is an analogy to it in the law of adoption. They further held that the person taking the estate by virtue of the exercise of the power must take it as a devise of the testator and must fulfil the conditions in which the testator could himself make him a devisee. Their Lordships ended their judgment by making a very important pronouncement and it is this:

> But whilst saying this they think they ought also to say that in their opinion the English law of powers is not to be applied generally to Hindu wills.

The word "power" in Cl. 3 of the will stands for the word "ekhtiar," which only means "freedom, liberty" and is not a technical term. On the other hand the word "power" in English conveyancing is a technical term and quite distinct from the power which a man has over his own property by virtue of his owner-

(29) [1897] 21 Bom. 703=24 I. A. 93=7 Sar. 140 (P. C.).

ship—*Tremayne* v. *Rashleigh* (30). In my long experience extending over a quarter of a century in this part of the country I have not come across a will or a deed in which power of alienation has been conferred as distinct and separate from the incident of ownership in property. To use the language of Wilson, J., in *Ram Lal Sett* v. *Kanai Lal Sett* (26) already quoted:

> It is a very serious thing to use rules of construction of English law in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently, from Englishmen, and who have never heard of the rules in question.

I think the limits of the application of the doctrine of "power" as understood in English law to instruments executed by Indians must be taken to have been defined by their Lordships of the Judicial Committee in *Bai Motivahoo* v. *Bai Mamoobai* (29) where power to designate a successor to the testator was upheld.

But even if I assume that there is a power of appointment added to a devise of a limited estate the assumption does not in my opinion advance the plaintiff's case. The scope and validity of a devise of power is subject to the same rules of law as any other devise, for instance, the rule against perpetuity. In the exercise of such wide and general powers as are given by Cl. 3 of this will, there is a possibility of the rule being broken. The power is, therefore, bad in law. But whether this is so or not one thing is clear. When the learned advocate for the appellant asks me to construe the power of alienation contained in this clause as a power of appointment according to English law I feel at liberty to take aid from cases decided in English Courts in construing the power under consideration. According to English decisions a gift over for life with a general power of appointment by deed or will is enquivalent to an absolute gift: *Bray* v. *Bree* (31), *Jebb* v. *Tugwell* (32) and *Re Wolsten-Holme*, *Marshall* v. *Aizlewood* (33).

The other argument advanced for the purpose of wresting the word 'malik' of its necessary incidents and natural meaning is that the context shows that the devisee was divested of the estate of inheritance. The argument is fair but not sound. In support of the argument reliance is placed upon the passage

> the property will devolve upon the legal heirs of the declarant.

I am unable to conceive that a person possessed of testamentary powers without any restriction, as is the case here, is not possessed of an estate of inheritance. A will may and it usually does provide for succession which may be either in accordance with law or against it. In my opinion the passage relied upon is an express provision as to succession to the estate of the devisee and in this sense it is consistent and not inconsistent with the implication involved in the full estate already and repeatedly devised in favour of the survivor by the testator. Thus the natural meaning of the word "malik" is not in any manner displaced or qualified by the context. The present case, therefore, entirely falls within the principle of the decision of *Sasiman Chudhurain* v. *Shib Narayan Chowdhury* (9) in which the previous cases are reviewed.

Even if I construe this passage as a provision of gift over, which I do not, I cannot consistently with rules of sound judgment hold that the gift over was intended to cut down the prior estate of inheritance. There are no words showing such an intention and I cannot enter into the region of speculation. A gift over on the happening of a contingency of the nature mentioned in this clause (that is the devisee dying without nominating a successor) does not with reasonable certainty indicate the testator's intention to reduce the preceding absolute estate into a limited estate: *Thornhill* v. *Hall* (34); *Fetherston* v. *Fetherston* (35), *Watkins* v. *Westorn* (36) and *In re Freeman* (37). Lord Justice Buckley, at p. 691, says:

> The second principle is that a clear gift in a will is not to be cut down by anything subsequent which does not with reasonable certainty indicate the intention of the testator to cut it down. If there be a plain gift in a will the Court will not say it is defeated by something ambiguous in a codicil which does not plainly cut down the previous gift.

(30) [1903] 1 Ch. 641=77 L. J. Ch. 365=98 L. T. 615=24 T. L. R. 298=52 S. J. 263.
(31) [1834] 2 Cl. & F. 453=8 Bligh. (N. S.) 453.
(32) [1856] 8 De. G. M. & G. 653=25 L.J. Ch. 109 20 Beav. 97 N.=2 Jur. (N. S.) 54=4 W. R. 157.
(33) [1881] 43 L. T. 752=29 W. R. 114.

(34) [1831] 2 Cl. & F. 22=8 Bligh (N. S.) 88.
(35) [1835]3 Cl. & F. 67.
(36) [1862] 3 De. G. J. & Sm. 431=8 L. T. 406=32 L. J. Ch. 609=11 W. R. 408.
(37) [1910] 1 Ch. D. 681.

Moreover the gift over, if any, is quite consistent with the testator's view amply manifested in this will that he could make a devise of an absolute estate and at the same time put restraint on such an estate.

I do not, however, hold that the passage " will devolve upon the legal heirs of the declarant " contains any gift over. There are no words of gift. On the contrary the words employed are clearly words indicating the devolution of inheritance. They are in marked contrast with the language used in relation to the estate of the granddaughters :

> It shall not revert to my family.

I take no objection to the gift over, if any, on the ground that it is not in favour of a specified individual. It would be valid in favour of such members of the class as are in existence at the testator's death—*Bhagabati Barmanya* v. *Kali Charan Singh* (27). But I am of opinion that there is no gift over. I hold that in the passage relied upon the testator prescribes the course of inheritance which he desires that the estate of the devisee should follow in case of intestacy. It is agreed that this course is contrary to the course prescribed by law. The testator's wish, therefore, must fail and the inheritance according to law should be left to run its course. It seems to me that the present case is wholly covered by the decision of their Lordships of the Judicial Committee in the case of *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (38). This was a case which went before their Lordships on appeal from a decision of the late Court of the Judicial Commissioner of Oudh and I may be permitted to add that I was counsel in the case in the said Court. In that case the ultimate remainder in absolute estate was held to have vested in one Lachman Singh. The document had also provided that the inheritance shall devolve according to the provisions of S. 22, Oudh Estates Act, 1869. The rules of inheritance according to that section were, however, applicable to the grantor himself, and could not be applicable to the grantee himself. The document was, therefore, construed to mean that the grantor intended that the heirs to Lachman Singh's estate shall be the same persons as were the heirs of the testator himself—see the report of the appeal in the Court of the Judicial Commissioner in *Narain Singh* v. *Kalakankar Estate* (39). In deciding the appeal Lord Phillimore said :

> In the first place they (their Lordships) think that, to borrow a phrase from the English law of real property, the words 'heirs' and 'representatives' are to be treated as words of limitation and not of purchase—that is, that they are merely intended to express the absolute estate which it was proposed to give to Lachman as distinguished from the life estates which had preceded it. This being so, the later words in the sentence may be regarded either as an idle attempt to derogate from the grant previously made and therefore to be rejected, or as words of description only, stating the legal incidents which the grantor conceived to belong to the estate which he had granted. In this case his mistake as to the legal consequences does not affect the grant which he has made. They think, therefore, that Lachman received an absolute estate in reversion.

Now I assume that there is a gift over; but having regard to the nature of the contingency on which it rests and the rule of law applicable to such an executory gift I hold that the gift over fails. It is clearly repugnant to the absolute estate conferred by the testator on the survivor of the two ladies. In the case of *Soorjomoney Dossee* v. *Denobundoo Mullick* (40) Lord Justice Turner said :

> A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy.

This was quoted by Lord Justice Willes in the well-known case of *Tagore* v. *Tagore* (12) and he himself made the following observation :

> Inheritance is a rule laid down (or in the case of custom recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy. It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail and the inheritance take place as the law directs.

In the case of *Dixon* v. *Charlesworth* (41) Swinfen Eady, J. held, on the authority of *Holmes* v. *Godson* (42) that

> a gift over on death " without a will following a prior absolute estate being inconsistent with the law regulating the devolution of the property in that event, is void for repugnancy.

(38) A. I. R. 1923 P. C. 160=45 All. 593=50 I. A. 265 (P. C.).

(39) [1920] 7 O. L. J. 93=55 I. C. 896.

(40) [1855] 6 M. I. A. 526=4 W. R. 114=1 Suther 291=1 Sar. 583 (P. C.).

(41) [1903] 2 Ch. 458=72 L. J. Ch. 642=88 L. T. 862=51 W. R. 652.

(42) [1856] 8 De. G. M. & G. 152=4 W. R. 415=25 L. J. Ch. 317=2 Jur. (N. S.) 383.

It now remains to consider the argument of the learned advocate for the appellant in support of the appeal. He argues that the estate vested in Mt. Param Kuar was defeated by the happening of the contingency that she has died without nominating a successor. In support of this argument reliance is placed on *Bhoobun Mohini Debya* v. *Hurrish Chunder Cowdhury* (43) and *Kristoromoney Dossee* v. *Norendro Krishna Bahadoor* (21). In the first-mentioned case the defeasance of the absolute estate depended on the failure of issue of the donee of the absolute estate (the contingency did not happen). In the second case on the construction as placed by their Lordships of the Judicial Committee on the will in that case no estate shifted on defeasance from one donee to another. The bulk of the devise was held to be invalid. Certain life estates and remainderman's estates were upheld. The two cases, therefore, are wholly inapplicable to the present case. In this case there are no words of defeasance and apart from the gift over there is nothing from which a defeasance of the prior estate can be inferred; and if the gift fails it must be held that the prior estate subsists and the plaintiff cannot succeed as an heir-at-law to the testator.

An executory devise on defeasance of a prior estate resting on a contingency of this nature is invalid, as already shown, but I here take the liberty of quoting a passage from the judgment of Fry, J., in the case of *Shaw* v. *Ford* (44) which is as follows :

> Now that being so, I have to inquire what are the general principles of law applicable to such a case. They may, I conceive, be stated in this way. Prima facie, and speaking generally, an estate given by will may be defeated on the happening of any event ; but that general rule is subject to many and important exceptions. One of those exceptions may, in my opinion, be expressed in this manner, that any executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad. The reason alleged for that is the contradiction or contrariety between the principle of law which regulates the devolution of the estate and the executory devise which is to take effect only at the moment of devolution and to alter its course. I am not bound to inquire into the logical sufficiency of the reason given, because it appears to me that the exception is well established by the cases of *Gulliver* v. *Vaux* (45), *Holmes* v. *Godson* (42) and *Ware* v. *Cann* (46). Another exception to the general proposition which I have stated is this, that any executory devise which is to defeat an estate, and which is to take effect on the exercise of any of the rights incident to that estate, is void ; and there again the alleged reason is the contrariety or contradiction existing between the nature of the estate given and the nature of the executory devise over. A very familiar illustration is this, that any executory devise to take effect on an alienation, or an attempt at alienation, is void because the right of alienation is incident to every estate in fee simple as to every other estate. Another illustration of the same principle is that which arises where the executory devise over is made to take effect upon not alienating, because the right to enjoy without alienation is incident to the estate given. Now that exception is fully justified by the cases of *Bradley* v. *Peixoto* (47), *Ross* v. *Ross* (48) and *In re Yalden* (49).

The executory devise (or the gift over) also fails on the ground that the subject-matter was uncertain. The uncertainty arises out of the fact that the testator clearly intended that the survivor may dispose of the property which passes into her hands either by transfer inter vivos or by testamentary disposition. She could exercise this power to the extent of the whole property or she may not exercise it at all. On the date of the death of the testator, the date from which the will came into operation, the subject-matter of the executory devise was therefore uncertain. It is immaterial for this purpose that Mt. Param Kuar as a matter of fact died without making any transfer or disposition. This principle was applied by Lord Buckmaster in the case of *Bhaidas Shivdas* v. *Bai Glub* (8) on the authority stated therein of the case of *Horwood* v. *West* (22).

> It may be observed
>
> says Mr. Jarman,
>
> that in numerous instances a devise or bequest of what shall remain or be left at the decease of the prior devisee or legatee has been held to be void for uncertainty.

Most of the cases quoted by Mr. Jarman in support of the view just now stated can also be explained on the ground that if a testator makes an absolute gift of property to A any gift over of what may be left undisposed of by A is repugnant and void as is remarked by the learned commentator of the sixth edition

(43) [1879] 4 Cal. 23=2 C. L. R. 339=5 I. A. 138=3 Sar. 815 (P. C.).
(44) [1878] 7 Ch. D. 669=47 L.J. Ch. 531=37 L.T. 749=26 W.R. 235.
(45) [1856] 8 De G. M. & G. 167.
(46) 10 B. & C. 433.
(47) 3 Ves. 324=4 R.R. 7.
(48) 1 Jac & W. 53.
(49) 1 D. G. M. & G. 53.

of Jarman's Treatise on Wills at page 463. In *Bull* v. *Kingston* (50) the gift over in case the devisee dies without a will was held void on the ground of uncertainty. Another case on the same lines is *Eade* v. *Eade* (51). This finishes the reference.

The Honourable the Chief Judge and my learned brothers Justices Misra and Raza have said something in their judgments in respect of *Indar Kuar* v. *Chheda Singh* (4) and *Rajeshuri* v. *Mathura Singh* (5). Out of respect to them I feel that I also must say something. In my opinion both these cases were rightly decided if I may respectfully say so. In the first mentioned case, I was counsel for the appellant and my arguments were accepted and the appeal was allowed. The first argument was as to the construction of the will and the construction placed on behalf of the appellant was that the devise of absolute estate in favour of the widow was subject to an executory devise in favour of daughter. In support of the validity of the devise *Comiskey* v. *Bowring Hanbury* (2) was cited. On the side of the respondents the construction was not questioned. What was questioned was that there could be no valid executory devise annexed to an absolute preceding estate. This was overruled and if I may say so with great respect was rightly overruled as a proposition of law. This is the substance of the decision in *Indar Kuar* v. *Chheda Singh* (4). In the second case no argument was advanced that the absolute gift could well in law be subjected to an executory devise or that there was any valid executory devise at all in that particular will. This being so the decision on the arguments as they seem to have been presented in that case was, it seems to me and if I may again respectfully say so, rightly given.

As regards the decision of the House of Lords in the case of *Comiskey* v. *Bowring Hanbury* (2), just now mentioned, the judgments delivered by several noble Lords constituting the tribunal clearly show that the case turned upon the construction of the particular will alone and no point of law was decided. The point of law involved in the case all along assumed and not disputed was that an absolute estate may be validly subjected to a valid executory devise. This is expressed in the terms of the decree prepared in the case

My answer, therefore, to the reference is that Mt. Param Kuar acquired an absolute estate under the will of Baldeo Singh dated the 24th February 1911, and she died possessed of the same. The gift over, if any, is void in law.

Pullan, J.—I have had the advantage of reading the judgments of the other members of this Bench and it is not necessary for me to re-state the terms of the will or to do more than give briefly the grounds on which I concur in the finding of the Court. The reference has been made to a Full Bench because the Court of the Judicial Commissioner of Oudh placed two differe t interpretations on a judgment of the House of Lords. These cases are reported in *Indar Kuar* v. *Chheda Singh* (4) and *Mt. Rajeshuri* v. *Mathura Singh* (5). The decision of the House of Lords was that given in the case of *Comiskey* v. *Bowring-Hanbury* (2), and, in my opinion, the difficulty has arisen from the somewhat loose use of the word "absolute" which appears in the finding of the House of Lords but not in the judgment of their Lordships. In my opinion the word "absolute" should always be used in its true meaning which is absolved or freed, and the limitation of an absolute estate is a contradiction in terms. In the case of *Comiskey* v. *Bowring Hanbury* (2), the estate given to Mrs. Hanbury was found not to be an absolute estate but an estate which would became absolute, if a certain executory devise failed to operate. As long as Mrs. Hanbury was bound to make a will in favour of one of her husband's nieces, her estate was not absolute and it was only in the event of all these nieces dying before Mrs. Hanbury that she would become vested with an absolute estate. Once an estate has become absolute it cannot be limited but it may come to an end It is only when the absolute estate come to an end that a gift over comes into operation.

In the present case we have only to consider whether the estate given to the widow was an absolute estate. The first and principal test is the language of the will. The words used leave no doubt in my mind that the estate was absolute. As long as the two widows were alive a restriction was imposd by the testator that the holder of the estate for the time being could only sell or mortgage the property

(50) 1 Mer. 314.
(51) 5 Madd. 119=21 R.R. 284.

for certain specific reasons and was bound to give half the property to the other widow, but on the death of one the survivor was given the property as owner (malik) with power of transfer, and her rights to sell, mortgage and give away the property by gift or will were unrestricted. An estate so given does not come to an end on the death of the donee intestate. What has been given absolutely must devolve on her heirs even if she makes no will. It is not as though there were some directions to the widow to make a will. Even had the estate come to an end on the widow's death there is ample authority for holding that the subsequent clause in this will does not create a gift over in favour of the heirs of the testator. Undoubtedly the testator believed that if she died intestate he would be able by the terms of his will to enact that the property should revert to his own legal heirs. But in enacting this clause the testator was in no way limiting the powers of the donee but was attempting to interfere with the ordinary law of intestate succession to an estate which he had already made absolute. Although the wishes of the testator when clearly expressed are carried out by the Courts wherever it is possible, it is not open to the testator to interfere with ordinary laws of succession to an estate which he has given absolutely by his will to another person.

I do not consider that it is necessary for the determination of this appeal to consider further the applications made by the Judicial Commissioner's Court of the House of Lords' ruling. Every will must be construed on the well-accepted principles which have been already laid down by the Honourable Chief Judge in his judgment. The present will in my opinion conferred an absolute estate on Param Kuar. That absolute estate devolved on her heirs and the subsequent clause in the will in which the testator laid down that on her death intestate the property should devolve on his own heirs was invalid.

By Court.—We return the case to the Division Bench with the finding that Mt. Param Kuar succeeded to an absolute estate and that upon her death intestate the property has devolved upon her heirs.

(The judgment of the Division Bench was as follows :)—The finding of the Full Bench is that Mt. Param Kuar succeeded to an absolute estate and that upon her death intestate the property devolved upon her heirs. The learned counsel for the appellant has withdrawn the objection to the effect that the learned Subordinate Judge ought to have held the custom of exclusion of daughters from inheritance in their father's family with respect to all kinds of properties including stridhan to have been established. He does not argue the third ground of appeal. In consequence, this appeal is dismissed with costs.

D.D. *Appeal dismissed.*

A. I. R. 1928 Oudh 67

PULLAN, J.

Mohammad Ali Khan—Plaintiff.

v.

Nisar Ali Khan—Defendant.

O. S. No. 6 of 1925, Decided on 5th September 1927.

(a) Will—Construction—Malik—Use of the word would mean absolute ownership unless the context or other circumstances imply to the contrary.

The term 'malik' when used in a will as descriptive of the position which a devisee is intended to hold, has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred, but the meaning of every word in an Indian will must always depend upon the setting in which it is placed, the subject to which it is related, and the locality of the testator, from which it may receive its true shade of meaning : *A. I. R. 1922 P. C. 63, Foll.* [P 72 C 2]

The use of the word 'Malikana' was held not to confer absolute estate as appearing from the context. [P 72 C 2]

(b) Will—Construction should be according to testator's wishes.

Isolated clauses should never be taken apart from their context and given a meaning contradictory to the apparent wishes of the testator. Even technical words should be given a meaning if possible in accordance with the testator's wishes as apparent from the whole context: *Halsbury's Laws of England, Vol. 28, p. 653, Ref.* [P 73 C 1]

(c) Transfer of Property Act, S. 31—Gift over—Incidents indicated (obiter).

In Indian law a gift over corresponds with the terms of S. 31, Transfer of Property Act, and is a condition superadded to a transfer of property that the interest should cease to exist in case a specified uncertain event shall happen

or in case a certain specified event shall not happen. Where there has been no defeasance the gift over cannot come into operation and there can be no defeasance unless some event arises which makes it impossible for the absolute title to continue : *A. I. R.* 1926 *Oudh* 561, *Foll.* [P 73 C 2]

(*d*) *Oudh Estates Act* (*amended* 1910), *S.* 14 —*Transfer to remote heir—Estate is still within operation of the Act.*

Although under S.14 a transfer made to remote heir would remove the estate from the operation of the Act, the amending Act of 1910 definitely brought back within the operation of the Act all estates which had been so transferred : 36 *All.* 373, (*P. C.*), *Ref.* [P 76 C 1]

(*e*) *Succession Act* (1925), *S.* 67—(*Act of* 1865, *S.* 54)—*Person signing in token of agreement is not attestor.*

Where the testator obtained the signatures of certain persons for some special purposes of his own, the mere fact that the word 'gawashud' appeared above their signatures did not make them attesting witnesses. A person who signs a will in token of his agreement with the terms of the will is not an attesting witness : *A. I. R.* 1925 *Oudh* 465, (*affirmed in A. I. R.* 1927 *P. C.* 24?), *Relied on.* [P 76 C 2

(*f*) *Muhammadan law—Will—Consent may be signified by conduct.*

A will made by a Shia of more than one-third of his estate is invalid unless it is made with the consent of all the heirs either before or after death, and such consent of an heir to such a bequest may be signified by conduct showing a fixed and unequivocal intention. 26 *Bom.* 497, *Ref.* [P 77 C 1, 2]

(*g*) *Muhammadan law — Succession — Heir can renounce right to inherit by conduct.*

According to Muhammadan law there may be a renunciation of the right to inherit and such renunciation need not be expressed but may be implied from the ceasing or resisting from prosecuting a claim maintainable against another : 17 *W. R.* 108, *Ref.* [P 77 C 1]

(*h*) *Civil P. C., S.* 17—*Mutawalishiip—Question as to ; depending on the decision as to succession—Court trying latter can also try former.*

Although a mutawali of a waqf is not the owner but the manager and there is an essantial difference between the position of a mutawali and that of an owner, yet where the waqf was to be administered as mutawali by the person who was the successor of the waqif, a Court having jurisdiction to try the question as to who the successor of the waqif is has also jurisdiction to decide as to the mutawaliship of the waqf property. [P 78 C 1]

(*i*) *Adverse Possession—Person holding life-estate under will cannot claim absolute estate adversely by merely asserting that he holds an absolute estate.*

A claim to an absolute estate by adverse possession cannot be made by the mere assertion on the part of a person, who has taken the property as a life estate holder under a will, during the course of his tenure, that his estate is absolute and will not terminate on his death. The plea of adverse possession comes into force where the person entitled to the property fails to take some step within the period of limitation to assert his title against the person who attempts to set up the adverse title. [P 81 C 2]

(*j*) *Specific Relief Act, S.* 42—*Suit for possession.*

It is established law that failure to bring a declaratory suit does not debar the plaintiff from bringing a suit for possession. [P 82 C 1]

(*k*) *Transfer of Property Act, S.* 35—*Applicability—"Owner"—Meaning explained.*

S. 35, Transfer of Property Act confines the doctrine of election to a case where a person professes to transfer property which he has no right to transfer and as part of the same transaction, confers any benefit on the owner of the property. [P 82 C 2]

In England no case of election arises, if the property, which the testator professes to dispose of does not belong to the legatee. The word "owner" is used in a very wide sense, and includes persons who have not only vested but contingent rights and reversionary and remote as well as immediate interests; but a chance of being elected is not an interest in property. [P 82 C 2]

(*l*) *Will—Construction—Legatee cannot dispute testator's title nor can he set up title different from that contained in the will—Evidence Act, S.* 115.

One who obtains or accepts or retains possession of property under the will and who neither has, nor professes to have, any title thereto except under the will is estopped, as against any remainderman or other person claiming under the same will, from asserting that the testator was not entitled to such an estate in the property as he purported to devise or bequeath and generally from setting up any title to the property in himself which is independent of and adverse to the will, or any interest of a different kind from that which he would have taken if the property had passed by the will as it was impliedly represented by him to have passed. [P 84 C 2]

(*m*) *Oudh Estates Act, S.* 32 (*a*)—*Property already part of taluka—Acquisition of rights —S.* 32 (*a*) *does not apply.*

Section 32 (a) does not apply to the acquisition of fresh rights in a property which already forms part of the taluka, and a failure to execute such an instrument does not imply that the property purchased by a taluqdar without the execution of such an instrument did not become part of the estate. A purchase of this kind by a taluqdar would ordinarily be held for the benefit of the estate and unless the taluqdar intended to keep alive such a title, there is a merger and the purchase by taluqdar of under-proprietary rights will go with the estate. [P 85 C 1]

(*n*) *Buildings—Fixture.*

In India the English law as to fixtures does not apply. [P 87 C 1]

Niamat Ullah and *Ghulam Hasan*—for Plaintiff.

Bisheshwar Nath and *Barkat Ali*—for Defendant.

Pullan, J.—The dispute which gave rise to this litigation deals with the

succession to the estates enjoyed by the late Nawab Sir Fateh Ali Khan, K. C. I. E. who died on the 28th October 1923. It is admitted that Nawab Sir Fateh Ali Khan was the head of the Qizilbash family and, as such, was in possession of the family estates and the hereditary title of Nawab. The estates consist firstly of taluqdari property in the district of Bahraich in Oudh known as the Nawabganj-Aliabad taluqa, secondly three properties conferred by Government grant in the Punjab known as the first and second Rakhkhamba grants and the Rakhjuliana grant ; one of these properties, however, namely the second Rakhkhamba grant has been dedicated as a waqf and was held by Nawab Sir Fateh Ali Khan as mutawali ; thirdly certain house property in Lahore and fourthly certain miscellaneous property in Oudh.

On the death of Nawab Sir Fateh Ali Khan, his son Sardar Nisar Ali Khan asserted possession over the estates both in Oudh and in the Punjab, but his title was challenged by the present plaintiff Khan Bahadur Sardar Mohammad Ali Khan, C. S. I., the cousin of the late Nawab who claimed reversion to the whole estate under the will of the former holder Nawab Nasir Ali Khan. As usual in such cases there was a trial of strength in the revenue Courts. In Lahore the present plaintiff was the applicant and the Collector of Lahore who went at length into the question of title decided that he, the applicant, was entitled to mutation, but he did not disturb the possession of Sardar Nisar Ali Khan. In Oudh the present plaintiff was able to force Sardar Nisar Ali Khan into the position of applicant in the mutation Court and the Assistant Collector decided in favour of Khan Bahadur Mohammad Ali. His decision was based on a consideration of title because he held that there was no certainty as to who was in possession of the property. This finding was reversed on appeal and the highest revenue Court, namely, the Court of the Board of Revenue, decided that Nisar Ali Khan was entitled to mutation on the ground of possession. As, however, the dispute between the parties was acute, the property was made over to the Deputy Commissioner of Bahraich and is still under his management.

As the present plaintiff had failed to obtain possession in either the Punjab or in Oudh, he was compelled to bring the present suit which was filed in its original form in this Court on the 9th December 1925. The plaintiff at that time asked the Court to decide only the question of title to the Oudh property and prayed for permission to file a separate suit in the Punjab for the property situated there. This prayer was not accepted and the plaint was accordingly amended. The valuation of the suit was substantially increased and the plaintiff framed his claim so as to include all the property in the Punjab, even the property which he only claimed as mutawali under the terms of the deed of waqf. The defendant has denied the jurisdiction of this Court as to the waqf property, but has admitted the jurisdiction as to the rest of the property in the Punjab, the cause of action being substantially the same for all the property except that included in the waqf.

To explain the position of the parties in the present dispute it is necessary to give a brief history of the Qizilbash family. The first member of the family with whom I am concerned is Nawab Ali Raza Khan who settled in Lahore and obtained property in Oudh before the mutiny. The Oudh property was confirmed to him when the Oudh estates were settled after the mutiny and he was entered in the list of taluqdars. During his lifetime he held a lease of certain property in the Punjab and he owned a house in Lahore known as Mubarak Haveli. Nawab Ali Raza Khan died in 1865 and was succeeded by his son Nawab Sir Nawazish Ali, K. C. I. E. Shortly after his accession a grant was made by Government of the Rakhkhamba property previously leased to Nawab Ali Raza Khan in lieu of a pension which had been granted to him for his services to Government. The grant was made in the year 1868 and a scheme of succession was laid down in that grant which purported to be in accordance with the wishes of the family. I shall refer later in detail to the terms of the grant, but it is sufficient here to say that the succession designed was to each of the brothers of Sir Nawazish Ali Khan in turn and after them to

whichever of the lawful male heirs of the said Nawab Ali Raza Khan shall be chosen by the said male heirs as the fittest person to succeed to the said estate.

or in default of such choice

to such one of the lawful male heirs of the said Nawab Ali Raza Khan as His Honour the Lieutenant-Governor may consider fittest to succeed to the said estate.

In 1871 a second grant was made, but without these conditions and this is the property which in the year 1892 was dedicated as a waqf along with certain house property in Lahore. In 1886 a third grant was made known as the Rakhjuliana grant which was also unconditional. In 1882 Nawab Sir Nawazish Ali had made a will in respect of his Oudh property in favour of his brother Nawab Nasir Ali and in 1889 he effected mutation in respect of all the property both that in Oudh and that in the Punjab in favour of Nawab Nasir Ali Khan and went to Europe. He did not return as he died in the year 1890 at Mecca and Nasir Ali succeeded to all the property without dispute. The third brother Nisar Ali died before Nawab Nasir Ali leaving two sons Sardar Barqat Ali and Sardar Fateh Ali. Nasir Ali himself had a son Sardar Mohammad Ali, the present plaintiff, and Sir Nawazish Ali left a son named Hidayat Ali, who died in 1924. On the 1st January 1892 a sanad was granted by the Viceroy and the Governor-General to Nasir Ali Khan in the following terms:

Having regard to the memory of Nawab Ali Riza Khan your father and of Nawab Sir Nawazish Ali Khan your brother and their loyal services, I confer upon you by this sanad the title of Nawab. This title will henceforth be hereditary in your family and will descend to the fittest member of the family by the same rule as that by which the estates devolve according to your family custom provided that such member shall, on each devolution of the title, be formally approved of by the Viceroy and Governor-General of India as a deserving representative of the family and the said title shall not descend to him until such approval has been accorded.

On the 15th July 1896 Nawab Nasir Ali executed two wills, one relating to the Oudh property and the other to the property in the Punjab including the Rakhamba grant, but making no reference to the waqf property which was governed by its own deed of endowment. The will relating to the Punjab property (Ex. 2) describes the testator as proprietor and muafidar of Rakhkhamba and Rakhjuliana, District Lahore, and goes on to give the terms of the Rakhkamba grant which according to the interpretation of the testator, devised the property after the death of the last three named holders to the most capable and most liked of the issue of the three brothers as successor and muafidar, and he professes in virtue of this grant to appoint his nephew Nawab Fateh Ali Khan as his devisee and successor to the whole of the above-mentioned grant and of the moveable and immovable property in the Lahore District. The following words in the will which are repeated in the Oudh will are of vital importance for the determination of the present suit. They are as follows:

I confer on my devisee Nawab Fateh Ali Khan if he survives me, such powers of possession and enjoyment (*kabza wa Tassaruf malikana*) as I have and enjoy in respect of the above mentioned moveable and immovable property. Likewise on the death of Nawab Fateh Ali Khan the devisee, my son, if he is alive, will succeed him and have and enjoy the same powers as have been conferred on Nawab Fateh Ali Khan by this will.

After this the testator laid down a new rule of succession which will be discussed later. The will as to the Oudh property (Ex. 1) describes Nawab Nasir Ali as being proprietor and taluqdar of Nawabganj-Aliabad and the will purports to be made under S. 11, Act 1, 1869, which is the first Oudh Estates Act. About four months after the execution of these wills Nawab Nasir Ali Khan died and was succeeded by Nawab Fateh Ali Khan. Apart from some objection which is said to have been made at the time by Barqat Ali Khan the elder brother of Nawab Fateh Ali Khan no member of the family ever disputed his title. He took possession of the whole estate, mutation being effected in his name of all the landed property. He became mutawali of the waqf, and he was recognized as Nawab by the Government.

The plaintiff has now come forward basing his claim on the two wills for the whole property, and the defendant contests the title on the ground that the wills, if properly construed, gave an absolute estate to Nawab Fateh Ali Khan and, in any case, the Punjab will in so far as it deals with the Rakhkhamba estate is invalid, because the testator had no power to dispose of that property under the Government grant, and the defendant asserts that his father's title in that property must be construed as either being one by adverse possession or derived from choice of the other members of the family given in accordance with the terms of the grant. He further pleads that the waqf property is outside the

jurisdiction of this Court, that the plaintiff cannot sue under the Oudh will because he is an attesting witness, and that the bequest of the Punjab property other than the Rakhkhamba property is void under Shia law, being a bequest of more than one-third of the testator's property without obtaining the consent of all the heirs. The other pleas affect various items of the property claimed and issues have been framed in each case. The following are the issues:

1. (a) Did the property No. 2 in Sch. 1 devolve on Nawab Sir Nawazish Ali Khan alone or on the three sons of Nawab Ali Raza Khan according to the personal law of the parties ?

(b) Has the plaintiff lost his share in the property stated in para. 41 of the additional pleas ?

2. (a) Did Nawab Sir Nawazish Ali Khan construct the buildings shown in Sch. 2 ?

(b) If any of the properties in defendant's list B consisted of under-proprietary rights acquired by Sir Fateh Ali Khan, did they merge in the taluqdari rights ?

3. Do Schs. 1 to 51 and Sch. 2 form a correct statement of the property devised to Nawab Nasir Ali Khan under the will of Sir Nawazish Ali Khan dated 17th February 1882 ?

4 (a). Did Sir Nawazish Ali Khan make an oral gift of certain properties in 1889 to Nawab Nasir Ali Khan and have mutation effected accordingly, and if so, what properties were included in the gift ?

(b) Was Sir Nawazish Ali Khan competent in law to make a gift of the Rakhkhamba estate?

5. Was Nasir Ali Khan in possession of property No. 52 in Sch. 1 and of the properties in Sch. 3 and 4 in accordance with the gift ?

6. Does the deed of waqf executed by Nasir Ali Khan in 1892 relate to all the properties in Sch. 5 and does it provide that the possession and management of the properties shall be with his successor ?

6A. Did Nawab Sir Fateh Ali Khan build Nawab Place out of waqf funds or out of his private funds ?

6B. If Sir Fateh Ali Khan built the Place out of private funds did he incorporate the building in the waqf property "*and did he incorporate in the waqf property*" the land which he bought for the purpose of building the Place ?

6C If the plaintiff is entitled to possession of the waqf property as mutawali is he not entitled, therefore, to possession of the Nawab Place together with land on which it is built also ?

7 Has this Court any jurisdiction in regard to the waqf property described in Sch. 5 ?

8 Do the two wills executed by Nasir Ali Khan in 1896 confer an absolute estate on Nawab Sir Fateh Ali Khan and if so, what is the effect ?

9 (a). Is the bequest of Nasir Ali Khan in plaintiff's favour of the property in Sch. Nos. 1 to 51, invalid under S. 54, Indian Succession Act, read with S. 19, Oudh Estates Act ?

(b). Are the bequests in the two wills invalid under Muhammadan law for want of consent of the widow and daughter of the testator ?

10 Are any of the clauses in these wills invalid for any of the reasons given in paras 25 and 35 of the additional pleas ?

11 (a). If for any reason the wills are wholly or partly invalid, is the plaintiff entitled to the properties in Schs. 1 to 4 as the sole heir of his father under the terms of the sanad and a family custom by which all female heirs are excluded or under the possessory title of his father ?

(b). Is the plaintiff's claim on the basis of possessory title within time ?

12 Is the defendant estopped from claiming that any portion of the wills of 1896 is invalid ?

13 Is the plaintiff entitled to possession of the property shown in sch. 5 as mutwali ?

14 Is the plaintiff entitled to any mesne profits and if so, to what extent ?

15 Is the property shown in Lists A and B the self-acquired property of Sir Fateh Ali Khan and if so, is the plaintiff entitled to it ?

16 Did Sir Fateh Ali Khan acquire an absolute title to the Rakhkhamba property (a) in the manner described in paras 36 and 37 of the additional pleas, (b) by adverse possession ?

17 Is the defendant in possession of all the property shown in Sch. 4 ?

18 To what relief, if any, is the plaintiff entitled ?

It will be seen that these issues are not arranged on any clear principle and it will be convenient to deal with them in a different order. First I shall deal with those issues which affect the title of the parties in general and afterwards I shall deal with the claims put forward to the separate properties involved. Primarily the claim of the plaintiff is based on the two wills executed by Nawab Nasir Ali Khan in 1896 and I shall deal first with Issue 8 which runs as follows ;

Do the two wills executed by Nasir Ali Khan in 1896 confer an absolute estate on Nawab Sir Fateh Ali Khan and, if so, what is the effect ?

It is laid down in Halsbury's Laws of England, Vol. 28, on p. 636 that the cardinal rule of English law as to the effect of a will is that the intention of the testator as declared by him and apparent in the words of his will has effect given to it so far and as nearly as may be consistently with law. These wills were drafted together and though the preamble is different because in the one case the testator was acting, as he believed, under S. 11, Act 1, 1869 that is, the Oudh Estates Act, and in the other in pursuance of the grant given by Government to Nawab Nawazish Ali Khan of the estate in the Lahore District, the effective part is in each case the same. I have already quoted these words and I believe that the intention of the testator is plain. He intended to give

his nephew Fateh Ali Khan, if he survived him, a full life interest in the property but after his death the property was to go in each case to the testator's own son Mohammad Ali Khan and after him to the son of Sir Nawazish Ali Khan thereby giving the property, in turn, to the descendants of all the three sons of the founder of the family, Nawab Ali Raza Khan. This is the plain meaning of the words employed, but the learned counsel for the defence has addressed to me a very careful and well-reasoned argument to show that the first of the two clauses which I have quoted above confers an absolute estate on Nawab Sir Fateh Ali Khan, and that being so, the subsequent clauses cannot detract from the absolute estate conferred by the former. He relies upon three phrases to prove that an absolute estate was conferred and these phrases are first of all "*Kabza wa tasarruf malikana*," which may be translated "possession and enjoyment as an owner"; secondly the words "*misl mere*," which mean "like myself"; and thirdly the phrase "*uska janashin*" (his successor) which is used in speaking of Mohammad Ali in reference to his predecessor, Fateh Ali.

There is a long series of rulings which deal with the word "malik" (owner). Although it is not said that this word is a term of art it has been ruled on many occasions that it means an owner in the full sense of the word and where there has been no clause giving to a legatee power of disposing of the property it has been held that such powers are implied in the word "malik." But all these rulings to which I am referred carry in themselves the answer to the defendant's contention. They are based on a ruling of the Calcutta High Court in 1875 in the case *Mt. Kollany Kooer* v. *Luchmie Pershad* (1). In 1897 this ruling was approved by their Lordships of the Judicial Committee in the case of *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy* (2) and that ruling in its turn was followed in the case of *Surajmani* v. *Rabi Nath Ojha* (3). Again this ruling was approved by their Lordships in the case of *Bai Das Shib Das* v. *Bai Gulab* (4), and all these rulings have been considered in the case of *Mt. Sasiman Chowdhurain* v. *Shiv Narain Chowdhury* (5). On p. 315 of that volume their Lordships have summarized the rulings as follows :

> The term "malik" when used in a will or other document as descriptive of the position which a devisee is intended to hold, has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred, but the meaning of every word in an Indian will must always depend upon the setting in which it is placed, the subject to which it is related, and the locality of the testator, from which it may receive its true shade of meaning.

Similar observations appear in the other rulings cited but I have quoted from this case partly because it is the most recent, and partly because in that case the word "malik" was not used but its significance was applied to the word "milkiat." In the present instance also the word "malik" is not used but the word is "malikana." Moreover the case of *Baidas Shibdas* v. *Bai Gulab* (4), must be distinguished because in that case disposing powers were expressly given to the legatee. In the case before me the word "malikana" is not only limited by the express provisions as to the inheritance contained in the following sentence but also by the fact that it is merely an adjective qualifyig the words "kabza wa tasarruf." Even if the words are taken in the strictest sense they only mean that the legatee was to have possession and enjoyment as an owner. Such a phrase clearly leaves the door open for a provision that the power of disposal is denied to him. As to the words "*misl mere*" (like myself) a condition of this kind has been found by Mr. Justice Mukerji in the case of *Amarendra Nath Bose* v. *Shuradhani* (6) to give a fuller meaning to the word "malik." But here they do not have this effect because they also apply strictly and grammatically to the words "kabza wa tasarruf" and, therefore, carry the meaning of "malikana" no further. Lastly the words "*uska janashin*" cannot be taken to mean that Mohammad Ali was to be in some sense a successor only of

(1) [1875] 24 W. R. 395.
(2) [1897] 24 Cal. 834=24 I. A. 76=1 C. W. N. 387=7 Sar. 155 (P. C.).
(3) [1908] 30 All. 84=35 I. A. 17=5 A. L. J. 67 (P. C.).
(4) A. I. R. 1922 P. C. 193=46 Bom. 153=49 I. A. 1 (P. C.).
(5) A. I. R. 1922 P. C. 63=1 Pat. 305=49 I. A. 25 (P. C.).
(6) [1909] 14 C. W. N. 458=5 I. C. 73.

Fateh Ali Khan without any connexion with the testator, and a further reading of the will shows that later on the testator, speaks of the taluqdar of the time being whoever he may be in the future as "*mera janashin*" that is my successor. And this clearly shows that the words "*uska janashin*" mean the next successor to the preceding *janashin* and have no significance such as that which has been applied to them in the defendant's arguments. In my opinion isolated clauses should never be taken apart from their context and given a meaning contradictory to the apparent wishes of the testator. Rather even technical words should be given a meaning if possible in accordance with the testator's wishes as apparent from the whole context. In this connexion I may quote from Halsbury's Laws of England, Vol. 28, p. 653 :

> Words are given that meaning which is rendered necessary in the circumstances of the case by the context of the whole will, the particular passage concerned being taken together with whatever is relevant in the rest of the will to explain it. The will itself is taken as the dictionary from which the meaning of the words is ascertained, however inaccurate such meaning would be in the ordinary or legal use.

I would also observe in view of the great stress which has been laid on the fact that the word "malik" has been so often interpreted to mean an absolute owner that the House of Lords in 1905 had before them a case *Comiskey* v. *Bowring Hanbury* (7), in which the testator bequeathed to his wife "the whole of his estate absolutely" and yet their Lordships held that a subsequent provision in the same will was a good executory limitation taking effect after her death. Thus the word "absolute" did not give the widow full heritable ownership of the property. I find, therefore, that the wills executed by Nasir Ali Khan did not confer an absolute estate on Nawab Sir Fateh Ali Khan.

In view of this finding it is perhaps superfluous to consider at length the plaintiff's argument that even if the wills should be held to confer an absolute estate on Sir Fateh Ali Khan the plaintiff would be entitled to come in on his death on the principle of a gift over. In Jarman on Wills, Vol. II, p. 1344, an attempt has been made to give the essential elements of a gift over, and they are, first that it is a gift to arise upon future contingency, and secondly, that it operates by way of defeasance or shifting of the prior gift, which would be absolute were the contingency not to occur. In Indian law the gift over corresponds with the terms of S. 31, Transfer of Property Act, and is a condition superadded to a transfer of the property that the interest should cease to exist in case a specified uncertain event shall happen or in case a certain specified event shall not happen. It is argued by the plaintiff that the uncertain event in this case is that Mohammad Ali should be alive at the time of the death of Fateh Ali. This certainly is an uncertain event, but if the estate conferred on Fateh Ali was absolute there was no defeasance at the time of his death as he left male issue. Where there has been no defeasance the gift over cannot come into operation and I take it that there can be no defesance unless some event arises which makes it impossible for the absolute title to continue. This view is I believe in accordance with that taken by a Bench of this Court in the case of *Ahmad Azim* v. *Safi Jan* (8). But as I have said above I hold that no absolute estate was conferred and that, therefore, this question of gift over does not arise.

The next issue with which I shall deal is issue 10 which is as follows :

> Are any of the clauses in these wills invalid for any of the reasons given in paras. 25 and 35 of the additional pleas ?

Paragraph 25 of the additional pleas in the written statement is as follows :

> That the clauses in the two wills subsequent to the clause conferring an absolute estate upon Nawab Sir Fateh Ali Khan are bad in law and of no legal effect as they create a line of succession unknown to Mahomedan law or Taluqdari law.

There were three other clauses in this paragraph, but none of them have been pressed in argument. Para. 35 refers only to the Punjab will and it is as follows :

> That Nawab Nasir Ali Khan held the Rakhkhamba property situate in the Punjab under the deed of grant dated the 31st March 1868 for his life only and was not competent to make a testamentary disposition thereof, and his will dated the 15th July 1896 so far as it seeks to dispose of the aforesaid Rakhkhamba property in favour of Nawab Fateh Ali Khan or after him in favour of the plaintiff is invalid and inoperative.

It is true that the scheme of inheritance laid down in these wills is unknown to Mahomedan law or taluqdari law.

(7) [1905] A. C. 84=74 L. J. Ch. 263=53 W. R. 402=92 L. T. 241=21 T. L. R. 252.

(8) A. I. R. 1926 Oudh 561.

Put briefly the scheme was, first that his nephew Fateh Ali should have a life interest, then that on his death the testator's son Mohammad Ali should have a similar interest, and again on his death that his nephew Hidayat Ali Khan should succeed. After these three successors the property was to go to the fittest from among their issue who was to be appointed by the last devisee under the wills. Failing such an appointment there was to be an election by all the male issue of the three successors of one of their own number and this principle was to be followed for ever. In the case of disagreement the Government was to appoint a successor, but the estate was never to rest absolutely with any one person. It cannot even be said that the wills reproduce the family custom, if it be a custom, laid down in the Rakhkhamba sanad for that grant contemplated that on the death of the last three holders named the property should go permanently into the hands of the person selected from among the male issue of the late Nawab Ali Raza Khan by themselves.

The objection, therefore, to the subsequent terms of these wills must be upheld, but it cannot be said that the objection has any serious effect on the present suit. In the first place the Courts are not concerned with the future except in exceptional circumstances. It is proper no doubt to decide the matter in so far as it concerns the existing parties who are interested, but I am not prepared to go on and consider circumstances which may arise after the death of the present plaintiff in the event of his being successful in the suit. If the scheme begins with Fateh Ali himself, on the authority of their Lordships of the Judicial Committee in the case of *Jutendra Mohan Tagore* v. *Ganendra Mohan Tagore* (9), I should hold that the first estate in favour of Fateh Ali Khan would be valid as a life estate because the giver had that intention and that on his death the estate would devolve upon the testator's heir at law. As that heir is undoubtedly the plaintiff no difficulty which affects this case arises from the illegal scheme of succession. If, on the other hand, it be held that the will is valid in so far as it confers a life estate on Fateh Ali with a remainder to Mohammad Ali it is altogether unnecessary to consider subsequent clauses which may be the subject of future controversy, but are in no way material to the decision of the present suit. The second objection regarding Rakhkhamba estate is of more importance. Before deciding this question it would be proper to decide issues 4 (a) and (b). These issues refer to an alleged oral gift made by Sir Nawazish Ali in favour of Nawab Nasir Ali in the year 1889. It will be remembered that Sir Nawazish Ali made a will of his Oudh property in 1882 and in the year 1889 he left India to tour in Europe and he died at Mecca in 1890 without returning to his native land. Before his departure he wrote a letter to the Tahsildar asking him to effect mutation in favour of Nasir Ali Khan in respect of the Punjab property and mutation was effected accordingly, with a note that it was in accordance with a deed of gift. In his will Nawab Nasir Ali states :

> Whereas on his departure for Europe in 1889 Haji Nawab Nawazish Ali Khan transferred to him Rakhkhamba and Rakhjuliana as well as all moveable property and immovable property, that is, residential houses in Lahore District and put him in possession of the same as sole proprietor thereof, and whereas the lands above referred to have also been mutated in my name, etc.

On this I have been asked to hold that Nasir Ali obtained the whole of the Punjab property by means of an oral gift. This contention is put forward in order to meet the difficulty occasioned by the wording of the Rakhkhamba grant. As to the rest of the property in the Punjab it is a matter of no importance whether there was an oral gift in favour of Nasir Ali or not. In any case he succeeded his brother in undisputed possession and neither his title nor his disposing power were ever challenged. And as to Rakhkhamba it is manifest from the terms of the grant that Sir Nawazish Ali had no power to make a gift of the property. He was himself only a life-holder and Nasir Ali was nominated in the grant itself as his successor. All that he did in respect of the Rakhkhamba property was to have mutation effected in the name of his successor who was already his heir under his will in the Oudh pro-

(9) [1872-73] I. A. Supp. Vol. 47=9 B. L. R. 377=18 W. R. 359=2 Suther. 692=3 Sar. 82 (P. C.).

perty and this was done for the sake of convenience because Sir Nawazish Ali himself intended never to return to India. There is no mention in the will of any deed of gift and I do not consider that the case of the rest of the property is in any way different from that of Rakhkhamba. All that Sir Nawazish Ali did was to put his heir in possession and I do not hold that this amounts to a deed of gift. I find, therefore, on this issue as a preliminary to issue 10 that there was no gift of the Punjab property to Nasir Ali in 1889, although mutation was effected in his name, and that as far as the Rakhkhamba estate is concerned Sir Nawazish Ali was not competent to make a gift thereof.

Thus Nasir Ali held the Rakhkhamba property in the terms of the Government grant and it was clearly laid down in that grant that on his death the property should go to his brother Nasir Ali, and that on the death of the last survivor, in this case Nasir Ali himself, the property should go to that person whom the male heirs of Nawab Ali Raza should choose as the fittest from among their own number. It was never contemplated in the grant that Nasir Ali should transfer the property by means of a will. The only clause relating to transfer is that in which it lays down that no transfer of proprietary rights in the said estate will be valid until it shall have received the sanction of his Honour the Lieutenant-Governor. If the term 'transfer' is held to include a will, which is hardly possible as such a condition would be entirely contradictory to the terms laid down above for the devolution of the estate, even so it is clear that such a transfer required the sanction of the Lieutenant-Governor and no such sanction was obtained. No doubt Nawab Nasir Ali himself professed to be making this will in pursuance of the grant and his will purports to recite the terms of the grant, saying that the property was to devolve in the following manner, namely that Nawab Nawazish Ali is to be followed by me Nawab Nasir Ali Khan and I by Nasir Ali Khan and he by the most capable and most liked of the issue of the three brothers as successor and muafidar. Now these are the terms of the grant; only the choice of the most capable and most liked of the issue of the three brothers did not rest with Nasir Ali. The principle of election, which Nasir Ali attempted to postpone until after the failure of the last survivor of three successors to make a selection, was to come into force on the death of Nasir Ali himself and Nasir Ali had no power to interfere by will with the rules of succession laid down in the grant which has a special sanctity under the Crown Grants Act, which came into force in 1895. On behalf of the plaintiff an attempt is made to support the will even as regards Rakhkhamba on the ground that it passed unchallenged and Government never refused to acknowledge it. It is even suggested that Government's acceptance of Nawab Fateh Ali Khan and confirment on him of the title of Nawab amounts to a sanction on the part of Government to this disposition of property. But there is no force in this contention for although Government accepted Fateh Ali Khan as the de facto holder of the estates and allowed him to succeed to the hereditary title of Nawab under the terms of the sanad of 1892, there is nothing to show whether the Government accepted him under the will or under the grant as a life-holder or as an absolute owner. It appears to me that he was accepted by the Government because he was in possession and no important objection was made. I cannot find that the will relating to Rakhkhamba was a transfer sanctioned by the Lieutenant-Governor under the terms of the grant and it is, therefore invalid as far as the Rakhkhamba property is concerned. I find, therefore, on this issue that the scheme of succession contained in these wills, although it may be ultimately found to be invalid, does not affect the suit before me but that the will dealing with the Punjab property is invalid, in so far as the property known as the Rakhkhamba grant is concerned.

Issues 9 (a) and 9 (b) attack respectively the Oudh will and that portion of the Punjab will which relates to property other than Rakhkhamba. 9 (a) runs as follows:

Is the bequest of Nasir Ali Khan in plaintiff's favour of the property in Sch. 1, Nos. 1 to 51, invalid under S. 54, Indian Succession Act, read with S. 19, Oudh Estates Act.

The meaning of this is that S. 19 of the Oudh Estates Act enacts that S. 54, Indian Succession Act, applies to all wills made by any taluqdar or his heir or legatee and S. 54, Indian Succession Act,

which is now S. 67 enacts that a bequest shall be void so far as it concerns the persons attesting a will. It is alleged that Mohammad Ali Khan, the plaintiff, himself attested the will as a witness and therefore is debared from taking advantage of the bequest in his favour. The plaintiff objects that as the law stands the will of 1896 cannot be held to have been made under the Oudh Estates Act. This is an argument which I cannot accept. It is true that owing to obscurity in the draft of S. 14, Oudh Estates Act, 1 of 1869, their Lordships of the Judicial Committee held in the year 1904 in *Balraj Kuar* v. *Jagat Pal Singh* (10) that a transfer made to remote heir removed the estate from the operation of the Act. Thus the transfer in favour of Fateh Ali Khan in preference to the testator's son might be said to have removed this property from the operation of the Act, though as a matter of fact on the same reasoning the transfer by Sir Nawazish Ali in favour of his brother Nasir Ali Khan in the year 1882 had the same effect. In my opinion it is immaterial because the amending Act of 1910 definitely brought back under the Act all estates which had been so transferred. The present wording of S. 14 is :

> If any taluqdar or grantee or his heir or legatee shall heretofore have transferred or bequeathed or if any taluqdar or grantee or his heir or legatee shall herafter transfer or bequeath the whole or any portion of his estate . . . . . , the transferee or legatee and his heirs and legatee shall have the same rights . . . . and powers in regard to the property . . . as the transferer or testator.

Thus in my opinion the transfer by Nawazish Ali validly transferred the estate to Nasir Ali and Nasir Ali transferred the estate in his turn validly to Fateh Ali and the estate still remains under the Act. The defendant who wishes to exclude Mohammad Ali from his rights because of his signature on the will argues that in any case he would have no title because of the terms of S. 21 of the amending Act of 1910 which is a saving clause, to protect persons who have obtained the estate in good faith and whose title might be affected by the alterations then made. Clearly this has no application to the case of Fateh Ali's son and is irrelevant. If therefore, Mohammad Ali signed the will as a witness even though the will was greatly to his own disadvantage as it postponed his right to inherit his father's property for 27 years, he would be excluded by S. 54 now S. 67, Indian Succession Act, from the benefit conferred on him. No doubt the matter is one of academic interest in view of my finding that the will conveyed only a life estate to Fateh Ali, because in that case Mohammad Ali would succeed to the estate even apart from the will, and if I had held that the will gave an absolute estate to Fateh Ali Khan the plaintiff would not have been entitled to the property even had he not signed the will. I am not, however, prepared to find that the plaintiff actually signed the will as a witness. (The judgment then discussed the evidence and proceeded). He did not sign as a witness but he signed in token of his agreement with the terms of the document. I feel fortified in this conclusion by a reference to a decision of a Bench of the Court of the Judicial Commissioner of Oudh in *Thakur Shiam Sunder Singh* v. *Thakur Jagannath Singh* (11), where it was held that the testator obtained the signatures of certain persons for some special purposes of his own, and the mere fact that the word 'gawahshud' appeared above their signatures did not make them attesting witnesses. In fact the case was so similar to the one before me that it was suggested that the plaintiff had based his evidence on that finding of the Judicial Commissioner's Court. I find, however, that the plaintiff and Abdul Karim made statements to the same effect in a Court in the Punjab before the judgment to which I have referred was pronounced. I find, therefore, on this portion of the issue that the bequest in favour of plaintiff is not void under S. 54, Indian Succession Act, read with S. 19, Oudh Estates Act.

The second portion of the issue is as follows:

> Are the bequests in the two wills invalid under Muhammadan law for want of consent of the widow and daughter of the testator.

It is conceded that apart from the taluqdari property in Oudh and the property covered by the Rakhkhamba grant in the Punjab the rest of the property must be governed either by Muhammadan law or some family custom. The only family custom on which any reliance

(10) [1904] 7 O. C. 248=26 All. 393=31 I. A. 132=8 Sar. 639 (P. C.).

(11) A. I. R. 1925 Oudh 465 since affirmed by A. I. R. 1927 P. C. 248—Ed.

is placed is a custom of the exclusion of females and the objection that the wills are invalid for want of consent of the widow and daughter runs counter to allegation. It is not necessary to go very deeply into the Muhamadman law on this subject and it is sufficient to say that under Shia law a childless widow is one of those heirs who are entitled to succeed to a Muhammadan estate, and according to the best authorities a will made by a Shia of more than one-third of his estate is invalid unless it is made with the consent of all the heirs either before or after death.

The wills in so far as they refer to the property in the Punjab known as Rakhjuliana and some property in Oudh which is not included in the taluqdari estate deal with more than one-third of the testator's property and one of the wills includes also the Rakhkhamba grant.

Consequently in so far as the wills are subject to Muhammadan law they would require the consent of the heirs unless there is some custom in the family which overrides the law. The heirs in this case were Mohammad Ali himself, his sister Zohra Begam and the testator's widow, who was not, it may be observed, the mother of either Mohammad Ali or Zohra Begam. The consent of Mohammad Ali was of course obtained, both before and after execution of the will, and although a feeble attempt has been made to show that Zohra Begam was not in Lahore when the wills were executed. it is in my opinion clearly proved that her consent was taken by Mohammad Ali and moreover as she was the wife of Fateh Ali it is unreasonable to suppose that she did not approve of the wills in favour of her own husband. There remains the case of Nasir Ali's widow. This lady went to Kerbella in the year 1889 and lived in retirement until her death in the year 1916. It is impossible for the plaintiff to prove that she was consulted as to the terms of the will, but according to Muhammadan law there may be a renunciation of the right to inherit and such renunciation need not be expressed but may be implied from the ceasing or resisting from prosecuting a claim maintainable against another. This was the view taken by their Lordships of the Judicial Committee in a case decided in the year 1871: *Mt. Harmutool Nissa Begam* v. *Allahadia Khan* (12). It was also held by the Bombay High Court in *Daulat Ram Khusal Chand* v. *Abdul Kayum* (13) that the consent of an heir to such a bequest may be signified by conduct showing a fixed and unequivocal intention. In my opinion this lady by her retirement to Kerbella clearly intended to give up any claim to this property and moreover it is proved that she received up to her death a regular allowance from Fateh Ali Khan for her maintenance and thereby acquiesced in his succession to the whole estate under the wills. As to the question whether there is a family custom excluding succession by females there is the evidence that no female succeeded to any portion of the estate on the death of Ali Raza or on the death of Nawazish Ali or on the death of Nisar Ali. And there is an admission in the first written statement made by the defendant in this case in para. 26:

> that in accordance with the family custom daughters are excluded from succession in the family of the parties.

No doubt this is not pleaded in the second written statement although I find that in reply to para. 3 of the plaint defendant claimed that the whole of the property known as Mubarik Haveli devolved on the three sons of Nawab Ali Raza Khan and makes no mention of the share of any women. In view of my finding that the will is not invalid for lack of consent it is unnecessary to go further into the question of custom but the evidence, such as there is, is in favour of the plaintiff and the defendant's own admission in his original written statement should, strictly speaking, debar him from raising such a plea. I find on this issue that the bequests are not invalid under Muhammadan law for want of consent of the widow and daughter of the testator.

Before proceeding to decide the other vital issues I shall consider briefly issue 7 which raises the question of the jurisdiction of this Court to decide the plaintiff's claim to the waqf property.

When the plaintiff filed his suit originally he wished to confine it to the property in Oudh and asked permission to withhold his claim to the Punjab property including the waqf property with

(12) [1871] 17 W. R. 108 (P. C.).
(13) [1902] 26 Bom. 497=4 Bom. L. R. 132.

a view to file a suit elsewhere. Permission, however, was refused by this Court and the order of my learned predecessor forced the plaintiff to bring his whole suit in this Court. No objection is raised by the defendant to the Court's jurisdiction as to the property in the Punjab which is claimed by the plaintiff as owner, nor could any objection be taken having regard to the provisions of S. 17, Civil P. C, and of O. 2, R. 2. It is, however, contended that a suit to be declared a mutawali of a waqf involves an entirely different cause of action from a suit to be declared the owner of the property. A mutawali of a waqf is not the owner but the manager and there is an essential difference between the position of a mutawali and that of an owner. On the other hand under the terms of this waqf the waqf was to be administered as mutawali by the person who was the janashin or successor of the waqif. In this suit I am bound to decide who the successor of the waqif is, and it is of no importance for the decision of the issue whether the successor is held to be the person entitled to succeed to the whole of the property or only the person who is entitled to succeed to the Rakhkhamba grant. In either case the waqf property is an appendage of the estate. In my opinion it cannot be divested from the estate and it becomes an essential part of the plaintiff's claim. That being so it comes within the jurisdiction of this Court and I find for the plaintiff on this issue.

Issue 16.—This issue deals with the defendant's claim apart from the wills to the Rakhkhamba property which in para. 9 of his answer he had specifically excluded from the operation of the will.

The issue is as follows:

Did Sir Fateh Ali Khan acquire an absolute title to the Rakhkhamba property ?

(*a*) in the manner described in paras. 36 and 37 of the additional pleas; and

(*b*) by adverse possession ?

Paragraph 36 of the additional pleas is as follows:

That Nawab Sir Fateh Ali Khan was chosen by the male heirs of Nawab Ali Raza Khan including the plaintiff as the fittest person to succeed to Nawab Nasir Ali Khan on the 3rd day of the latter's death at the dastarbandi ceremony and was also considered fittest to succeed by His Honour the Lieutenant Governor of the Punjab. Nawab Sir Fateh Ali Khan succeeded to the Rakhkhamba grant mentioned above not under the will of Nasir Ali Khan but under the terms of the deed of grant dated the 31st March 1868 by selection by the male heirs of Nawab Ali Raza Khan or in the alternative by selection by the Lieutenant Governor.

Paragraph 37 runs:

That under the terms of the deed of grant dated 31st March 1868 Nawab Sir Fateh Ali Khan acquired absolute title to the Rakhkhamba property and plaintiff cannot lay claim to it on his death.

Thus in regard to the Rakhkhamba property the defendant sets up the Government grant as against the will and seeks to prove that Fateh Ali Khan was chosen by the male heirs of Ali Raza Khan under the terms of the grant and so had an absolute title. And in the alternative he claims that he was appointed by His Honour the Leutenant-Governor of the Punjab under the terms of the grant. The bulk of the oral evidence in this case has been directed to show what happened at a ceremony held three days after the death of Nawab Nasir Ali Khan. This evidence was not recorded in Court. It was recorded before a commissioner who was sent by this Court to Lahore.

I wish at this place to thank the commissioner Mr. Kidwai for the careful manner in which he recorded the evidence under extremely difficult circumstances. Neither the counsel nor the witnesses appear to have treated him with the respect due to a Court, and he showed a very creditable firmness in dealing with the futile objections made by counsel to question after question and in cases by the witnesses themselves. Still he was bound to admit much irrelevant evidence and in proof of this I may remark that in argument I was not referred to more than a very small portion of the 1,500 pages of evidence recorded by the commissioner, and the learned counsel for the defendant stated that in a case of this kind he would not himself lay any great stress on any statement that was not supported by other evidence. (The judgment here dealt with the evidence relating to dastarbandi and proceeded.) In my opinion the plaintiff's evidence on this point is far more credible than that of the defendant, and the probability is all in favour of an acceptance by the heirs under the will rather than a choice under the sanad. The wills of Nasir Ali Khan must have been mentioned on this occasion. They had been executed before numerous witnesses four months before, their terms were most unusual and were well known and the chief spokesman of

the ceremony, Khan Bahadur Barkat Ali, was himself a marginal witness. Moreover it is admitted by everybody that the present plaintiff had full knowledge of the terms of the will and had been persuaded to agree to it. It is most unlikely that he knowing his father's wishes would without any further inducement agree to give up his reversionary rights and accept Nawab Fateh Ali Khan as the absolute owner of the whole estate, for no one suggests that at that time there was an agreement to accept the wills with regard to the rest of the property and not to Rakhkhamba. Whereas it is almost certain that the wills must have been referred to on this occasion, it is very improbable that any reference was made to the grant of 1868, because the will itself purported to be made under that grant, and had the grant been discussed at the meeting, the divergence between it and the will would have been seen and noticed. Another point I have to notice is that if there was a choice under the grant, there were only four electors, for the male heirs of Ali Raza could only be those immediately entitled to succeed, namely his four grandsons Muhammad Ali Khan, Fateh Ali Khan, Barkat Ali Khan and Hidayat Ali Khan.

The defendant has all along contended that Hidayat Ali who was about 18 years of age was weak witted and Barkat Ali who was the elder brother of Fateh Ali was a person of dissolute and profligate habits and clearly unsuitable to take possession of the estate. There were, therefore, only two persons who could succeed, namely the present plaintiff and Fateh Ali, and the defendant's witnesses have themselves made a mistake as to the terms of the grant when they asserted that 7 or 8 members of the family took part in the election. One more fact may be noticed and that is that according to the evidence of Rai Bahadur Amar Nath, M. B. E., who was at that time confidential clerk to the Commissioner of Lahore, Barkat Ali came to the Commissioner after the death of his uncle and put forward his claim to succeed, but Fateh Ali produced documents, presumably the two wills, and convinced both his brother and the Commissioner that his claim was superior. There is no reason to disbelieve this witness and if his story is true it is probable that the events to which he refers took place between the death of Nasir Ali and the dastarbandi ceremony. If this is the case it is additional proof that Barkat Ali agreed to the succession of Fateh Ali under the terms of the will and there is no question of his taking part in an election. It fact both he and Muhamrned Ali would rather have stood out of the election and taken the chance that the Lieutenant-Governor would nominate one of them as he was empowered to do in case of disagreement in the family under the terms of the Rakhkhamba grant.

Another point has been raised by the defendant which has, in my opinion, little bearing on the case, namely that Fateh Ali Khan was clearly the fittest member of the family and so it is likely that the other members would have chosen him. No doubt Fateh Ali Khan after obtaining the property was successful in his management, and although he lost the favour of the Government in the year 1912, he recovered it subsequently and received the title of K. C. I. E. But Muhammad Ali is also a person who took a prominent part in public life, particularly in connexion with the Lahore Municipality and became Khan Bahadur and K. C. S. I. So that even if the claims of Hidayat Ali and Barkat Ali are discarded, the one on account of his lack of intelligence and the other on account of his profligacy, it cannot be said that the present plaintiff was a person who could not have been chosen to succeed his father. At any rate it is impossible to say what the opinion of his relations may have been at the time, or what view might have been taken by the Government in the event of disagreement. And even if I were prepared to hold that Fateh Ali Khan was manifestly the fittest member of the family, that finding would in no way indicate that he had been actually chosen in the manner required by the Rakhkhamba grant.

But apart from the oral evidence and this consideration of the probabilities of the case, there is strong documentary evidence that, as a matter of fact, Nawab Fateh Ali Khan succeeded to the whole estate including the Rakhkhamba grant under the wills. (The judgment here referred to the documents and concluded.) It is, therefore, a proved fact that Fateh Ali took possession of the whole property, including the Rakhkhamba grant under

the will, and I conclude that the choice, in so far as it was a choice, made by his brother and his cousins at the dastar-bandi ceremony was no choice under the terms of the Rakhkhamba grant, but an approval of the terms of Nasir Ali's wills. Thus the heirs accepted Fateh Ali subject to the proviso that he was to succeed for life only, and that on his death Muhammad Ali was to succeed and thereafter Hidayat Ali if he survived him. This does not amount to an acceptance of Fateh Ali as absolute owner and it is, therefore, not a choice under the Rakhkhamba grant and cannot be considered as such. It is, if anything, a family agreement, though I am not prepared to lay any stress on this description of the affair which has been put forward on behalf of the plaintiff. I am aware that considerable stress has been laid on the validity of family agreements in a series of cases, commencing with the case of *Lala Oudh Beharee Lal* v. *Ranee Mewa Koower* (14). But seeing that the agreement, if any, was made to an invalid request I am doubtful whether the Courts would be justified in acting upon it—see *Indra Narain Manna* v. *Sarbasova Dasi* (15).

There remains the question whether Fateh Ali was chosen by the Government or more correctly by the Lieutenant-Governor of the Punjab under the terms of the grant. In the first place the Lieutenant-Governor could only exercise his powers if there was a disagreement among the heirs and there was no such disagreement. But secondly, which is more important, it is manifest that the Lieutenant-Governor never made any choice of Fateh Ali Khan. The Lieutenant Governor merely accepted his position under the belief that he was carrying out the wishes of the family and recommended the Viceroy to grant the hereditary title of Nawab to Fateh Ali. The position of the Lieutenant-Governor himself appears from a letter written on his behalf by Col. Parsons, Deputy Commissioner of Lahore, to Nawab Fateh Ali Khan on the 9th April 1911, when the Lieutenant-Governor was asked to arbitrate in the matter of the allowance to be made to Muhammad Ali by Nawab Fateh Ali. The letter purports to be a copy of the notes made by Sir Louis Dane, the Lieutenant-Governor, and it is proved to be in the handwriting of Col. Parsons. The note is :

> I am still not in a position to act, as Sardar Muhammad Ali Khan only agrees to arbitration on the condition that the terms of his father's will are accepted. This would mean that both wills are upheld while Nawab Fateh Ali insists that the decision must be in accordance with the terms of the deed of grant in respect of the Lahore Jagir property. As long as this conflicting attitude exists, any arbitration would be merely a waste of time,

and Col. Parsons himself went on to say :

> If the Nawab wishes His Honour to proceed to arbitration, it will be necessary to send a further letter explaining that he does not wish to impugn the terms of either will and considers himself and his heirs and the family generally absolutely bound by it.

This being the position taken by Government, it is idle to contend that Nawab Fateh Ali was chosen as absolute owner of the Rakhamba grant under the sanad by the Lieutenant-Governor. I find for the plaintiff and against the defendant on the first part of this issue.

Defendant, however, falls back upon the plea of adverse possession. He essays to show that Fateh Ali Khan and Mahomed Ali Khan were on very bad terms from the year 1906 onwards, and that Fateh Ali Khan at some uncertain period took up the definite position that he had obtained an absolute title by selection to the Rakhkhamaba property under the terms of the grant, and that he did not acknowledge the will. This has enabled the parties to introduce much irrelevant evidence, including extraordinary suggestions on the part of the defendant that in the year 1905 Mahomad Ali was seeking in compass the destruction of Fateh Ali by means of witchcraft. As a matter of fact the parties were on very good terms for the first few years. Fraction arose when Fateh Ali Khan married another wife and became the father of a son in 1901. Undoubtedly Fateh Ali became more and more anxious to preserve the whole or part of his property for his son, and he began to resent the claims of Muhamad Ali Khan for large sums of money in order to keep up his position as heir. In 1907 Fateh Ali paid a considerable sum in order to settle Mahomed Ali's debts and, as Mahomed Ali himself admits, their relations remained strained from that period onwards. On the other hand as late as 1920 Mahomed Ali was

(14) [1869] 3 N. W. P. H. C. R. 82.
(15) A. I. R. 1925 Cal. 743.

photographed along with Fateh Ali at a party given by the latter to Sir James Meston and it is probable that they remained outwardly civil to each other, although there was always some friction both in public and private life. But this goes only a very little way to show that Nawab Fateh Ali set up any adverse claim to an absolute estate in this property and the only witness who mentions any such claim prior to the year 1911 is Mr. Halifax, who was Deputy Commissioner of Lahore in 1905 and 1906. But this gentleman is far from certain when he heard Nawab Fateh Ali assert his claim to the estate by election. It is true that he believes that it was when he was Deputy Commissioner, but it must be remembered that he was employed in Lahore for a considerable time afterwards, and presumably saw the papers in this case when it was suggested to him that he should arbitrate between the parties after Nawab Fateh Ali Khan's death.

As against his evidence, there is the evidence of Mr. Butler, now Sir Montague Butler, Governor of the Central Provinces, who was Deputy Commissioner of Lahore in the years 1909 to 1911. He knew the parties well and was well aware of their differences, but always understood that Nawab Fateh Ali had succeeded under the wills, and he has no recollection that Nawab Fateh Ali ever mentioned to him that he held any property by election. He remembers that Nawab Fateh Ali claimed that there was some flaw in the wills, but he himself was puzzled as to what could be the flaw in them. From this it appears that in the time of Mr. Butler Nawab Fateh Ali was not openly denying Mahomed Ali's title to succeed to the estates on his death. It was in the later part of the year 1910 that Nawab Fateh Ali decided to apply to the Lieutenant-Governor Sir Louis Dane to arbitrate on the question of the allowance which he should make to Mahomed Ali, and in connexion with the application which he appears to have made on 10th January 1911 and which gave rise to the letter of Col. Parsons, to which I have already referred above, he took the opinion of Mr. B. Bevan-Petman, a practising Barrister. No doubt he had taken other opinions previously and when he went to Mr. Petman he was prepared to dispute Mahomed Ali Khan's claim to succeed him in the whole property. It is evident from Mr. Petman's statement that at that time Nawab Fateh Ali Khan was very anxious to secure the property for his own children. As Mr. Petman says :

> The Nawab claimed under every possible head. He claimed by selection. He claimed by will. He claimed by Mahomedan law. He claimed by English law and, I also inferred, that he claimed by divine right.

Mr. Petman, however, advised him to give up the other claims and concentrate on the claims to the Rakhkhamba estate by selection and acting on Mr. Petman's advice, Nawab Fateh Ali filed a statement of his case, of which a copy (Ex. 152) has been admitted in evidence. His claim as to Rakhkamba was that the property was granted with definite restrictions as to the mode of succession and devolution and the Nawab's predecessors received in this estate no more than a life interest with no power of testamentary disposition.

> In fact as in law the Nawab holds this property solely by family selection in strict terms of the grant.

It is interesting to note that he only claimed a life estate in the rest of the property in so many words. This then is the position taken by Nawab Feteh Ali in the year 1911, and the defendant pleads that because this definite assertion of absolute title was made more than twelve years before his death in October 1923, I should hold that the property became his absolute property by adverse possession. But I find it difficult to see how any claim to an absolute estate by adverse possession can be made by the mere assertion on the part of a person, who has taken the property as a life estate holder under a will, during the course of his tenure, that his estate is absolute and will not terminate on his death. The plea of adverse possession comes into force where the person entitled to the property fails to take some step within the period of limitation to assert his title against the person who attempts to set up the adverse title. It must be remembered that Mahomed Ali accepted in a formal manner Fateh Ali's title to hold the estate until his death. Thus he could bring no suit for possession of the property until Fateh Ali's death. It is doubtful even whether he could bring a declaratory suit when he learnt that Fateh Ali intended to set up

the title for his son, because, actually speaking, no such title could be set up until Fateh Ali himself had died. But even if we assume that Mahomed Ali could have brought such a suit for a declaration, it is admitted by the learned counsel for the defendant as being established law that failure to bring a declaratory suit does not debar the plaintiff from bringing a suit for possession. This, in my opinion, definitely disposes of the defendant's claim to the estate of Rakhkhamba by adverse possession, and I find accordingly for the plaintiff and against the defendant on the second portion of this issue.

I have held so far that the plaintiff is entitled to succeed to the property mentioned in the wills of the late Nawab Nasir Ali Khan under those wills with the exception of the property covered by the Rakhkhamba grant as to which the testator had no disposing power, and I have also found that the wills were accepted as a whole by the family and that Nawab Fateh Ali Khan was accepted under the terms of the will as having a life interest in all the property, including that which was transferred to him by invalid bequest. I have now to consider whether the action of Fateh Ali in accepting the property under the wills, in obtaining mutation under the wills, and certain other actions to which I shall presently refer, amount to an estoppel as against his son. The question of estoppel is contained in issue 12, which is as follows :

Is the defendant estopped from claiming that any portion of the wills of 1893 is invalid ?

It is not necessary to consider the case of the rest of the property as apart from Rakhkhamba, because Nawab Fateh Ali himself consistently claimed that he was holding under the will. As late as the year 1919 he gave evidence in the Court of the City Magistrate of Lucknow and stated that he succeeded by will and selection to Nawab Nasir Ali Khan, and he mentions both the wills in this deposition. He is also bound by the statement which he submitted to the Lieutenant-Governor in 1911 (Ex. 152), to which I have already referred, in which he stated that both the Oudh property and the Rakhjuliana property he held strictly in terms of the wills and had only a life interest in them. This issue, therefore, has been confined in argument to the case of the Rakhkhamba grant. Estoppel is claimed generally and also in particular under the doctrine of election. The doctrine of election has been introduced into India in the Transfer of Property Act and also in the Indian Succession Act, but the latter is not applicable to the present case, and S. 35, Transfer of Property Act, confines the doctrine to a case where a person professes to transfer property which he has no right to transfer and as a part of the same transaction, confers any benefit on the owner of the property. I find also that in England no case of election arises, if the property, which the testator professes to dispose of, does not belong to the legatee—see Jarman on Wills, Vol I, p. 585. No doubt the word "owner" is used in a very wide sense, and includes persons who have not only vested but contingent rights and reversionary and remote as well as immediate interests ; but, in my opinion, Nawab Fateh Ali was not an owner of any part of this property in any sense of the term. He was not the heir of the testator and, in the case of the Rakhkhamba property, he was, under the grant, one of four persons who could elect one of their own number to be the absolute owner of the property. A chance of being elected is not, in my opinion, an interest in property and on this view I should not be able to accept the plaintiff's theory that the principle of election in a strict sense applies to the present case. On the other hand, the plaintiff can and does rely on the broad principle of equity, that a person, who received a benefit under an instrument, must adopt the whole giving full effect to its provisions and renouncing every right inconsistent with it. Mr. Spencer Bower, in his book on Estoppel by Representation, professes to give the rules of estoppel as to testamentary instruments on p. 339. He writes :

One who obtains or accepts or retains possession of property under the will and who neither has, nor professes to have, any title thereto except under the will is estopped, as against any remainderman or other person claiming under the same will, from asserting that the testator was not entitled to such an estate in the property as he purported to devise or bequeath and generally from setting up any title to the property in himself which is independent of and adverse to the will, or any interest of a different kind from that which he would have taken if the property had passed by the will as it was impliedly represented by him to have passed.

The defendant cannot escape by saying that Fateh Ali had another title other

than the will, because in my opinion he had no title except under the will, for a chance of election is not a title. Had he been able to say that he had such a title, but set up a mistaken claim under the will, the defendant would not have been estopped. An attempt has been made to apply to this case two English cases *In re Anderson Pegler* v. *Gellatt* (16) and *In re Coole Coole* v. *Flight* (17), but it will be seem that both these rulings are based on the finding that the principle laid down in *Board* v. *Board* (18) that a person cannot say that a will is valid to enable him to take a benefit under it but invalid so far as regards the interests of those in remainder who claim under the same will, does not apply. The reason why the principle does not apply in these two cases is that they refer to cases where a person has a title but "does not because she cannot devise" The case before me is not one where Nasir Ali Khan had a title and could not devise. It is a case like *Board* v. *Board* (18) where a testamentary instrument was validly executed by a person who had no title, that is to say, no disposing title in the property. Nor can the defendant rely upon the judgment of Lord Jessell in the case of *In re Stringer's Estate, Shaw* v. *Jones-Ford* (19). What Lord Jessell said was that a remainder man claiming under an invalid will cannot recover, upon some notion of estoppel, on the death of another person, who under the same will, having no title had entered as a tenant for life. In fact the will was invalid for one as for the other, and if the life estate holder had no title neither had the remainderman. But this is not the case here, for Mohammad Ali Khan has a perfect title as the heir of the testator quite apart from the will.

The last ground on which the defendant attempts to escape from the plea of estoppel is that there can be no estoppel if the allowance of the estoppel results in an illegality. This is based on the presumption that the bequest in favour of Fateh Ali with the remainder to Mohammad Ali was illegal. It does not appear to me that this bequest was illegal. I have been referred to certain rulings but none of them appear to be in point. A bequest may be invalid without being illegal and the fact that the bequest dealt with property gifted by Government is one which concerns the Government only and not other beneficiaries under the bequest. In this case, as I have already shown, Nawab Nasir Ali made a disposition of the Rakhkhamba property under the belief that he was acting in accordance with the sanad Those persons who could, under the sanad, have objected to the will and made an election among themselves, accepted the will and, the Government which might have made an appointment in the last resort, was content to allow the will to stand, and in the year 1911, 15 years later, wished to make acceptance of the succession as laid down in the will, a preliminary to arbitration by the Government in a dispute as to the maintenance allowance of Mohammad Ali Khan, which could only be referred to the Government under the terms of the grant Further, in order that an act may be illegal, it must be contrary to some law. I know no law which makes a will of this nature illegal, although for many reasons it may be invalid or inoperative.

I have noticed above that Nawab Fateh Ali never objected to the article published in the newspapers as to his succession but I have not so far referred to the oral evidence adduced by the plaintiff to show that Fateh Ali Khan repeatedly stated that Mohammad Ali would succeed to his estate. These witnesses are persons of high position. They are all title-holders and well acquainted with the parties. No doubt they have from time to time shown their sympathy with the plaintiff both before and after the death of Fateh Ali but this, as I have stated above, is not, in my opinion, sufficient reason for them to come forward and give false evidence. A deputation went in the time of Mr. Butler to ask Nawab Fateh Ali to be more generous in the matter of allowance to Mohammad Ali, and one of the gentlemen who formed the deputation states that, on that occasion Fateh Ali Khan said to him that Mohammad Ali Khan should not be extravagant with what was his own property, as he would succeed on his death. I have no doubt that Fateh Ali Khan did make such statements, and although they may not have specifically referred to the Rakh-

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(16) [1805] 2 Ch. D. 70=74 L.J. Ch. 433=92 L.T. 725=53 W.R. 510.
(17) [1920] 2 Ch. 536=89 L.J. Ch. 519=64 S. J. 739=36 T.L.R. 736.
(18) [1873] 9 Q.B. 48=43 L. J. Q. B. 4=29 L. T. 459=22 W.R. 206.
(19) [1867] 6 Ch. D. 9.

khamba property, it never occurred to any one until about the year 1911 to suggest a division of the property. It is not without significance, as showing the position which Fateh Ali Khan himself took with regard to the succession, that he purchased property in the name of his son and that he never executed any will or made any formal indication of his intention that his son should succeed him. Had he been confident that his eldest son would succeed, it seems unlikely that he would have purchased property in his name. I, therefore, find that, both by acceptance of the wills as a whole and by assertions which led Mohammad Ali Khan to suppose that he was the accepted heir, Fateh Ali Khan created an estoppel to the present claim of his son, that one portion of the property, namely, the Rakhkhamba estate, came to him by some means other than the will on which his original title was based, and I find for the plaintiff on this issue.

Issue 11 is not quite clear to me and no stress has been laid upon it in arguments. It runs :

(a) If for any reason the wills are wholly or partly invalid, is the plaintiff entitled to the properties in Schs. 1 to 4 as the sole heir of his father under the terms of the sanad and a family custom by which all female heirs are excluded or in the alternative under the possessory title of his father ?

(b) Is the plaintiff's claim on the basis of possessory title within time ?

The first part of the issue must refer to the Oudh sanad and the question does not arise in view of my finding that the will in plaintiff's favour is valid. The plea as to exclusion of females presumably applies only to the property which is held to be under Mohamedan Law but as to that property the defendant admits that females are not entitled to inherit and as I have shown in dealing with issue 9 (a), there has never been any instance in which females had claimed any share in estate and no attempt has been made to show me that any female is now entitled to a share. The claim to succeed under the possessory title of his father has not been explained to me and Cl. (b) of the issue has been specifically dropped by the defendant in argument. The issue accordingly, in so far as it is relevant, has been disposed of in other issues and no separate finding is necessary.

I now turn to those issues which have been raised as to the details of the property to which the plaintiff will succeed in accordance with my findings.

Issue 1 deals with his claim to the family house known as Mubarak Haveli in Lahore. This house was purchased by Nawab Ali Raza, and a small portion was added to it by Nawazish Ali. Undoubtedly the house passed without any will or bequest into the possession of Ali Raza's sons. It must be presumed that they succeeded under Mohamedan Law as modified by the custom of the family that no share was taken by the females. There is no evidence that Nawazish Ali was the sole owner and, although it is argued that he made an oral gift of the house along with other property to Nasir Ali when he left India for good in the year 1889, I have already shown in dealing with issue 4 that there was no gift and, in any case, the house being family property could not be gifted.

The second clause of this issue raises the defendant's claim that the plaintiff lost his share in the property by ejectment. It appears that the plaintiff did not live in this house, but in one of the other houses belonging to the estate in Lahore. It is proved that his son's wife gave birth to a son in the Mubarak Haveli in the year 1917, but that is hardly proof that her father-in-law was in possession. In my opinion, however, he was a co-owner and never lost his right merely because Fateh Ali lived in this house and he lived in another. I find, therefore, on this issue that the Mubarak Haveli is the ancestral family house of the parties and the plaintiff is entitled to one-third share in it. This was accepted by plaintiff's counsel at the time of argument.

This finding also enables me to arrive at the decision of issue 5 in which I hold Nasir Ali Khan was not in possession of property No. 52 in Sch 1 and the properties in Schs. 3 and 4 in accordance with a gift.

Issue 2 deals with certain property in Oudh. Cl. (a) is :

Did Nawab Sir Nawazish Ali Khan construct the buildings shown in Sch.. 2 ?

and (b) is

If any of the properties in defendant's list H consisted of under-proprietary rights acquired by Sir Fateh Ali Khan.and did they merge in the taluqudari rights ?

Along with this is Issue 3, namely,

Do Schs. Nos. 1 to 51 and Sch. 2 form a correct statement of the property devised to Nawab Nasir Ali Khan under the will of Sir Nawazish Ali Khan dated 17th February 1882.

It is proved by documentary evidence that the house property in Bahraich referred to in Sch. 2 was purchased by Sir Nawazish Ali and all that Fateh Ali did in connexion with this property was to renew certain leases. It is also proved that Nawab Fateh Ali did at an auction sale purchase under-proprietary rights in a village known as Ramnagar Semra in the taluqdari property. There is, therefore, no question that the property mentioned in Sch. 2, namely, the house property in Bahraich, comes to the plaintiff under the will. But as to the under-proprietary rights it is argued that there has been no merger, and that Fateh Ali Khan's heirs are entitled to these under-properietary rights as against the plaintiff, if he obtains the taluqa. I have been referred to S. 32 (a), Oudh Estates Act, which shows that any taluqdar may by registered instrument on a fifteen rupees stamp declare that the immovable property in which he has separate, permanent heritable and transferable right, is a part of his estate, and it is suggested that a failure to execute such an instrument would imply that the property purchased by a taluqdar without the execution of such an instrument did not become part of the estate.

Seeing, however, that the section is permissive, I am unable to infer that the property is necessarily excluded from the estate, because no such instrument has been executed. Moreover I do not consider that the section is intended to apply to the acquisition of fresh rights in a property which already forms part of the taluqa. The only important question is whether the principle of merger applies. In my opinion a purchase of this kind by a taluqdar would ordinarily be held to be for the benefit of the estate, and it cannot be supposed that Fateh Ali, in making the purchase, intended to keep alive a title in his own person adverse to the estate. Unless he intended to keep alive such a title, there is a merger and these under-proprietary rights will go with the estate. I do not however accept the argument of the defendant that S. 90, Indian Trusts Act, has any application, first because the Trust Act has no reference to property of this nature, and secondly because, in any case there is nothing to show that in making the purchase Fateh Ali availed himself of his position as owner to "gain an advantage." I find, therefore, on Issue 2 (a) that Nawab Sir Nawazish Ali Khan constructed the buildings shown in Sch. 2 and (b) that the under-proprietary rights purchased by Sir Fateh Ali Khan, and mentioned in defendant's list B, merged in the taluqdari rights and on Issue 3, that Schs. 1 to 51 and Sch. 2 form a correct statement of the property devised to Nawab Nasir Ali Khan under the will of Sir Nawazish Ali Khan, except that the under-proprietary rights mentioned in the previous issue were actually acquired for the estate by Nawab Fateh Ali.

Before dealing with issue 6 I shall take up Issue 13, which runs as follows:

Is the plaintiff entitled to possession of the property shown in Sch. 5 as mutawali ?

Now I have found on the question of jurisdiction that this Court is empowered to decide plaintiff's claim to the waqf property. It follows, therefore, that the plaintiff is entitled to possession of the property, if he is the person designated in the deed of endowment to succeed. The deed of endowment is absolutely clear and indicates that the successor (janashin) of the founder from time to time will be the mutawali. Had I found that the plaintiff was not entitled to the property covered by the Rakhkhamba grant, there would have been a question of some difficulty for decision, as there is some force in the defendant's contention, that the waqf property follows the Rakhkhamba estate, and certainly it has no connexion with the Oudh Estate. I have myself no doubt that neither Nasir Ali nor Nawazish Ali ever contemplated that the estate would be divided. They regarded the whole estate, whether in the Punjab or in Oudh, as being the property of the Nawab for the time being. It never occurred to Nawab Nasir Ali when he instituted this waqf to attach it especially to the Rakhkhamba grant or to any other particular part of his estate, because his intention was that the property should remain in the hands of one person as janashin and that that person should ipso facto be mutawali. As I have found the plaintiff entitled to the whole property, I must accordingly find that he is entitled to possession of the waqf property shown in Sch. 5, subject to my finding on Issue 6, as to the correctness of that schedule.

Issue No. 6 runs :

Does the deed of waqf executed by Nasir Ali Khan in 1892 relate to all the properties in

Sch. 5 and does it provide that the possession and management of the property shall be with his successor ?

I have already decided the last clause in this issue and the first clause has been virtually decided by the agreement of the parties. The defendant has filed a long list of items under this schedule which were acquired by Fateh Ali Khan and there is no proof that any of them were ever made part of the waqf. Plaintiff indeed admits the defendant's claim to all the items contained in this list except seven. In only two cases has evidence been adduced by the plaintiff. The first is No. 513 in Killa Gujar Singh and I find nothing to show that this is waqf property and the other is No. 568 which was purchased by Nawab Fateh Ali Khan from Government, and forms part of the site of Nawab Place. This is covered by the succeeding issues. As to the rest I find that the schedule should be corrected as desired by the defendant. These issues are as follows :

6A. Did Nawab Sir Fateh Ali Khan build Nawab Place out of waqf funds or out of his private funds ?

6B. If Sir Fateh Ali Khan built the Place out of private funds did he incorporate the building in the waqf and did he incorporate in the waqf property, land which he bought for the purpose of building the Place ?

6C. If plaintiff is entitled to possession of the waqf property as mutawali is he not entitled therefore to possession of the Nawab Place together with the land on which it is built also ?

Issue 6 *A*.—It is admitted that about the year 1906 or 1907 Nawab Fateh Ali Khan commenced building a large house known as Nawab Place. The house is built partly on land contained in the original waqf and partly on the plot of 5 bighas 8 biswas which Nawab Fateh Ali purchased from the Government for this purpose. Originally there was an hotel on the site of a portion of Nawab Place and evidence has been given from which I can infer that Nawab Fateh Ali used a portion of the old building when he commenced the construction of his new house. The first contention of the plaintiff that the house was built out of waqf funds appears to me to be untenable. The building has been valued at practically two lacs of rupees. The waqf accounts which have been produced and attested by oral evidence, show that there was very rarely any profit in the year out of the waqf and there was generally a deficiency. This appears from a statement made by Nawab Fateh Ali himself in the year 1920. It appears that a Lucknow newspaper published certain articles criticising Nawab Fateh Ali's management of the waqf and he was particularly annoyed by one passage which said that, on the accession of Nawab Fateh Ali the door of charity was closed and it was locked on the appointment of Mr. Jaffri. This is the gentleman who gave evidence on behalf of the defendant and who was the secretary of Nawab Sir Fateh Ali. The Nawab accordingly brought a suit for defamation and obtained the conviction of the editor of the newspaper. It is noticeable that no accusation was made against him of employing waqf funds for building a large house for himself and, had this been the case, it is not likely that such a good opportunity would have been wasted. On that occasion the Nawab stated that generally he had to supplement the waqf funds out of his private purse in order to pay the expenses of the Mohurram and other ceremonies which he had to meet as mutawali. It is possible that the Nawab did not keep the waqf accounts, entirely separate from his private accounts but I am satisfied that the profits of the waqf, if any, could not have provided the funds for building this house, and I find on this issue that it was built out of the private funds of Nawab Sir Fateh Ali Khan.

Issue 6 *B*—The plaintiff, however, contends that even if the house was built out of the Nawab's private funds, it should be held that he incorporated the building in the waqf property and also that portion of the site which he purchased. In my opinion there is no evidence that the Nawab had any such intention and, on the contrary, there is abundant evidence, such as it is, to show that he intended the house merely as a residential house for his own family. It is also put forward by the defendant that he paid rent to the waqf for the site of the house The accounts show that after the year 1920 a genuine entry was made showing a rent of Rs. 100 a month paid to the waqf for the site of Nawab Place. The entries before that have been tampered with, but as Nawab Fateh Ali Khan lived up to 1923 it is clear that the interpolations were made in his time. The reason appears to be this: Under Muhammadan Law a mutawali is

not allowed to occupy waqf property without paying rent, and when Fateh Ali brought his suit for defamation in Lucknow he carefully examined his own conduct as mutawali and, finding that an objection might be raised that he was paying no rent for the site of his house, made the necessary corrections in the waqf account books. It may be that he always intended to pay the rent to the waqf, and in any case I am satisfied that he did so for some years before his death, and it is of very little importance whether he commenced the payment in 1920 or earlier. My conclusion is that he never intended to incorporate Nawab Place in the waqf nor the land which he purchased for part of the site, and I find accordingly on this issue.

Issue 6 *C.*—It follows from the above finding that the house and that portion of the site, which is not waqf property, will not come into the possession of the plaintiff when he becomes mutawali. On the other hand the site of that portion of the house, which stands on the waqf property, will go with the waqf. In India the English law as to fixtures does not apply and the building will remain in possession of the defendant—see *Mofiz Sheikh* v. *Rasik Lal Ghose* (20). I have no power in the present case to dictate to the parties any course of procedure with regard to this house, but I think it proper to state that in my opinion, the right course for the plaintiff to adopt is to leave the defendant in possession of the house as it stands and to continue to take rent at the rate of Rs. 100 a month on behalf of the waqf as the ground rental.

Issue 15 is covered by issue 2 (a) and (b) and issue 3 and no separate finding is necessary.

Issue 17 runs:

Is the defendant in possession of all the property shown in Sch. 4?

The defendant states that he has no concern with item 2, namely two houses in Lahore inside the Mochhi Gate, and item 3, an imambara in Lahore in the same locality. The plaintiff offers no evidence that the defendant is in possession of these items and I find, therefore, that the defendant is in possession of all the property shown in Sch. 4 except items 2 and 3.

(20) [1920] 37 Cal. 815=12 C. L. J. 246=5 I. C. 796=14 C. W. N. 952.

Issue 14 deals with the question of mesne profits. By agreement the decision of this issue is left for the execution Court.

Issue 18.—On the above findings the plaintiff is successful in the whole of his case with a few small exceptions As to the Oudh property it is not in the possession of the defendant, but of the receiver appointed by this Court, and the plaintiff therefore, only asks for a declaration that he is entitled to possession of this property. As to item No. 52 in Sch. 1, the Mubarak Haveli, the plaintiff is entitled to a declaration as to a one-third share of that property only, and as to the rest of the property he is entitled to possession of all except those numbers which have now been excluded from Sch. 5 in the waqf property. He is also entitled to mesne profits but the amount of this will, by mutual agreement, be determined later. I, therefore, decree in favour of the plaintiff.

(1) for a declaration that he is entitled to possession of the property detailed in Nos. 1 to 51 in Schs. 1 and 2;

(2) for a declaration that he is entitled to a one-third share in the property No. 52 in Sch. 1, and

(3) for possession of the properties entered in Schs. 3 to 5, with the exception of those numbers in Sch. 5, which have already been excluded, and the house known as Nawab Place. I also decree the plaintiff mesne profits from the date of the death of Nawab Sir Fateh Ali Khan, the amount to be ascertained in execution proceedings, together with interest at 12 per cent per annum till the date of realization on those amounts which are found to be due from the defendant. Plaintiff will receive his full costs from defendant, with the exception that two-thirds of the value of Mubarak Haveli, namely Rs. 20,000 and the whole value of the house known as Nawab Place valued at Rs. 2,00,000 shall be omitted from the sum on which costs will be calculated.

D.D. *Suit decreed.*

A I. R. 1928 Oudh 88

STUART, C. J, AND RAZA, J.

Firm Danaji Jasraj—Appellants.

v.

Firm Puran Lal Bobind Prasad—Respondents.

S. A. No. 194 of 1927, Decided on 1st November 1927.

Civil P. C. S. 20 (c)—Exparte decree obtained in one Court sent for execution to another—A suit to set aside the decree on the ground of fraud filed in the latter Court—That Court can entertain the suit.

Where an ex-parte decree was obtained in a Court outside Oudh by a grave fraud by wilful misstatement and suppression of material facts in the plaint and deliberately misdescribing the persons against whom the decree was sought in order to prevent their being in a position to defend and it was attempted to be executed in a Court in Oudh.

Held: that the Court in Oudh can hear a suit to declare a decree so passed as null and void and that it should be so declared: 37 *All.* 189, *Foll.* [P 88 C 2]

Ishri Prasad—for Appellants.

A. P. Sen and *Sundar Lal Gupta*—for Respondents.

Judgment.—There is little to be said on this appeal. The case was tried with great care and great intelligence by the trial Court and the appeal before the learned District Judge was decided as well as the original case was decided. There is a ground of appeal which has not been pressed to the effect that the Hardoi Court had no jurisdiction. The facts of this case are simple. The plaintiffs are members of a firm carrying on business as grain dealers in Hardoi. Both the Courts have arrived on the facts at the same conclusions. The defendants who are a firm carrying on grain business in Poona ordered 151 bags of bajra from the plaintiffs at Hardoi and remitted a sum of Rs. 1,000 in part payment of the consignment. The plaintiffs obtained the grain and on the defendants' instructions caused consignment to be booked to Poona and remitted the railway receipt with a hundi for the balance due to the defendants' agents in Bombay. The defendants' agents honoured the hundi and lost the railway receipt and owing to this latter fact the consignment was taken possession of by a firm of Poona other than the defendants' firm. The defendants' firm received full information as to how the mistake arose. Nevertheless they filed a suit in the Small Cause Court at Poona against the plaintiffs in which they made absolutely false allegations to the effect that after they had remitted to the plaintiffs' firm a sum of Rs. 1,000 and honoured the hundi the plaintiffs' firm had sent no consignment to them. The allegations in this plaint were untrue and untrue to the defendants' knowledge. This is a finding of both the Courts and it is difficult to see how any other finding could have been arrived at upon the evidence. The defendants' firm then proceeded to misdescribe the plaintiffs in the summons issued and as a result of this misdescription two summonses were sent to the plaintiffs and returned unserved. Finally substituted service was effected upon the plaintiffs, the same misdescription continuing and an ex-parte decree was passed by the Poona Small Cause Court in favour of defendants against the plaintiffs which was based upon an affidavit sworn on behalf of the defendants.

The suit with which we are concerned was a suit for a declaration that the decree so passed was null and void on the ground that it had been obtained by fraud.

It was suggested in the grounds of appeal that such a suit as this, in which a Court in Oudh is asked for a declaration that a decree passed by a Court outside Oudh is null and void because it has been obtained by fraud, was a suit which no Oudh Court has jurisdiction to try. We consider it sufficient in repelling this contention to refer to a decision of a Bench af the Allahabad High Court in *Jawahir* v. *Neki Ram* (1), in which it was laid down that when as here an attempt has been made to execute such a decree within the jurisdiction of the local Court, the local Court has jurisdiction to hear the case. The question has been discussed very elaborately by the learned Judges who decided that appeal and we have nothing to add to their remarks. The learned counsel who has appeared before us had argued that on the facts there was no fraud committed upon the Poona Court. Upon the facts we find that a very grave fraud was committed upon the Poona Court. We find that there was wilful misstatement and wilful suppression of material facts in the plaint put in before the Poona Court and that the defendants deliberately misdescribed the plaintiffs in order to prevent their being in a positi on to defend the case. We, dismiss this appeal with costs.

N.D. *Appeal dismissed.*

(1) [1915] 37 All. 189=28 I. C. 502=13 A.L.J. 190.

* A. I. R. 1928 Oudh 89 (1)

STUART, C. J., AND RAZA, J.

Punjab National Bank, Ltd.—Plaintiff—Applicant.

v.

Jai Ram Das and *others*—Defendants—Opposite Party.

Civ. Misc. Applns. Nos. 355 and 357 of 1927, Decided on 2nd September 1927, for transfer of the suit.

* (a) *Civil P. C.—Chief Court of Oudh is a High Court.*

The Chief Court of Oudh is a High Court within the meaning of Civil P. C. [P 89 C 1]

(b) *Civil P. C., S. 23—Transfer is unnecessary if the suit will be more expeditiously and more economically decided in the Original Court.*

Where the suit will be decided more expeditiously and more economically if it is left where it is, than it would be by being transferred to another Court transfer should not be allowed. [P 89 C 1]

Ram Prasad Varma—for Applicant.

Bisheshar Nath and *Bishambhar Nath*—for Opposite Party.

Judgment—These are applications requesting that under the provisions of S. 23, Civil P. C., a suit, which has been correctly instituted as an original suit before the Chief Court of Oudh, should be transferred to a Court of original jurisdiction in the Punjab. The application for transfer was placed before the Judge seized with the suit. He referred it for decision to a Bench of this Court by an order which we read as an order under S. 14, Local Act 4 of 1925. It has been suggested to us that we have no jurisdiction to decide the matter as S. 23 does not cover the case of suits within the original jurisdiction of a High Court. The Chief Court of Oudh is a High Court within the meaning of the Code of Civil Procedure. But we need not discuss the question of jurisdiction in deciding the matter as in our opinion the applicants have absolutely failed to make out any case on the merits. In our opinion the suit will be decided more expeditiously and more economically if it is left where it is, than it would be by being transferred to another Court. That is sufficient to conclude the matter. These applications are dismissed with costs.

N.D. *Application dismissed.*

A. I. R. 1928 Oudh 89 (2)

RAZA AND PULLAN, J.

Mohammad Ali Mohammad Khan—Defendant—Appellant.

v.

Gur Prasad and *another*—Plaintiff and Defendants—Respondents.

F. A. Nos. 5 and 30 of 1927, Decided on 17th October 1927, from the decree of the First Addl. Sub-Judge, Lucknow, D/- 20th December 1926.

(a) *Contract Act, S. 214—Principal is liable if the agent acts according to the duty imposed upon him under the section.*

The plaintiff did work in the construction of defendant's building through a certain firm, who were acting as defendant's agents. No payment was made for the work done by the plaintiff though the firm submitted the final bill containing the amount due to the plaintiff. His work was got examined by a different engineer according to whose fresh estimate a lower amount was offered.

Held: that the defendant was liable to pay according to the bill of the firm who were his agents and who were acting according to the duty imposed upon them under the section. [P 91 C 2]

(b) *Damages — Interest may be allowed by way of damages—Interest.*

Interest can be allowed by way of damages on principles of equity: 20 *Mad.* 481, *Dist.*; 42 *Mad.* 661; 31 *Bom.* 351 and 22 C. W. N. 488, *Foll.* [P 92 C 2]

M. Wasim and *Khaliquzaman*—for Appellant.

Niamatullah, *L. C. Misra* and *Ram Gopal Sinha*—for Respondents.

Judgment—These are cross-appeals arising out of a suit brought by B. Gur Prasad against the Hon'ble Maharaja Sir Muhammad Ali Muhammad Khan of Mahmudabad in the first instance and also against Messrs. Lane-Brown & Hewlett who are represented as being the Maharaja's agents, in respect of a certain sum alleged to be due to the plaintiff for work done in the construction of the building known as Butler Palace. This work was commenced in the year 1916 and payments were made from time to time up till the year 1921 and the work cam to an end in 1923. On the 21st May 1923, Messrs. Lane-Brown & Hewlett submitted their final bill which showed the separate sums due to the various firms who were employed by them as contractors for carrying out the work. The sum shown to be due to the plaintiff B. Gur Prasad was Rs. 75,511-12-2. No payment was made at the time and

appears that the Maharaja employed the services of one Khan Bahadur Hira Khan, an engineer, who examined the work carefully and made a fresh estimate as to the amount due to the plaintiff. This he did and according to his calculations the amount due was Rs. 33,576-9-4. Payment was offered of this amount in full settlement, but it was not accepted and, although a sum of Rs. 22,000 was paid in March 1924, the plaintiff has been compelled to file a suit for the balance. According to his claim the sum due to him is Rs. 53,511-12-2 and he has also charged interest at the rate of 12 per cent. The total sum claimed, therefore, is Rs. 70,142-12-9.

The suit is contested by defendant 1 mainly on the ground that the rates on which this bill has been prepared are not the rates sanctioned by defendant 1 and that the plaintiff should be held down to certain rates which were fixed according to his allegation in the year 1921. The plaintiff on the other hand pleads that the Court should not go into the rates at all because he entered into an agreement with Messrs. Lane-Brown & Hewlett, who were the defendant's agents and fully authorized to fix the rates, and that, therefore, their principal was bound by that agreement. He also pleads that the agreement with Messrs. Lane-Brown & Hewlett was that he should be paid at the market rate and not at any rate fixed by defendant 1.

The position of Messrs. Lane-Brown & Hewlett appears to us to be perfectly clear. They entered into an agreement with defendant 1 on the 12th February 1916, which is marked as plaintiff's Ex. 5. Under this agreement it appears that very wide powers were given to Messrs. Lane-Brown & Hewlett. The third paragraph runs as follows :

> Now it is hereby agreed between the parties hereto that the owner hereby engages the engineers to prepare such drawings, calculations and estimates as may be necessary for the construction of the said palace and to supervise the constructions necessary to build the said palace.

The agreement goes on further to show that the Maharaja's bankers were to be instructed to pay on presentation all bills certified as correct by the engineers (Messrs. Lane-Brown & Hewlett) up to the amount of one and a quarter lacs of rupees per annum for the period of three years. It is not contested that the powers of Messrs. Lane Brown & Hewlett have been extended after the expiry of three years, and that they went on paying out money on behalf of their principal. It is true that the word "rates" is not specifically included in this agreement but, in our opinion, there was no need to add that the firm which was empowered to make all calculations and estimates and to order payment through the bank on their own certificate, without any further check by their principal, was also authorized to settle the rates. Without settlement of the rates there could be no preparation of estimate and the calculations would be useless. There is nothing in the evidence which goes to show that there was anything apart from this agreement to regulate the relations between the principal and the agent, but in the year 1921, owing to a very sharp rise in the rates of certain building materials a letter was addressed on behalf of the firm of Lane-Brown & Hewlett to the Maharaja dated the 23rd February 1921, which runs as follows :

> As verbally instructed I am sending herewith analysis of the rates of Butler Palace with recommendation that the rates asked for by B. Gur Prasad are quite fair

Along with the letter was submitted an analysis of rates to which we shall refer later and on the letter Mr. Habib Ullah, the manager of the Mahmudabad estate, made the following endorsement :

> As agents you recommend these rates and it is only fair on my part to accept your recommendation, and therefore agree to these rates.

This letter and the rates attached to it were summoned from Messrs. Lane-Brown & Hewlett and the rates are contained in a single page exhibited as Ex. A4. These rates refer to earthwork, concrete, bricks, lime, arch work and stone flooring. It is obvious that many other articles must have been required for the construction of a palace and as a matter of fact there are many items contained in the bill which are not included in this analysis. It is argued, therefore, on behalf of defendant 1 that there was some other page which is missing giving revised rates for such items as wood-work, iron-work and the like. But although Mr. McKenzie, an employee of the firm of Messrs. Lane-Brown & Hewlett, who himself sent this letter and the analysis of rates to defendant 1, was examined as a witness, no question was put to him as to whether there was any missing sheet of paper submitted along with his covering letter.

This analysis in itself appears to be a complete document as it has a heading and at the end what purports to be an agreement on behalf of B. Gur Prasad to accept these rates for a period of six months. In our opinion that is a complete document and the omission of other items such as wood-work and the like may easily be explained by the fact that the document only refers to the work then in progress and likely to be completed within six months, and there is no evidence that any wood-work was to be completed within that period. The only evidence that there were other rates agreed upon in the year 1921 is the statement and report of Khan Bahadur Hira Khan. He appears to have been furnished with some other list of rates which he refers to in his report and which was commented upon by Messrs. Lane-Brown & Hewlett in the form of notes which were, as Mr. Lane-Brown states, written by a clerk who was at that time in his employment. But there is nothing whatever to show that these rates were those which have been accepted on behalf of the Maharaja by Mr. Habib Ullah and, in our opinion, the only rates that were so approved by him are those which we now find in Ex. A 4.

We have now to consider the significance of this sanction if it may be called a sanction of enhanced rates by Mr. Habib Ullah. First of all we may notice both the terms in which the letter was addressed and those in which Mr. Habib Ullah made his endorsement. The firm of Lane-Brown and Hewlett did not ask for a sanction. They merely said that, as verbally instructed, they were sending the analysis with the recommendation that the rates are fair. This appears to us to suggest that the rates were rising very rapidly at the time and that the Maharaja or his manager had become alarmed and wanted to know how much the cost of the building was likely to be increased by this rise of rates, and it is evident from the endorsement made by Mr. Habib Ullah that he accepted these rates from Messrs. Lane-Brown and Hewlett as being the agents of the estate, and it never occurred to him to dispute their authority to raise the rates. This appears also from his evidence when he was examined as a witness where he says:

I, like every conscientious man, sanctioned the prevailing market rates where here was no previous sanction to the same,

and elsewhere he says:

I approved the rates and estimates and the estimates were made on the basis of those rates which were approved by the firm who were responsible for mathematical accuracy.

This does not suggest that the manager of the estate ever considered the question of interfering with the discretion of the agents in fixing or raising the rates when it was necessary to do so in view of the state of the market at the time. In our opinion this was a case in which the agents were acting according to the duty imposed upon them under S. 214, Contract Act, which lays down that it is the duty of an agent in cases of difficulty to use all reasonable diligence in communicating with his principal and in seeking to obtain his instructions.

The learned Judge who decided this case is not altogether consistent in his finding. He found first of all that defendant 2 acted as the agent of defendant 1 and that there was an agreement between the plaintiff and defendant 2 about payments to be made to the former according to the prevailing market rates and he appears to have admitted the complete authority of defendant 2 to make this contract with the plaintiff. But subsequently he went on to alter the amount claimed by the plaintiff by cutting down certain items which he said were charged in excess of the revised rates made in 1921. No doubt this was an alternative plea raised by the plaintiff, but it is not his main contention. He sought payment in accordance with the bill as approved and passed by defendant 2 acting as the agent of defendant 1 and, in our opinion, he is entitled to succeed. We do not consider that there were any fixed rates, although from time to time defendant 2, acting according to his duty as an agent, kept his principal informed of changes in the rates and obtained his approval for going on with the work at those rates. It was the duty of defendant 2 to get the work done as cheaply as possible and if he acted wrongly or dishonestly towards his principal it was not the plaintiff who should suffer. We do not, therefore, think it necessary to go into the details which formed a great part of the subject-matter of defendant 1's appeal. We cannot reconstruct a schedule of rates for 1921, on the evidence of Khan Bahadur Hira Khan, nor do we think it proper to do so. We note further that in many cases which are specified in

the judgment the bill actually shows rates lower than those which were agreed upon in 1921, because apparently the market rate had fallen and, if the plaintiff is to be a loser by a deduction in those cases where his rates are in excess of the rates of 1921 he should similarly be allowed to benefit by those cases where he has charged lower rates than those to which, in the view of the lower Court, he should be entitled. This is the view set up in appeal by the plaintiff and he claimed that he should be allowed an additional sum of Rs. 1,478-13-6 which represents the amount deducted by the lower Court on account of what it considers to be charges in excess of the rates sanctioned in 1921.

Two further points remain to be decided. The first is the question of compensation for defective work. It is admitted on all hands that some of the work was defective and will have to be done again. Learned counsel for defendant 1 argued in general terms that in a palace work had to be of the highest quality, and if a single door frame had a defect the whole work would have to be redone. Similarly a crack in a floor could not be repaired, but the whole floor would have to be relaid. We are not prepared to follow him in this argument nor would it be possible for us to come to any just conclusion as to the amount that should be deducted from the plaintiff's bill on such a calculation. We find that the learned Judge of the Court below has gone very carefully into this matter and we are not prepared to dissent from his conclusion. He deducted a sum of Rs. 1,388-11-6 and we accept this as being a fair deduction on account of defective work.

The last point is the question of interest. On this question the learned counsel for defendant 1 has asked us to find that no interest can be allowed on an account of this kind because it is not authorized by the Interest Act of 1839. This was the view taken by the Madras High Court in *Kamalammal* v. *Peeru Meera Levvai Rowthen* (1), but we do not find that this ruling has been followed by the Madras High Court itself in *Muhammad Abdul Gaffur* v. *Hamida Bivi* (2), in which their Lordships pointed out that there was a difference of opinion on this matter in England and India and they allowed interest by way of damages on principles of equity, although admitting that such a decision would possibly not be good law in England. This appears to be the view held generally by the Courts in India and we need only refer to *Saundanappa* v. *Shivbasawa* (3) and *Khetra Mohan Poddar* v. *Arwani Kumar Saha* (4). The question of the amount of interest is one which we are inclined to decide in favour of defendant 1, because it is not the practice of this Court to allow more than 6 per cent interest by way of damages, and we think we should adhere to this principle in the present case. We, therefore, allow the appeal of defendant 1 to this extent that the amount of interest will be cut down from 12 per cent. to 6 per cent. but otherwise we dismiss the appeal and we allow the appeal of the plaintiff to this extent that an additional decree shall be passed for the sum of Rs. 1,478-13-6 with interest thereon at 6 per cent. Parties (i. e. plaintiff and defendant 1), will receive and pay costs according to their success and failure both in this Court and the Court below. The lower Court has awarded the defendant 2 his costs from defendant 1. This order is maintained and we allow further costs of defendant 2 in this Court also against defendant 1.

N.D. *Appeal allowed.*

(1) [1897] 20 Mad. 481=7 M. L. J. 263.
(2) [1919] 42 Mad. 661=36 M. L. J. 456=52 I. C. 505=(1919) M. W. N. 484.
(3) [1907] 31 Bom. 354=9 Bom. L. R. 439.
(4) [1918] 22 C. W. N. 488=45 I. C. 667.

A. I. R. 1928 Oudh 92

GOKARAN NATH MISRA, J.

Mahomed Ali Khan—Plaintiff—Appellant.

v.

Mt. Badrul Nisa and *another*—Defendants—Respondents.

S. A. No. 218 of 1927, Decided on 1st November 1927, from the decree of the 2nd Additional Sub-Judge, Lucknow, D/- 25th February 1927.

Landlord and Tenant—Proprietary right—Proprietor is not entitled to re-entry on the site in a town when such site is mortgaged and the mortgagor has a right of redemption at the end of the period.

In towns, unless a custom to the contrary is established, the occupiers of houses should be considered to have a power of transfer of the right to occupy the sites on which their houses

stand, and where such a right is transferred, the proprietor cannot exercise his right of re-entry on the site by demolition of the house standing thereon, especially when the site is mortgaged and the mortgagee is only in possession for a specified period on behalf of the mortgagor and after the expiry of that period the latter would be entitled to re-enter into the possession of the property by redeeming it: 9 *I. C.* 427; 16 *I. C.* 353; 15 *O. C.* 91 and *A. I. R.* 1927 *Oudh* 46, *Foll.* [P 94 C 1 ; P 65 C 1]

Niamatullah—for Appellant.

M. Wasim and *Nazirudddin Siddiqi*—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for possession. The facts of the case are :—The plaintiff-appellant is the zamindar (proprietor) of a Mohalla called by the name of Mirzagunj, situate in the town of Malihabad, district Lucknow. Within the said zamindari lies a plot of land described as ahata No. 484, on which stands a pucca house bearing No. 250. The house was purchased by defendant 2, Mushir Ahmad Khan, from the heirs of Umed Ali Khan, son of Major Bax Khan who had originally built it. On the 29th September 1924, defendant 2 transferred the said house to defendant 1, Mt. Badrunnisa, by way of usufructuary mortgage. The term fixed in the mortgage was a period of 45 years but the deed clearly provided for redemption at the expiry of the said period. The plaintiff brought the present suit against Mt. Badrunnisa, the mortgagee, and Mushir Ahmad Khan, the mortgagor, impleading both of them as defendants 1 and 2 respectively. The plaintiff's allegation was that the status of defendant 2 was that of an ordinary riyaya who had no right to transfer the said house by way of mortgage, and the house having been so transferred the plaintiff as proprietor of the village was entitled to re-enter on the site of the house in dispute by asking defendant 2 to remove the materials of that house. The plaintiff, therefore, claimed possession of the plot in suit by demolition of the said house.

The defendants denied the plaintiff's title to the plot in suit on which the house stood and contended that the riyayas living in the town of Malihabad had a right to transfer their houses as they stood, and that in any case, the plaintiff had no cause of action for taking possession of the site of the house in suit because defendant 2 had only executed a mortgage in respect of that house which could not be considered as equivalent to sale.

The plaintiff contended in reply that the mortgage in suit was really a sale clothed in the form of a mortgage in order to defeat the plaintiff's right of re-entry as proprietor.

The learned Munsif of Hawali, Lucknow, who tried the suit, found that the plaintiff was the owner of the land on which the house stood, but held that the land was situate in the town of Malihabad, of which Mirzaganj was only a part, where no such custom as pleaded by the plaintiff by which a riyaya could not transfer the right of residence in his house, had been established to exist. He further found that the mortgage in question was not a sale but a genuine mortgage and the transfer being by way of mortgage and not by sale the plaintiff was not entitled to re-enter upon the plot on which the house in suit stood. On these findings he dismissed the plaintiff's suit.

The plaintiff then appealed against the decree of the learned Munsif and the second Additional Subordinate Judge of Lucknow, agreeing with the findings of the Munsif on all the points, dismissed the appeal.

In second appeal it is now contended before me that under the wajib-ul-arz of the town of Malihabad a riyaya has got no right of transfer ; and that the plaintiff is entitled to eject the defendants even though the transfer was by way of mortgage. As to the first point it appears to me that the wajib-ul-arz is not very clear; although it gives clearly a right to the residents of that town who belong to high caste (qaum asharaf) to sell the materials of their houses, yet it does not contain a provision restraining them from selling the houses as they stand. The learned advocate for the plaintiff-appellant contended that there being no express provision permitting the residents to sell their houses no such right should be presumed to exist. The Courts below have, however, decided the point against the plaintiff-appellant treating the case in dispute as one relating not to an agricultural village but to a town. They have relied on cases decided both by the late Court of the Judicial Commissioner of Oudh and the Allahabad High Court, for the proposition that in case of towns no such presumption ought to be made and that in

such cases unless a custom to the contrary is established the occupiers of houses should be considered to have a power of transfer of the right to occupy the sites on which their houses stand—vide *Banwari Lal* v. *Raina* (1) decided by Lindsay, J. C.; and *Jumna Kuar* v. *Abdul Nabi* (2) decided by Chamier and Rafique, JJ. After due consideration I am in entire agreement with the proposition laid down in these cases. The Courts below have concurrently found in the present case that Malihabad is a town and that the land in suit is situate in Mirzaganj, a part of that town. Under these circumstances I am not inclined to hold unless a definite custom to the contrary is established, about which I do not find any satisfactory evidence on the record, that the residents of the town of Malihabad have no right to sell the right to occupy the sites of houses along with the sale of the materials thereof. In these circumstances the plaintiff is not entitled to exercise his right of re-entry on the land in suit by seeking possession thereof by demolition of the house standing thereon.

As to the second point I am clearly of opinion that the plaintiff cannot exercise the right of re-entry even if he be considered entitled to the exercise of such right because the house in suit has only been transferred by way of mortgage and not by sale. In *Ali Mohamed Khan* v. *Chhedan* (3), it was held by a Bench of the late Court of the Judicial Commissioner of Oudh that there was an essential distinction between a transfer by way of lease in which different considerations would apply. In that case the plaintiff who was the proprietor of village Maharaj Nagar had sued for ejectment of the defendants from certain groves because some of them who were proprietors of those groves and who possessed no right to transfer any of them, had mortgaged the said groves to other defendants. The suit of the plaintiff was based on an alleged right of re-entry. It was argued in that case that the grove-holders had no transferable rights and that by transferring the possession to a stranger they had forfeited whatever rights they possessed so as to give to the plaintiff a right of re-entry. The learned Judges remarked as follows:

> We have already said that the plaintiff has in our opinion failed to establish any customary law binding on the parties which makes the forfeiture of the grove-holder's right the necessary penalty of a breach on his part of the conditions against transfer of those rights by way of mortgage. The plaintiff, therefore, can only appeal to the general principles of law, and these are in our opinion against him. Whether we refer by way of analogy to the provisions of S. 111, Transfer of Property Act (4 of 1882) or to those of S. 25, Cl. (2) Oudh Rent Act, the principle involved seems to be that forfeiture of lease is not involved in the case of the breach of any conditions for which forfeiture is not prescribed as the proper penalty under the terms of the lease or agreement under which the lessee holds. We see no good reason why a similar principle should not apply to the case of a licensor and licensee generally and we note that a similar principle was affirmed by this Court in the case of *Lal Bahadur* v. *Mahomed Karim Khan* (S. C. No. 240). We note in this connexion that it may well be that a distinction ought to be drawn in a case like the present between transfers by way of lease and transfers by way of sale. In the latter case the principles which governed the decision in *Narain Roy* v. *Ishan Chander Sen* (4) would have to be considered.
>
> These principles seem to us to have also determined the decision of this Court in an unreported case, viz., *Sheo Dayal* v. *Deputy Commissioner of Barabanki as Manager of the Court of Wards in charge of Bilahra Estate* (S. C. A. Nos. 52 to 57 of 1909) decided on 8th April 1909. The transfers with which the Court had to deal in these cases were transfers by way of sale, and I may add that the rights of the grove-holders in the village which were there in question, as recorded in the wajib-ul-arz, would seem to have been even more strictly limited than those proved by the wajib-ul-arz in the present case. At any rate, in the case of a transfer by way of sale it may be said that there has been on the part of the transferrer an entire abandonment of his rights in favour of another person, so that if a grove-holder in a case like the present purports to sell outright whatever rights he may possess in respect of his grove, he clearly has no rights left which he can set up against another person, and the transferee who is left in actual possession cannot plead that there exists as between himself and the landlord any contract or license in respect of the trees in the grove, or the land on which they stand, which can secure him against ejectment or prevent the landlord from treating him as a mere trespasser. The case of a mortgage is different, in that the grove-holder cannot be said to have entirely parted with or abandoned his own rights, and has still something left which he can plead against the landlord so as to protect the mortgagee, who after all is only in temporary possession by permission of the mortgagor and subject to the latter's right of redemption. It seems to us very difficult in a case like the present to draw any valid distinction between a mortgage such as we have before us and a zar-i-peshgi lease, or a lease for a term of years, or even a sale of the produce of the tress for a particular year, or

(1) [1911] 9 I. C. 427.
(2) [1912] 16 I. C. 353.
(3) [1912] 15 O. C. 91=15 I. C. 385.
(4) 22 W. R. 22.

specified number of years. In the absence, therefore, of any express provision in the wajib-ul-arz, or any satisfactory evidence as to the existence of a custom giving to the proprietor a right of forfeiture or re-entry in case of a breach of the rule against alienation by way of mortgage, we are unable to see that such right arises in favour of the plaintiff in the present case by reason of any general principle of law.

I am in entire agreement with the view taken by the learned Judges in the above case. So far as I am aware the case has been uniformly followed in Oudh. It was also followed by a learned Judge of this Court in *Ram Raj Singh* v. *Tej Singh* (5). It was also contended by the learned advocate for the appellant that the mortgagee must be treated in such cases as a trespasser and in that view of the case the appellant would be entitled to possession by ejecting him as such. Reliance was placed upon a decision of the late Court of the Judicial Commissioner of Oudh in *Mt. Azmat-un-nisa* v. *Ganesh Prasad* (6). It is clear from the facts of that case that it was a case of complete abandonment by sale and the defendants were, therefore, treated as trespassers. In the case of a mortgagee no such view is possible to be taken. A mortgagee is only in possession for a specified period on behalf of the mortgagor and after the expiry of that period the latter would be entitled to re-enter into the possession of the property by redeeming it. If the mortgagee were to be treated as a trespasser liable to ejectment and the plaintiff given possession on foot of such a transfer, the obvious result of it would be to oust the mortgagor who had never abandoned the property. I, therefore, hold that the plaintiff cannot exercise his right of re-entry even if he were possessed of such right in the present case since it is only a case of mortgage and not of sale.

The appeal, therefore, fails and is dismissed with costs.

N.D. *Appeal dismissed.*

(5) A. I. R. 1927 Oudh 46.
(6) A. I. R. 1925 Oudh 262=28 O. C. 119.

A. I. R. 1928 Oudh 95

STUART, C. J., AND RAZA, J.

Saheb Din and *another* — Plaintiffs — Appellants.

v.

Mahabir Singh and *others* — Defendants—Respondents.

S. A. No. 158 of 1927, Decided on 11th November 1927,

(*a*) *Landlord and tenant—Suit between rival claimants of qabzadari lands is cognizable by a civil Court.*

A suit between rival claimants of qabzadari lands is not a suit between a tenant-in-chief and a sub-tenant and, therefore, is maintainable in a civil Court : *A. I. R.* 1926 *Oudh* 205, *Dist.* [P 97, C 1]

(*b*) *Landlord and tenant—Abandonment—Occupancy tenant not paying rent and absconding—Landlord settling with another tenant—Returning of the absconder after more than 12 years—Letting of the land to the returning tenant does not confer occupancy rights upon the lessee.*

An occupancy tenant absconded having failed to pay the rent due from him. He left the village, abandoned the holding and remained absent for more than 12 years. During the period of his absence the landlord settled the holding with another tenant. The absconding tenant returned and the new tenant let out some lands to him.

Held : that under these circumstances the landlord was justified in assuming that he had abandoned the holding and was also justified in settling the land with another tenant. [P 97, C 1, 2]

Held : further that letting by the new tenant was an act of grace and the absconding tenant cannot hold the land in his own right. The absconding tenant had lost his rights and the new tenant could not confer on him the right of occupancy in the lands to he was admitted. [P 97, C 2]

Ali Zaheer and *Satya Nand Roy*—for Appellants.

Niamat Ullah and *Naim Ullah*—for Respondents.

Judgment. - This is an appeal from a decree of the District Judge, Fyzabad, dated the 9th March 1927, setting aside a decree of the Munsif, Akbarpur, dated the 16th December 1926.

The following facts are no longer in controversy :

One Harbadan Singh had four sons, namely (1) Ram Saran Singh, (2) Sheo Prasad Singh, (3) Debi Dat Singh and (4) Raghunath Singh. Harbadan Singh and Raghunath Singh died some time before the first settlement. The sons of Harbadan Singh were not living jointly as members of a joint Hindu family at the time of the first settlement. Ram Saran Singh, Sheo Prasad Singh, Debi Dat Singh and Ram Dat Singh, son of Raghunath Singh, brought separate suits against the taluqdar of Samanpur for their under-proprietary rights in village Diwaipur, and ultimately decrees for occupancy rights (without right of transfer) were passed in their favour in 1869, as detailed below :

1. Ram Saran Singh	24 bighas 9 biswas
2. Sheo Pershad Singh	30 bighas 6 biswas
3. Debi Dat Singh	7 bighas 10 biswas
4. Ram Dat Singh	7 bighas 17 biswas

A few years after the decrees were passed by the settlement Court, Sheo Pershad Singh, Debi Dat Singh and Ram Dat Singh fell into serious arrears and left the village to avoid payment. Ram Saran Singh paid off the arrears and got possession of their holdings also. He was recognized and treated by the taluqdar as the occupancy tenant of the said holdings and also rent was realized from him as such. After a period of more than 12 years, Sheo Pershad Singh, Debi Dat Singh and Ram Dat Singh returned to the village and then Ram Saran Singh let certain lands to them. He let some 12 bighas land (including the land in suit) to Sheo Pershad Singh, at the annual rent of Rs. 26 odd. In 1887 Ram Dat Singh sued Ram Saran Singh for his share of the occupancy tenure, but his suit was dismissed by the civil Court (Munsif of Akbarpur) on the 29th November 1888. Sheo Pershad Singh was examined by Ram Dat Singh as a witness in that suit. He admitted that he had absconded, as he had failed to pay the rent of his holding. He stated that he had returned to the village in or about 1877 and that Ram Saran Singh had taken possession of his holding in his absence, having colluded with the taluqdar. He stated further that he had got possession of $12\frac{1}{4}$ bighas land only out of his holding which was held by tenants and that Ram Saran Singh was making collections. The taluqdar has all along realized the rent of all the holdings from Ram Saran Singh and his (Ram Saran Singh's) descendants.

Sheo Pershad Singh died many years ago. He had four sons. They are also dead. The plaintiffs, Sahib Din Singh and Gaya Din Singh, are the only surviving members of the family. They are the sons of Sheo Pershad Singh's son Ram Bharos Singh.

Amarjit Singh, Uderaj Singh, Samarath Singh and six others (defendants 2 to 10 in the present suit) are the descendants of Ram Saran Singh deceased.

The dispute in this case relates to 3 bighas 13 biswas 5 biswansis land specified at the foot of the plaint. Mahabir Singh (defendant 1 in the present suit) holds the land as a tenant.

Deoki Singh, uncle of the plaintiffs issued a notice of ejectment against Mahabir Singh (defendant 1) in respect of the land in suit, in 1920. Mahabir Singh contested the notice of ejectment on the ground that he was not the tenant of Deoki Singh and that he was holding the land as the tenant of the defendants 2 to 10. His claim was decreed by the revenue Court and the notice of ejectment was cancelled on the 26th May 1920. The plaintiffs then brought the present declaratory suit, on the 19th April 1926, on the allegation that the land in suit formed part of their 30 bighas 6 biswas land in respect of which their ancestor Sheo Pershad Singh had obtained a decree for occupancy rights on the 4th January 1869, that they were entitled to claim occupancy rights in the land as against the defendants and that the defendants 2 to 10 had got no right whatever in the land in suit. They prayed for a declaration of their right and, in the alternative, for a decree for possession of the land.

The claim was resisted by the defendants on various grounds. They denied that the plaintiffs were entitled to claim occupancy rights in the land in suit and alleged that the defendants 2 to 10 were the rightful occupancy tenants of the land which was held by the defendant 1 as their tenant. They pleaded also limitation, res judicata and estoppel. It was also pleaded that the suit was not cognizable by the civil Court.

The learned Munsif framed seven issues and found as follows :

1. The plaintiffs are 'qabzadars' of the land in suit.
2. The plaintiffs have been in possession as 'qabzadars' within limitation.
3. The plots in suit were let to the defendant 1 by the plaintiffs' uncle Deoki Singh
4. The plaintiffs' claim is not barred by S. 11 Civil P. C. as against the defendant 1.
5. The plaintiffs are not estopped from alleging themselves to be the 'qabzadars' of the land in suit.
6. The suit is cognizable by the civil Court.
7. The plaintiffs are entitled to the declaration that they are owners as qabzadars of the land in suit, that the defendant 1 is only a tenant and that the defendants 2 to 10 have no title to the land in suit.

The learned Munsif decreed the plaintiff's claim accordingly.

The defendants appealed and their appeal was allowed by the learned District Judge. He held that the present suit was not maintainable in the civil Court.

He, therefore, dismissed the suit and did not think it necessary to give his finding on any other point involved in the case. In determining the question of jurisdiction, the learned Judge has gone into questions of fact also, but he has given no definite finding on issues of fact. The plaintiffs have now come to this Court in second appeal.

We are not prepared to agree with the finding of the learned District Judge on the question of jurisdiction. We think the present suit is cognizable by the civil Court. The learned District Judge has referred to the case of *Dilawar Khan* v. *Kulsum Bibi* (1) decided by one of us on the 21st January 1926. That case may be easily distinguished from the present case. The present suit is not a suit between a tenant-in-chief and a sub-tenant. The facts and circumstances of that case are quite different from the facts and circumstances of the present case. The present suit is a suit between rival claimants of qabzadari lands. The tenant (defendant 1) has of course been impleaded in the present suit, but defendants 2 to 10 are the principal defendants againt whom the plaintiffs want to establish their occupancy rights in the land in suit.

We do not think it necessary to remand the case to the lower appellate Court for findings on other points as the evidence on record is sufficient to enable us to determine the issues of fact necessary for the disposal of the appeal on the merits. We have examined the record and heard the learned counsel on both sides. In our opinion the plaintiffs' claim must be rejected on the merits.

The principal points for determination in this case are these :

1. Are the plaintiffs entitled to claim occupancy right in the land in suit ?

2. Does defendant 1 hold the land in suit as the plaintiffs' tenant or as the tenant of defendants 2 to 10 ?

We find on the first point that the plaintiffs are not entitled to claim occupancy rights in the land in suit. The statement made by the plaintiffs' grandfather, Sheo Pershad Singh, on the 22nd June 1888 (Ex. C. 13) shows clearly that he had absconded as he had failed to pay the rent due from him. He had left the village and abandonded the holding. He remained absent for a long time. In these circumstances the Taluqdar was justified in assuming that Sheo Pershad Singh had abandoned the holding. He treated the holding as abandoned and settled the land with Ram Saran Singh, the ancestor of defendants 2 to 10. He was perfectly right in doing so under the circumstances of the case. Ram Saran Singh thus became the occupancy tenant of the holding in question and paid rent for the same as such. Sheo Pershad Singh remained absent for more than 12 years and then returned to the village. His brother, Ram Saran Singh, then let some 12 bighas land to him at the annual rent of Rs. 26 odd. If he and his sons thus held the land after they returned to the village, it was an act of grace from Ram Saran Singh and they did not hold the land in their own right. They had lost their rights and Ram Saran Singh did not and could not confer on them right of occupancy in the lands to which they were admitted. It is neither alleged nor shown that the Taluqdar had conferred on them right of occupancy in the land in question. It is said that Sheo Pershad Singh had obtained a decree against Ram Saran Singh for possession of the land as " qabzadar," but no such decree has been produced in this case. It is true that there is a reference to a decree in a statement made by Ram Saran Singh on the 17th August 1895 (Ex. 6), but there is nothing in that statement to show that Sheo Pershad had obtained any decree against him as a " qabzadar " in respect of the land in question. Ram Saran Singh has stated clearly that he was the qabzadar of the entire occupancy tenure (72 bighas) in the village. Sheo Pershad Singh and, after his death, his sons were, surely holding the land in question as the sub-tenants of Ram Saran Singh, the occupancy tenant. Ram Saran Singh had sued the plaintiffs' father, Ram Bharos Singh, for arrears of the rent for the years 1291 and 1292 fasli (1883 and 1884 A. D.)

The suit was compromised and the claim of Ram Saran Singh was decreed by the Commissioner of Fyzabad on the 8th June 1886 (See Exs. C. 3 and C. 9). Had Ram Bharos Singh been holding the land as an occupancy tenant from the Taluqdar, under the decree of the settlement Court mentioned above, Ram Saran Singh could not obtain the decree against him for arrears of rent.

(1) A. I. R. 1926 Oudh. 205.

The very fact that Ram Saran's claim for arrears of rent was decreed against Ram Bharos Singh shows clearly that the latter was holding the land as the sub-tenant of the former. It may safely be inferred from the compromise (Ex. C. 9) that Ram Bharos Singh admitted that he was holding the land as a tenant from Ram Saran Singh. It is true that the entries in the patwari's papers support the plaintiff's case, but the entries in question cannot help the plaintiff's when their ancestors Sheo Pershad Singh lost his rights under the circumstances stated above. It should be borne in mind that mutation of names, by itself, confers no title. It is amply proved that the plaintiffs' ancestors have all along paid the rent to Ram Saran Singh and have never paid it to the Taluqdar. It is neither alleged nor shown that the plaintiffs or their ancestors were ever recognised by the Taluqdar as occupancy tenants after Sheo Pershad Singh left the village and abandoned his holding. No suit was brought by Sheo Pershad Singh against the Taluqdar after he returned to the village. The Taluqdar is not a party to the present suit also. The land which was let to Sheo Pershad Singh on his return, was not wholly the land of his decree of 1869. There were some plots which were not included in the decree. Some plots out of the plots in suit are not included in the said decree. The plaintiffs' allegation that all the plots in suit are included in the decree is untrue. The learned Munsif thinks that there was some exchange of plots; but this view of the learned Munsif is hypothetical and speculative. It was never the plaintiffs' case that there was any exchange of plots at any time. We hold, therefore, that the plaintiffs cannot claim occupancy right in the land which was let to their ancestors by Ram Saran Singh under the circumstances stated above.

We find on the second point that the defendant 1 holds the land in suit as the tenant of the defendants 2 to 10. The plaintiffs' witness, Sampat Lal, patwari, states that the plaintiffs' uncle Deoki Singh had let the plots in suit to Mahabir Singh, defendant 1, more than 10 years ago. His evidence is quite vague and unreliable. We are not satisfied with his evidence. He says that a patta and a qabuliat were executed in his presence, but no patta or qabuliat has been produced in this case. The evidence given by Mahabir Singh and Amarjit Singh shows clearly that it was Ram Saran Singh who had let the land in suit to Mahabir Singh about 18 or 20 years ago. Ram Saran Singh took back the land from Ram Bharos Singh or Deoki Singh and let it to Mahabir Singh at the annual rent of Rs. 12. Mahabir Singh never paid rent to Deoki Singh or to the plaintiffs. He has all along paid the rent to Ram Saran Singh and his descendants. We are inclined to believe the evidence given by Mahabir Singh and Amarjit Singh on the point under consideration.

The result is that the plaintiffs' suit fails on our findings on the two points mentioned above. We do not think it necessary to decide any other point in disposing of this case. Hence we dismiss the appeal with costs. The defendants will get their costs from the plaintiffs in all the three Courts.

N.D. *Appeal dismissed.*

A. I. R. 1928 Oudh 98

STUART, C. J., AND WAZIR HASAN, J.

Kashif Husain — Judgment-debtor—Appellant.

v.

Ganga Bakhsh Singh—Decree-holder—Respondent.

Misc. Appeal No. 49 of 1926, Decided on 4th March 1927, from the order of the Sub-Judge, Partabgarh, D/- 17th August 1926.

Civil P. C., O. 21, R. 69 (2)—Sale not concluded on date fixed and so adjourned—Sale cannot be held on adjourned date without issuing fresh proclamation—Omission to issue fresh proclamation is irregularity but not sufficient to set aside the sale.

Where on the date fixed for sale, the sale is not concluded and the officer conducting the sale adjourns it intending to hold it again, the sale cannot be held and concluded without issuing a fresh proclamation. Omission to issue fresh proclamation is an irregularity but that alone is not sufficient to justify an order for setting aside the sale. [P 99, C 1]

Zahur Ahmad—for Appellant.

Niamat Ullah—for Respondent.

Judgment.—This is the judgment-debtor's appeal in execution proceedings from the order of the Subordinate Judge of Partabgarh, dated 7th August 1926. The judgment-debtor's immovable pro-

perty has been sold in execution of the decree held by the respondent, Ganga Bakhsh Singh, against him. The proceedings were before the Court below for confirmation of the sale. The judgment-debtor objected to the confirmation by an application dated the 3rd June 1926. The objections were overruled by the learned Subordinate Judge and the sale confirmed by the order under appeal.

It is argued that the sale held on 20th May 1926 was not concluded on that day; that it was adjourned within the meaning of O. 21, R. 69, Civil P. C., and that consequently it could not be held without a fresh proclamation.

It is agreed that no fresh proclamation was issued and on the evidence we are satisfied that the officer conduc'ing the sale, who was a Deputy Collector in the dist ict of Partabgarh, did adjourn the sale and intended to hold it again on the 20th of the following month. That being so the argument that the sale could not be held and concluded without a fresh proclamation is right. The omission, however, to issue a fresh proclamation was an irregularity which might also be a material irregularity. But that alone is not sufficient to justify an order for setting aside the sale. As provided by R. 90, O. 21, Civil P. C. the sale shall not be set aside on the ground of irregularity unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity. Upon the facts proved in this case we are not so satisfied. In an adjudication between the parties the value of the property, which has been sold, was fixed at Rs. 36,500 and this value was entered in the sale proclamation under which the sale was initiated. The last bid which was the decree-holder's bid under the permission obtained from the Court was for the sum of Rs. 32,371. The difference between the two figures does not in our opinion amount to substantial injury nor can it be directly connected with the irregularity mentioned above.

We accordingly dismiss the appeal with costs.

R. D. *Appeal dismissed.*

A. I. R. 1928 Oudh 99

STUART, C. J.

Ram Lal—Defendant—Applicant.

v.

Badal Khan — Plaintiff — Opposite Party.

Civ. Revn. No. 45 of 1927, Decided on 17th November 1927, from the decree of the First Addl. Small Cause Court Judge, Lucknow, D/- 1st August 1927.

(a) *Provincial Small Cause Courts Act* (9 *of* 1887), *Sch.* 2, *Cl.* 13 — *Suit for the recovery of fees against a person occupying a site within municipal limits for the privilege of selling goods is cognizable by Small Cause Court.*

The Lucknow Municipality instead of collecting fees called Tahe Bazaree fees, which are levied by them under byelaws, through their servants, gave a contract to a third person to collect such fees. The latter instituted a suit to recover certain of these fees in the Small Cause Court,

Held: that the suit was cognizable by a Small Cause Court as the fees are not of the nature of malikana or haq under Cl. 13, but they are fees payable for the privilege of doing certain acts. [P 101 C 1]

(b) *Landlord and tenant — Suit for rent — Essentials — Fees not for the occupation of the site but for the privilege of selling goods upon the same are not rent.*

In order that a suit can be a suit for rent, there must be a lessor and a lessee, and that involves the existence of an agreement to give out the land on one side and to take it on the other side. [P 100 C 2]

The fact that a man takes the site at his own free will, occupies it for a few hours and pays fees, not for the occupation of the site, but for the privilege of selling goods upon the site, does not create the relation of landlord and tenant. [P 100 C 2]

K. P. Misra—for Appellant.

Zahur Ahmad—for Opposite Party.

Judgment—This application involves the decision of several questions. Under the provisions of S. 265, Local Act 2 of 1916 (The United Provinces Municipalities Act) a person is not allowed to expose any article for sale, whether upon a stall or booth or any manner, so as to cause obstruction in any street, and is not allowed to deposit or suffer to be deposited any building materials, box, bale, packages or merchandise in any street without the written permission of the Board, and is liable to prosecution and to a fine of Rs. 50 for transgressing these provisions. It is, however, stated at the end of that section, that nothing contained in that section shall apply to any obstruction of a street permitted by the

Board under any section of the Act, or any rule or bye-law made, or license granted thereunder. The word 'street' as defined by S. 2 (23) of the Act includes the land up to the defined boundary of any abutting property. Thus in the word "street" is included the patri or side walk. Under the provisions of S. 298 (E), of the same Act, the Board is authorized with the sanction of the Local Government to make bye-laws consistent with the Act, and with other rules, permitting, prohibiting. or regulating the use or occupation of any public streets or places by itinerent vendors or by any person for the sale of articles, or for the exercise of any calling, or for the setting up of any booth or stall, and providing for the levy of fees for such use or occupation.

The Lucknow Municipal Board has in accordance with the provisions of S. 298 (E) framed bye-laws, which have been sanctioned by the Local Government for the levy of fees from persons selling or exposing for sale any goods otherwise than as hawkers, or setting up any stall or booth, or allowing any cart or animal to stand for business in any public street or place except in certain specified places on payment of fees Amongst the places which are not excepted are the patris or side walks of all roads within the municipal limits. The present application is concerned with a portion of the Sitapur road which is within the municipal limits. The bye-laws in question lay down that persons selling articles on these patris are liable to pay certain fees. These fees are called tahe-bazari fees. The name is unimportant. The questions are what is the authority to charge these fees and what is the nature of the fees charged. I have already stated the authority. The nature of the fees is clear. They are fees for permission to do certain acts, the acts in question being the sale of goods in certain places. The fees are assessed according to the circumstances of the sale. An itinerant vendor selling vegetables loaded on a pony has to pay an anna a day for the privilege if the sale takes place within these limits. A man selling goats has to pay to the municipality a fee of six pies per goat sold. Amongst these fees are fees for persons selling off stands. Such dealers as prefer to adopt this method are permitted to sell their wares from a site and they pay per day according to the area of land occupied. There are no contracts, no agreements, and no rents. The municipality has authority to refuse to grant permission to a person to carry on such business, but if that permission is not refused a man selling his goods from a site is permitted to select his own site and to change his site at will. Apparently what happens is that the first comer gets every day his choice of vacant sites, subject to the reservation of certain sites for certain established traders as a matter of good feeling among the traders themselves. This preamble is necessary in order to explain some of the questions raised in the application.

It appears that the Lucknow Municipality, instead of collecting these fees in this particular area of the Sitapur road through their own servants, gave a contract to the plaintiff in these Small Cause Court suits a man of the name of Badal Khan to collect these fees. The Board farmed out the fees to Badal Khan. Badal Khan has instituted a certain number of suits in the Small Cause Court to recover certain of these fees. The application raises the question as to whether such suits as these can be instituted in a Small Cause Court under the provisions of Act IX of 1887. The learned counsel, who appears against Badal Khan, has argued that these suits, which are suits brought against persons who were occupying a certain area of land, are in reality suits for rent, and are thus suits excepted from the cognizance of the Court of Small Causes under the provisions of Cl. 8, Sch. 2, and, in the alternative, he argues that they are suits to enforce the payment of dues payable to a person by reason of his interest in immovable property and are thus excluded from the cognizance of the Court of Small Causes under Cl. 13 of the same schedule. I do not consider that these suits are for either such relief. They are certainly not suits for rent. In order that a suit can be a suit for rent there must be a lessor and a lessee, and that involves the existence of an agreement to give out the land on one side and to take it on the other side. Here the Municipal Board in no way leases the site. The man takes the site at his own free will, occupies it for a few hours and pays fees, not for the occupation of the site, but for the privilege of selling goods upon the site There is no real distinction between such a person who sells his goods seated with the goods

laid out upon the ground and a person who sells his goods standing with the goods in a tray. Each pays the fees for the privilege of vend, not for the occupation of the land. It is true that the fees increase according to the extent of the land upon which the vendor has laid his goods, but the suits are not in my opinion suits for rent. They are suits for fees. Suits for fees under the provisions of Cl. 13 are excepted from the cognizance of a Court of Small Causes only when the fees are of the nature of malikana or haq. The fees in question are not of the nature of malikana or haq. The suits are not suits for dues payable to a person by reason of his interest in immovable property. They are suits for fees payable for the privilege of doing certain specified acts. In these circumstances I find that the suits were brought rightly in a Small Cause Court. I am unable outside these clauses to find any other clause excepting these suits from the cognizance of the Small Cause Court.

The next point which has been argued by the learned counsel supporting this application is that the Municipal Board is not the owner of that portion of the parti on which his clients carried on their business but that that portion of the parti had been transferred to a body called the Lucknow Improvement Trust, and that the Municipal Board had no longer any right to collect fees in respect of persons carrying on business in that portion. There is no evidence on the record to support this objection. The applicant's case is that he was wrongfully debarred from producing evidence. I do not find that he was wrongfully debarred from producing evidence I do not consider that the applicant has any grievance in this matter. The remaining arguments were directed to questions of fact. I see no reason to interfere thereon. I, therefore, dismiss this application with costs.

N.D. *Application dismissed.*

A. I. R. 1928 Oudh 101

STUART, C. J., AND PULLAN, J.

Ram Sidh Singh and *others*—Plaintiffs—Appellants.

v.

Mahanth Baloodas and *others*—Defendants—Respondents.

S. A. No. 198 of 1927, Decided on 30th November 1927.

U. P. Land Revenue Act (3 of 1901) S. 111 - Jurisdiction of civil Courts in relation to partition—Conditions and qualifications under S. 111 must be strictly complied with.

The jurisdiction of the civil Courts in matters relating to partition is expressly ousted, except in so far as is provided by the provisions of S. 111, and the conditions and qualifications annexed to the grant of jurisdiction must be strictly complied with. The civil Court has jurisdiction to determine a question of proprietary title, which has not been already determined by a Court of competent jurisdiction arising in a partition proceeding, if the partition officer refused to inquire into the merits of the objection himself. [P 102 C 1]

Where the objection merely stated that the land in question was not objectors' *sir* and that was their jagir; but they claimed neither proprietary nor under-proprietary title in it, *Held*: the partition officer should not have directed the objectors to seek their remedy in a Civil Court: 17 *O. C.* 224, *Foll.* [P 102 C 2]

Hyder Husein and *Ali Zaheer*—for Appellants.

Niamat Ullah—for Respondent 1.

Judgment.—In order to understand the question for decision in this second appeal it is necessary to state the previous history of the case at some length. There is in the Sultanpur district a certain village called Fatehpur which is held by certain persons as under-proprietors. The taluqdar of Maniarpur is the superior proprietor of the village. In this village there is an area of some 24 bighas of land. In partition proceedings of the revenue Courts prior to 1916 this area has been treated in a particular manner. We have it that in the year 1916 Mahant Nanku Das applied under the provision of Chap. 7, Local Act, 3 of 1901, for partition of his own under-proprietary rights in that village. The proclamation under S. 110 of that Act fixed as a date for the filing of objections by other co-sharers the 26th June 1922. Up till that date no objections were filed. At a considerable later date afterwards the appellants filed an application to the effect that this particular area was their jagir held by them for a period of over fifty years and that it should be excluded from partition and retained by them as their jagir.

The Deputy Collector conducting the partition appears to have considered this as an objection to the partition made under S. 110 and as time barred. In due course of time the partition proceeding was completed and submitted to the Collector under the provisions of S. 114 for confirmation. At the time of considering the confirmation the Deputy Com-

missioner considered an appeal made by the appellants against the dismissal of their objection. The Deputy Commissioner passed upon this appeal an order dated 16th February 1925. Apparently he considered the application made by the applicant as an objection made by a recorded co-sharer involving a question of proprietary title which had not been already determined by a Court of competent jurisdiction and he apparently intended to direct the appellants to institute within three months a suit in the civil Courts for the determination of the question. We say that he apparently intended to do this for the words are by no means clear. The words used are these:

> The applicant appellant will have his rights adjudicated before a proper forum and the result of the decision will be given effect to in the partition proceedings to whatever stage they might have reached, but in order to avoid delay I would recommend that the necessary steps should be taken by the applicant appellant to have his rights adjudicated within the next three months. The lower Court will proceed with the partition.

The appellants understood this to be an order under S. 111, Cl. (b) and instituted a suit accordingly for a declaration that the land in question was their jagir and should be excluded from the partition. The learned Munsif, who tried the suit, awarded them the declaration which they desired. The lower appellate Court, however, found that a civil Court had no jurisdiction to grant the relief and dismissed their suit. They appeal here.

We support the conclusion that the suit must fail. Our reasons, however, are completely different from the reasons of the lower appellate Court. The reason why we find that the suit must fail is this. As was pointed out by a Bench of the Judicial Commissioner's Court in *Mukhtar Ahmad* v. *Barati Lal* (1), the jurisdiction of the civil Courts in matters relating to partition is expressly ousted, except in so far as is provided by the provisions of S. 111, and the conditions and qualifications annexed to the grant of jurisdiction must be strictly complied with. The civil Court has jurisdiction to determine a question of proprietary title, which has not been already determined by a Court of competent jurisdiction arising in a partition proceeding, if the partition officer refuses to inquire into the merits of the objection himself. Here undoubtedly the Deputy Commissioner refused to enquire into the merits of the objection himself, but the question was not a question of proprietary title.

We have examined the objection of the appellants. This objection is very clear. It merely states that the land in question is not their *Sir* and that it is their jagir; but they claimed neither proprietary nor under-proprietary title in it. Their statement is exactly the same in their plaint. The learned Deputy Commisioner has no jurisdiction of any kind to pass the order which he did. He should have decided the matter himself. He has asked the Courts to do something which they have no jurisdiction to do. We notice as a somewhat peculiar incident that while directing the civil Courts to determine the matter he proceeded to conclude the partition without waiting for the decision. It is not for us to say what remedy the appellants will have in this matter. But the case clearly stands that in the partition proceeding they came forward with a very reasonable request that the land which was recorded in the wazib-ul-arz as their Jagir, which had been decided in previous partition proceedings to be their jagir and as such to be excluded from partition, should be excluded from the present partition. They set up no claim of any kind to proprietary title. The Deputy Commissioner proceeded under a misapprehension to refer them to the civil Courts, in order that they might decide the question which they had no jurisdiction to decide, but, before the civil Courts had arrived at a conclusion one way or another, proceeded to make a partition in which he decided the point against the appellants. What the appellants' remedy may be it is not for us to say. It would seem hard if they have no remedy. This much we can say that the civil Courts can give them no remedy. The civil Courts had no jurisdiction.

For these reasons and for these reasons alone we dismiss the appeal, but in the circumstances of the case direct that the parties bear their own costs in both the courts.

N.D. *Appeal dismissed.*

(1) [1914] 17 O. C. 224=25 I. C. 316=1 O. L. J. 335.

A. I. R. 1928 Oudh 103

STUART, C. J. AND WAZIR HASAN, J.

Sarfaraz Singh—Defendant — Appellant.

v.

Baleshwar Prasad and *others*—Plaintiff and Defendants—Respondents.

S. A. No. 382 of 1926, Decided on 28th February 1927 from the decree of the Sub-Judge, Gonda, D/- 30th July 1926.

(a) *Pre-emption—Mortgage, instead of sale, executed in order to avoid right of pre-emption—Rtght of pre-emption does not exist.*

When a man wishes to raise money transferring property and is absolutely indifferent as to the manner in whcih the property is transferred and in order to avoid the exercise of a right of pre-emption executes a mortgage instead of a sale of the property, no right of preemption arises even although the same results are obtained by the execution of the deed of mortgage as by a deed of sale: *A. I. R.* 1927 *Oudh* 40; *A. I. R.* 1927 *Oudh* 161 and *A. I. R.* 1928 *Oudh* 25, *Foll.* The proper method to decide a case like this is by the construction of the document and if the document is not a sale deed there can be no right of preemption.

[P 103 C 2]

(b) *Pre-emption—Mortgage beset with onerous conditions.*

Wazir Hasan, J.—The fact that a mortgage is beset with onerous conditions does make it none the less a mortgage for the purposes of pre-emption suit. In a claim for redemption if such conditions have the effect of extinguishing the equity of redemption the Court seized with the claim may relieve the mortgagor from those conditions.

[P 104 C 2]

(c) *Pre-emption—Locus penitentiae availed of and mortgage executed instead of sale—No right of pre-emption exists.*

Wazir Hasan, J.—Where a contract is not a completed and an executed contract in law until it is reduced to writing and registered, there is locus penitentiae till it is reduced to writing, and where the locus penitentiae is availed of for fear of a claim for pre-emption and a mortgage is executed instead of a sale, there is no right of pre-emption: *A.I R.* 1914 *P.C.* 27, *Rel. on.*

[P 104 C 2]

Hyder Husein—for Appellant.

Ram Bharose Lal and *Mahabir Prasad*—for Respondents.

Stuart, C. J.—The principles governing the decision of this appeal have been laid down on several occasions within the last few months. On the 21st November 1925, the present Bench decided First Civil Appeal: *Shamshad Ali Khan* v. *Dharam Singh* (1), in which the principle was accepted that when a man wishes to raise money tran ferring property and is absolutely indifferent as to the manner in which the property is transferred and in order to avoid the exercise of a right of pre-emption executes a mortgage instead of a sale of the property, no right of pre-emption arises even although the same results are obtained by the execution of the deed of mortgage as by a deed of sale. On the 22nd December 1926, similar decision was arrived at in *Ajudhia* v. *Sheo Shankar* (2), and on the 10th January, 1927, a similar principle was accepted in *Oudh Behari* v. *Rameshar Singh* (3). I again state, as I have stated before, that to my mind the proper method to decide a case of this kind is by the construction of the document; and if the document on its construction is other than a deed of sale there can be no right of pre-emption. Here the document is undoubtedly not a deed of sale; it is a deed of mortgage and in these circumstances no right of pre-emption can exist. I would, therefore, allow this appeal and would direct that the suit of the plaintiff Baleshar Prasad should stand dismissed and that Baleshar Prasad should pay his own costs and those of Sarfaraz Singh in all Courts.

Wazir Hasan, J.—This is the appeal by Sarfaraz Singh, defendant 1, from the decree of the Subordinate Judge of Gonda, dated the 30th of July 1926, reversing the decree of the Munsif of Tarabganj, dated the 5th of May 1926. The appeal arises out of a claim for pre-emption in respect of a transaction dated the 14th October 1925. The Court of first instance dismissed the claim on the ground that the transaction evidenced by the deed of the 14th October 1925 was one of mortgage and not of sale. The lower appellate Court has come to the conclusion that it is sale and has consequently decreed the suit for pre emption.

Ex facie the deed of the 14th October 1925 is a deed of mortgage and, therefore, the claim for pre-emption in respect of it is prima facie untenable. The lower appellate Court has, however, based its decision to the contrary on two grounds: (1) That the terms of the mortgage are so onerous and unconscionable in their nature that the exercise of the right of redemption in respect of that mortgage would be both unreasonable and impracticable; and (2) that parol testimony proves that prior to the endorsement of the terms of the contract between the

(1) A. I. R. 1927 Oudh. 40 = 29 O. C. 161.

(2) A. I. R. 1928 Oudh 25 = 2 Luck. 416.
(3) A. I. R. 1927 Oudh 161.

parties on the deed in question a contract for sale was agreed upon.

I am of opinion that both the grounds of decision are erroneous. As to the first ground, I have no hesitation in holding that on a proper construction of the deed of the 14th October 1925 it is a deed of mortgage and as between the parties it is conclusive evidence of a transaction of mortgage. The learned pleader for the respondents cited the decision of their Lordships of the Judicial Committee in the case of *Hanif-un-nisa* v. *Faiz-un-nisa* (4), for the purpose of showing that it was open to the parties to the transaction to show by extrinsic evidence that the deed in question was intended to be a deed of sale.

To my mind this is not the effect of the decision cited. The deed in question in that case purported to be one of sale of the property in suit in favour of three children of the vendor. Subsequently the vendor brought the suit, out of which the appeal before their Lordships of the Judicial Committee had arisen, for a declaration that the deed was of no effect against the vendor and for possession. In the alternative a prayer was made for payment of the price. The defence was that the price mentioned in the deed of sale as consideration for the transaction in its true nature was a transaction of gift. The High Court held that the defendants were precluded by S. 92, Indian Evidence Act, from giving parole evidence for the purpose of showing that the deed of sale was a deed of gift; in other words, the decision of the High Court amounted to this that the defendants were precluded from showing that a transaction which on the face of it was for consideration was in reality without consideration. This decision was reversed by their Lordships of the Privy Council in a short judgment by merely observing that the decree appealed from could not be sustained.

There can be no doubt that S. 92, Indian Evidence Act, 1872, permits a party to a contract to prove by extrinsic evidence the absence of consideration where consideration is set forth in the written instrument. The fact that the mortgage of the 14th October 1925, is beset with onerous conditions does make it none the less a mortgage. In a claim for redemption if such conditions have the effect of extinguishing the equity of redemption the Court seized with the claim may relieve the mortgagor from those conditions as was done in the case of *Balbhaddar Prasad* v. *Dhanpat Dayal* (5). This, however, is not the proper opportunity to express any opinion on that view of the case. The fact remains that in spite of those conditions the transaction in question is a transaction of mortgage and not of sale.

As to the second ground of decision of the lower appellate Court, the contract of the nature under consideration is not a completed and an executed contract in law until it is reduced to writing and is registered and thus there was locus penitentiae till it was reduced to writing. In support of this view of law I would quote the observations of Lord Shaw in the case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (6).

> To use language common from very early times in Scotland and highly approved in the case of *Maddison* v. *Alderson* (7), in the House of Lords, it is no doubt true that there is a locus penitentiae, that is a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite, and has not yet been adhibited in an authentic shape. This is the situation where the parties stand upon nothing but an engagement which is not final or complete.

The evidence which has been accepted by the learned Subordinate Judge shows that the locus penitentiae was availed of in the present case for fear of a claim for pre-emption. I, therefore, agree in the order which the Honourable the Chief Judge proposes to pass in this appeal.

R.D. *Appeal allowed.*

(4) [1911] 33 All. 340=11 I. C. 398=38 I. A. 85 (P. C.).

(5) A. I. R. 1924 Oudh 193=27 O. C. 4.

(6) A. I. R. 1914 P.C. 27=42 Cal. 801=42 I. A. 1 (P. C.).

(7) [1883] 8 A. C. 467=49 L. T. 303=52 L. J. Q. B. 737=31 W. R. 820=47 J. P. 821.

A. I. R. 1928 Oudh 104

WAZIR HASAN, J.

S. C. Mitra—Petitioner.

v.

Raja Kali Charan and *others*—Opposite Party.

Commercial Case No. 14 of 1927 and Mis. Applications Nos. 555, 562, 629 and 639 of 1927, Decided on 21st November 1927.

(a) *Criminal P. C., S. 439—"Quash" means setting aside or reversal of an order.*

The word "quash" is not a banned word. "Quashing of Proceedings" is a term of compendious connotation and the practical result is the setti g aside or reversal of the order initiating the proceedings. [P 105 C 2]

(b) *Criminal P. C., S. 561-A—Proceedings in subordinate Courts constitutes process within S. 561A—Such proceedings can be set aside in exceptional cases.*

Criminal proceedings in a subordinate Court constitute process of the Court and if the High Court comes to the conclusion that the process is being abused, S. 561-A invests the Court with the jurisdiction of passing an order to set aside those proceedings so as to prevent the abuse, but it is a rule of practice that it will be exercised only in exceptional cases: *A. I. R.* 1924 *Cal.* 1018 and *A.I.R.* 1926 *Oudh* 202, *Ref.* [P 106 C 1]

(c) *Companies Act, Ss. 235 and 237—Liquidator applying for public examination of Company's officers and order to state particulars of charges against them—Liquidator not complying with the order but filing criminal complaints against them—Such conduct is an attempt to divest Court of its jurisdiction under S. 237 and cannot be permitted.*

Where an official liquidator makes an application under S. 235 for public examination of certain officers of the company and also that the opposite parties or such of them as may be found to be liable for having misappropriated or misapplied the funds of the company be ordered to make good the sums misappropriated or misapplied by them, and he is ordered to state particulars of charge as against each of such persons and to support that statement by affidavit, but instead of complying with the order of the Court and allowing the law to take its normal course the official liquidator institutes a criminal complaint under Penal Code, Ss. 120B, 409 and 420, the conduct of the official liquidator is a clear attempt to divest the Court of its jurisdiction possessed under S. 237, Indian Compa ies Act and for reasons of public policy High Court cannot permit such an attempt to succeed. [P 107 C 1, 2]

S. N. Roy—for Petitioner.

S. D. Saksena, Harish Chandra, Ghulam Hasan, H. N. Misra, and *J. Jackson*—for Opposite Party.

Judgment.—Sajjad Husain, Cursetji, Madho Narain Shukla, Brij Bahadur, Swami Dial Saksena and Mahabair Sharma have made application in writing to this Court. During the progress of the hearing of those applications the following persons also appeared and made oral applications:

(1) Jai Lal; (2) E. A. Labanti; (3) Brijmohan Lal; (4) Balgobind; (5) Jiwan Nath Hukku; (6) Puran Chand Kapur; (7) K. C. Bhalla; (8) Chaudhri Ram Narain; (9) Jagmohan Lal, (10) Radhe Saran; and (11) Lal Bahadur.

The prayer of these applications both in writing and oral invokes the jurisdiction of the Court with which it is vested under the provisions of Ss. 439 and 561-A Criminal P. C. 1898. The basic foundation is proceedings under the Indian Companies Act 1913, taken by me in the matter of the liquidation of the United India Industrial Trust Limited. The applications have, therefore, been entrusted to me by the Honourable the Chief Judge for disposal.

On the 8th March 1927 Mr. S. C. Mitra, who was appointed official liquidator of the company mentioned above under the order dated the 20th September 1924 of the late Court of the Judicial Commissioner of Oudh, presented a complaint to the District Magistrate of Lucknow charging the persons mentioned above and Sri Krishna, P. D. Gaur. Madan Mohan Lal Bhatnagar and Chandra Bhan Suhkla with offences punishable under Ss. 120-B, 409 and 420, I. P. C. The learned District Magistrate thereupon transferred the complaint to the Court of the City Magistrate of Lucknow for trial. The applicants are accordingly being prosecuted in the Court of the City Magistrate for the offences just now mentioned. Except some evidence under S. 202, Criminal P. C., no evidence has so far been recorded in the Magistrate's Court mainly for the reason that the proceedings therein were stayed by an ad interim order of this Court.

The substance of the prayer of these applicants is that the criminal proceedings pending against them in the Court of City Magistrate be quashed. I have no doubt that this Court has jurisdiction to quash the proceedings in the exercise of the powers conferred by S. 439, Criminal P. C. I was entertained at the Bar with the argument that the Code of Criminal Procedure does not provide for any "quashing of proceedings" of a subordinate Court by the High Court. The argument, it seems to me, is a piece of pure pedantry. The word "quash" is not a banned word, see Ss. 215 and 232, Criminal P. C. "Quashing of Proceedings" is a term of compendious connotation and the practical result is the setting aside or reversal of the order initiating the proceedings. The power of so doing is clearly vested in the High Court under S. 439, read with Cl. (c), Sub-S. (1), S. 423. Criminal P. C. Section 439 in term says that the High Court may, in its discretion, exercise any of the powers

conferred on a Court of appeal by S. 423. Clause (*c*) mentioned above is as follows:

In an appeal from any other order, alter or reverse order.

The power under Cl. (c), therefore, is the power of altering or reversing an order. Clause (d) also gives jurisdiction to make any consequential or incidental order that may be just or proper.

The Code of Criminal Procedure, 1898, has recently been amended by S. 156, Criminal Procedure Amendment Act, 1923. This amendment has introduced a new section in the Code. Section 561-A is the new section and is as follows:

561-A. Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or prevent abuse of the process of any Court or otherwise to secure the ends of justice.

The language of the new section is wide and comprehensive. According to that section the High Court has inherent jurisdiction to make an order as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice. There can be no doubt that criminal proceedings in a subordinate Court constitute process of the Court and if the High Court comes to the conclusion that the process is being abused the new law invests the Court with the jurisdiction of passing an order to set aside those proceedings so as to prevent the abuse. Reference in this connexion may be made to a decision of three Judges in *Nripendra Bhusan Roy* v. *Gobinda Bandhu Majumdar* (1). This Court has never been driven off that jurisdiction and has frequently exercised it. The case of *Emperor* v. *E. H. Parakh* (2) decided by the Hon'ble Sir Louis Stuart, C. J. is a recent illustration.

Having reached the conclusion that the High Court has jurisdiction it follows that any single Judge of this Court can exercise the said jurisdiction. "High Court" according to the definition in Cl. (j) S. 4, Criminal P. C. 1898, means the highest Court of criminal appeal or revision for any local area. According to S. 9, Oudh Courts Act, 1925, the Chief Court shall be the highest Court of criminal appeal and revision and according to S. 10 of the same Act the jurisdiction of the Chief Court may be exercised by a single Judge of the Court. Besides this the Chief Court of Oudh is expressely included in the definitlon of a 'High Court' in Cl. (j), S. 4, Criminal P. C.

The limits of the jurisdiction are very wide indeed as the language employed by the Legislature in enacting Ss. 439 and 561-A Criminal P. C., shows but though the jurisdiction exists and is wide in its scope it is a rule of practice that it will only be exercised in exceptional cases. I have come to the conclusion that the case before me is exceptional in its nature and that I should exercise my jurisdiction in respect thereof.

The circumstances are as follows:

The United India Industrial Trust Ltd., was put under compulsory liquidation under an order dated the 30th of September 1924 of the late Court of the Judicial Commissioner of Oudh and as already stated Mr. S. C. Mitra was appointed official liquidator. Among other things the

official liquidator shall have power, with the sanction of the Court to institute any criminal prosecution in the name and on behalf of the company.—S. 179, Indian Companies Act, 1913.

One of the arguments in the case is that the official liquidator not having obtained the sanction of the Court has acted ultra vires of his powers in instituting criminal prosecution mentioned above. In reply to this argument the official liquidator shows an order of the 18th November 1924 of the late Court of the Judicial Commissioner of Oudh granting him sanction to institute a criminal prosecution. It is contended on behalf of the applicants that the sanction purporting to have been granted by the order of the 18th November 1924 is not enough in law and that it should be specific as to the charge for and as to the person against whom it is granted.

Having regard to the opinion which I have formed as to the merits of the case after protracted hearing and prolonged consideration, I do not think it is necessary to decide this pure question of law and I decline to do so. The fact remains that the sanction which the official liquidator obtained under the order of the 18th November 1924 was not availed of until after circumstances, grave in their character and which have a serious bearing on the case, had come to happen as I shall presently state.

On the 3rd January 1925 the official liquidator through his counsel, Mr. S. N. Roy, made an application under S. 196,

(1) A. I. R. 1924 Cal. 1018.
(2) A.I.R. 1926 Oudh 202=1 Luck. 133.

Indian Companies Act, 1913, for the public examination of 11 persons connected with the company under liquidation. Their names are as follows:

(1) P. D. Gaur ; (2) Sir Krishna ; (3) E. A. Labanti ; (4) Balgovind ; (5) J. N. Mukerji ; (6) Ram Narain ; (7) Jai Lal ; (8) K. C. Bhalla ; (9) N. K. Shavakshaw ; (10) Puran Chand ; and (11) K. S. Sajjad Husain.

On the 11th February 1925 a Bench of the late Court of the Judicial Commissioner of Oudh consisting of Mr. (Now Mr. Justice) Dalal and myself passed an order that the official liquidator should file a list of questions which he desires to be answered by the persons mentioned in his application. When those questions are placed before the Court then the Court shall decide whether they should be served on those persons or whether they should be summoned to appear in Court for open examination. One month's time was allowed to the liquidator to comply with this order. Afterwards the time was extended on several occasions. Finally on the 16th September 1925 I ordered issue of summonses for public examination under S. 199, Indian Companies Act, 1913, to the following persons :

(1). P. D. Gaur ; (2) Sri Krishna ; (3) E. A. Labanti ; (4) Balgobind ; (5) K. C. Bhalla and (6) N. K. Shavakshaw.

In pursuance of the above order E. A. Labanti, Balgobind and one other person with whom we are not concerned were examined in open Court on the 25th January 1926. On the 16th September 1926 the official liquidator made another application. In this application he repeated the prayer for summonses for public examination of certain officers of the company and also.

that the opposite parties or such of them as may be found to be liable for having misappropriated or misapplied the funds of the company be ordered to make good the sums misappropriated or misapplied by them.

This last-mentioned prayer was in accordance with the provisions of S. 235, Indian Companies Act. On the 28th September 1926 the order made by the Court on the application just now mentioned was as follows :

I order the liquidator to state particulars of charge, under S. 235, Indian Companies Act, as against each of such persons and to support that statement by affidavit, until this is not done I decline to issue summonses. 15 days' time is allowed for this purpose.

The time granted under this order was subsequently extended on the application of the official liquidator. In spite of this the order was never complied with. Had it been complied with, the procedure according to the provisions of the Indian Companies Act would have been the institution of proceedings under S. 235 and on the determination of those proceedings the Court would then have proceeded under S. 237, Indian Companies Act, to inquire as to whether

any past or present director, manager, officer or member of the company has been guilty of any offence in relation to the company for which he is criminally responsible.

In the event of the inquiry yielding result in the affirmative the Court would dive directed " the official liquidator to prosecute 'for the offence. " Instead of complying with the order of the Court and allowing the law to take its normal course the official liquidator institutes the criminal complaint, mentioned above.

The file of the criminal case is before me. It shows no trace of any intimation having been conveyed to the District Magistrate of the fact that proceedings under S. 235, Indian Companies Act, which may result in criminal prosecution under S. 237 of the same Act were pending in this Court. The official liquidator and his counsel both stated before me that no such information was given to the District Magistrate. I am convinced that had this information been given to the District Magistrate he would certainly have awaited the result of the impending inquiry in proceedings before this Court. Be that as it may, the conduct of the official liquidator in disregarding the order of the 28th September 1926 and making the criminal complaint during the pendency of the proceeding in this Court is a clear attempt to divest this Court of its jurisdiction possessed under S. 237, Indian Companies Act. For reasons of public policy the High Court cannot permit such an attempt to succeed. This, therefore, reveals the exceptional nature of this case.

The principle upon which I propose to act in this case was enunciated by Buckley J. (afterwards Lord Justice Buckely) *In re London and Globe Finance Corporation, Limited* (3). That was a converse case where the Crown had refused to institute a criminal prosecution and Buckley J. proceeded to act under

(3) [1903] 1 Ch. 728=72 L. J. Ch. 368=51 W. R. 651=10 Manson 198=19 T. L. R. 311=88 L. T. 191.

S. 167, Companies Act, 1862 (25 and 26 Vict, c. 89) (This section is the same as S. 237, Indian Companies Act, 1913), and ordered the official receiver to institute a criminal prosecution. He said:

> Under these circumstances it seems to me that I ought not to allow my judgment to be influenced even by the fact that the highest authority at the bar, and the first law officer of the Crown, has thought proper to decline to put the public prosecutor in motion. I must accept the responsibility of determining the question before me for myself.

Therefore I have heard arguments on the merits of the case of these applicants for five days. Documentary evidence in possession of the liquidator and in possession of the several applicants was read to me in the course of the arguments. On behalf of the official liquidator statements of witnesses whom he proposes to produce in support of the criminal prosecution were also read and the conclusion at which I have arrived will now be stated.

Having regard to the criminal prosecution now pending in the Court of the City Magistrate of Lucknow it will not be in the interest of justice that I should state my reasons for quashing this prosecution in favour of some and allowing it to continue as against others but this is the conclusion at which I have reached. I accordingly quash or set aside the pending prosecution against the following persons :

(1). K. S. Sajjad Husain ; (2) Cursetji ; (3) Ram Narain ; (4) Madho Narain Shukla ; (5) Swami Dayal Saksena; (6) Mahidhar Sharma; (7) Lal Bahadur Mathur, and (8) Jiwan Nath Hukku.

I further direct that the said criminal prosecution shall proceed in accordance with law against the following persons :

(1) Sri Kishen ; (2) Balgobind Rastogi ; (3) E. A. Labanti ; (4) Jagmohan Lal Rastogi ; (5) Jai Lal ; (6) D. Gour ; (7) K. C Bhalla ; (8) Brij Bahadur Srivastava ; (9) Brij Mohan Lal ; (10) Chandra Bhan Shukla ; (11) Puran Chand ; (12) Madan Mohan Lal Bhatnagar, and (13) Radhe Saran Agarwal.

This order should at once be communicated to the City Magistrate, Lucknow, for compliance.

R.K. *Order accordingly.*

A. I. R. 1928 Oudh 108

STUART, C. J. AND RAZA, J.

Mt. Braj Rani—Plaintiff—Applicant.

v.

Sibta Din and *another*—Defendants—Opposite Party.

Misc. Appln. No. 640 of 1927, Decided on 16th November 1927, for leave to appeal from the judgment of Raza, J. reported in *A. I. R.* 1928 Oudh 35.

(*a*) *Oudh Courts Act* (1925), *S.* 12 (2)—*Application for declaration—Time is thirty days—Court has discretion for the admission of time-barred application.*

An application for a declaration that an appellate decree made by a single Judge of the Chief Court in second appeal is a fit decree for appeal to a Bench consisting of two Judges, is time-barred if presented more than thirty days after the date of the judgment under R. 7, Ch. 12, Oudh Chief Court Rules, though the rule allows discretion for the admission of such an application to grant further time if good cause is shown for its presentation. [P 110 C 1 & 2]

(*b*) *Oudh Courts Act, S.* 11—*Rules framed by Chief Court have the same authority as a rule contained in the Civil P. C.*

The Oudh Chief Court has authority to fix the period of limitation under the provisions of S. 11, Local Act 4 of 1925; for presenting an application for a declaration under S. 12 and the rule so framed when approved by the Local Government and published in the Official Gazette has the same authority as a rule contained in Sch. 1, Civil P. C. [P 109 C 2]

Ishri Prasad—for Applicant.

Stuart, C. J.—This is an application for a declaration that an appellate decree made by the Hon. Mr. Justice Raza sitting as a single Judge of the Chief Court in second appeal is a fit decree for appeal to a Bench consisting of two other Judges of the Chief Court. The decree in question is dated 8th August 1927. S. 12 (2), Act 4 of 1925 directs that before an appeal can be admitted from an appellate decree made by a single Judge of the Chief Court to a Bench consisting of two other Judges of the Chief Court, the Judge who made the decree must make a declaration that the case is a fit one for appeal. Act 4 of 1925 and the Limitation Act are both silent as to the period within which such an application should be made. Under S. 11, Act 4 of 1925, the Chief Court may make rules to provide in such manner as it may think fit for the exercise of any of its powers by a Bench of two or more Judges of the Court. As Section 12 (2) directs that before a Bench of two Judges of the

Court is competent to hear such an appeal the Judge who made the decree must make a declaration that the case is a fit one for appeal, the question as to the period within which an application for such a declaration should be made is a question affecting the exercise of the powers of a Bench of this Court and the question has to be provided for in rules made by the Court. Under the provisions of S. 122, Civil P. C. (Act 5 of 1908) the Chief Court may from time to time after previous publication make rules regulating their own procedure and the procedure of the civil Courts subject to their superintendence. Before such rules become authoritative they must be approved by the Local Government and published in the Local Official Gazette. This Court worked after its inception on provisional rules which had been prepared before it came into being. As soon as it came into being on 2nd November 1925 the Court commenced framing permanent rules. These rules are not now absolutely complete. The rule to which this application refers is R. 7 in Ch. 12. In the provisional rules it was laid down that an application for a declaration could be made within ninety days of the date of the judgment. The Court, however, considered that this period was too long, and in the rule as finally drafted reduced that period to thirty days. The draft rule was published for information in the United Provinces Gazette Part II on 18th June 1927. It was published with other rules. Persons wishing to object were directed to object on or before 13th July 1927. No one did object to this draft. The rules in question as published in the Gazette of the 18th June 1927 remained unaltered. They received the sanction of Government according to the provisions of S. 126, Civil P. C., under G. O. No. 1153 7-398, dated 8th September 1927, from the Secretary to Government, United Provinces, to the Registrar of the Chief Court of Oudh, Lucknow. They were then published in the Gazette of the 24th September 1927. As the rules stand now the period is thirty days.

I have had to go into these matters as the application presented by the learned counsel questions the validity of the rule upon the ground that the Court had no authority to make the rule. The suggestion is that the action of the Court was ultra vires. The application further suggests that as the Code of Civil Procedure and the Limitation Act have no express provision to cover the case, the limitation must be held to be governed by the provisions of Art 181, Sch. 1, Act 9 of 1908, which lays down that in the case of applications for which no period of limitation is provided elsewhere in the schedule or by S. 48, Civil P. C., 1908, the period of limitation is three years from the date when the right to apply accrues.

According to the view, any person who wishes to obtain a declaration that an appellate decree made by a single Judge of the Court is a fit decree to appeal to a Bench would be allowed three years from the date of the judgment within which to make the application. I have no hesitation in repelling this suggestion in limine It is perfectly clear to me that the Court has authority to fix the period of limitation under the provisions of S. 11, Local Act 4 of 1925. I find that the rule so framed has received all the sanction that it could possibly be expected to receive. It has been approved by the Local Government. It has been published in the local Official Gazette, and it now has the same authority as a rule contained in Sch. 1, Civil P. C. The limitation for presentation of an appeal under S. 10 of the Letters Patent of the Allahabad High High Court is provided for in a similar rule of the Allahabad High Court contained in R. 6 in Chap. 3. The period of limitation is given as ninety days from the date of judgment appealed from. Under this rule the provisions of S. 12 (2) and (3), Limitation Act (9 of 1908) are not given effect to. The period requisite for obtaining a copy of the decree and the judgment of which the decree is founded are not excluded. This clearly shows that Art. 156 of Sch. 1 is not considered to have application and that such an appeal is not considered as an appeal to a High Court. It is of course not an appeal to a High Court. It is an appeal from the appellate judgment of a Judge of the High Court sitting singly to a Bench of two Judges which is allowed under the special provisions of S. 10, Letters Patent. The rule in question provides, that a memorandum of appeal need not be accompanied by a copy of the decree, order or judgment appealed from. In these circumstances there is no

oubt in my mind as to the fact that since the publication of that rule a person making an application for such a declaration more than thirty days after the date of the judgment will ordinarily have his application refused on the ground that it is time barred.

This does not, however, conclude the matter. Rule 7 allows discretion for the admission of such an application by the Judge who has decided the case. The Judge who has passed the appellate decree in question can, for good cause shown grant further time for presentation. Whether Mr. Justice Raza will consider that there is good cause in this case, when the applicant overlooked the fact that the proposed rule was published in the Gazette of June, and when it is clear upon the applicant's own statement that he did not even present the application, within ninety days, but took the further benefit of a Gazetted holiday and a Sunday and has presented it today the 7th November 1927 will be a matter for Mr. Justice Raza to decide. I send the application to Mr. Justice Raza to decide in the first place whether he will admit it as being within time, and secondly whether he will be ready to grant the declaration desired on the full consideration of the merits of the case.

Raza, J.—This is an application under S. 12 (2), Oudh Courts Act of 1925. I decided the appeal on the 8th August 1927. The present application was filed on the 7th November 1927. This Court worked after its inception, on provisional rules which had been prepared before it came into existence. As soon as the Court came into being on 22nd November 1925 it commenced framing permanent rules. In the provisional rules it was laid down that an application for a declaration under S 12 (2), Oudh Courts Act, could be made within ninety days from the date of the judgment. The Court considered that this period was long and reduced that period to thirty days in the rules as finally made. The rules were sanctioned by Local Government and were finally published in the Government Gazette dated 24th September 1927. They came into force from the 1st October 1927. As the rules stand now the period is thirty days as already observed. I am not prepared to accept the contention that the action of the Court in making the rule was ultra vires. As pointed out by the Hon'ble Chief Judge in his order, dated the 7th November 1927, the Court had authority to fix the period of limitation under the provisions of S. 11, Oudh Courts Act of 1925. The rule so framed has received all the sanction that it could possibly be expected to receive. It has now the same authority as a rule contained in Sch. 1, Civil P. C. There is no doubt that since the publication of the rule in question a person making an application for declaration under S. 12 (2), Oudh Courts Act more than thirty days after the date of the judgment will ordinarily have his application refused on the ground that it is time barred. . The rule under consideration (R. 7, Chap. 12, Oudh Chief Court Rules) allows discretion for the admission of such an application to grant further time if good cause is shown for its presentation. I have heard the applicant's learned counsel. I am not satisfied that there is any good cause in this case.

The proposed rules were published in the Government Gazette of the 18th June 1927. The rules were sanctioned by the Local Governmet on the 8th September 1927 and were finally published in the Gazette dated 24th September 1927, under this Court's notification dated the 19th September 1927. They came into force from the 1st October 1927. However the applicant did not think of presenting the application under consideration before the 7th November 1927. Even granting that the applicant had good cause for not presenting the application before the 7th November 1927, I am not prepared to grant the declaration desired on the full consideration of the merits of the case. I have considered my judgment of the 8th August 1927. I have also heard the applicant's learned counsel at some length. I am not prepared to declare that the case is a fit one for appeal.

Hence I reject this application.

N.D. *Application rejected.*

A. I. R. 1928 Oudh 111

STUART, C. J.

Jagannath—Accused—Appellant.

v.

Emperor—Respondent.

Cr. A. No. 497 of 1927, Decided on 3rd November 1927, from the order of the Asst. Ss. J., Partabgarh, D/- 4th October 1927.

Whipping Act (4 of 1909), S. 4—Whipping in addition to a sentence under S. 436, Penal Code, is not allowed.

An additional punishment of whipping cannot be passed on a person who has received an adequate substantive sentence for an offence under S. 436, Penal Code. [P 111 C 2]

J. N. Misra, Ali Zaheer and *Ruknuddin*—for Appellant.

H. K. Ghose—for the Crown.

Judgment.—The circumstances of the case, out of which this appeal arises, are these. There can be no doubt as to the fact that on the night of 30th April, 1927, two separate houses in the village of Rendi Garapur went on fire. The result of the fire was that both houses were reduced practically to ashes and that two little girls were burnt to death. One house at that time was occupied by a Chamar woman called Bipti and the other was occupied by a Chamar woman called Soniya. The two children, who were burnt to death, were Soniya's children They died in Soniya's house. Both Bipti and Soniya are married women. Their husbands did not happen to be in the village on the night in question. This village is some four miles distant from the Patti police station in Partabgarh district. At 8 a. m. next morning on the 1st of May Kallu chaukidar of the adjoining village of Manjhagawn appeared at the Patti police station. According to Sub-Inspector Alim Uddin, officer in charge of the Patti police station, Sub-Inspector Suraj Prasad Singh second officer in charge of the Patti police station, Head Constable Shafiq Ahmad of the same police station and Naib Tahsildar called Mahbub Alam, Kallu dictated a report which Shafiq Ahmed took down to the effect that there had been a fire in Rendi Garapur and that two children had been burnt to death. He stated that the fire had arisen from accidental causes. Sub-Inspector Suraj Prasad Singh proceeded to the village at once to investigate the circumstances. It was of course the duty of some officer to go to the village to investigate deaths of this nature and see whether they were or were not accidental. He arrived at the village in the course of the day and did not return to the police station till the 3rd May 1927. On the 4th May 1927, the two women Bipti and Soniya presented themselves at Partabgarh, which is sixteen miles away from their village, and there they filed a petition before the District Magistrate which contained allegation that the fire was not accidental but that it was the work of a man named Jagannath Brahaman, who was on the worst of terms with the two women. They cotinued that they had sent a written report to the patti police stating that Jagannath was guilty of arson and of murder and that the second officer had arrived, but had forbidden them to make any complaint, threatening them with the most dire consequences if they did so. They said, being hopeless of obtaining justice through the ordinary channels, they had come to make a complaint direct to the District Magistrate and to ask that he should take up the investigation of their case personally.

The District Magistrate upon this petition directed an independent inquiry, as a result of which Jagannath has been committed to Sessions, and tried and convicted on a charge under S. 436, I. P. C. of having committed mischief by fire intending to cause or knowing it to be likely that he would thereby destroy a house. He appeals. His appeal is now before me. The evidence has presented a considerable amount of difficulty. At the outset, I wish to express my appreciation of the admirable manner in which the learned Assistant Sessions Judge has handled the evidence in this case. (The judgment then discuissed the evidence and proceeded.) I have to note that the learned Assistant Sessions Judge has added, as a punishment to Jagannath, a punishment which the law does not allow. He has sentenced him to thirty stripes in addition to a sentence of five years' rigorous imprisonment and a fine. The sentence is of course amended by the setting aside of the order directing him to be flogged. This in no way detracts from the excellence of the trial and the judgment. I have been unable to understand why Jagannath was not put on his trial for murder. But he has not been put on his trial for murder and I do not see how he can be put on his

trial now. Further the sentence of five years is a very mild sentence considering what the man did. But again as the case was handed over for trial to an Assistant Sessions Judge, who has only authority to pass a sentence of seven years' imprisonment, it seems to me unnecessary to take action here. I find, however, that the learned Assistant Sessions Judge has been absolutely right in his conclusion that the evidence for the prosecution is true and that the evidence for the defence is false. I trust that there will be a searching departmental investigation both into the conduct of the police officers and of the Naib Tahsildar. Jagannath has been rightly convicted. I uphold the sentence with the exception already made that the sentence of flogging is set aside.

N.D. *Sentence modified.*

A. I. R. 1928 Oudh 112

STUART, C. J.

Sumran Singh and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Cr. Revn. No. 114 of 1927, Decided on 1st December 1927, from the order of the S. J., Fyzabad, D/- 14th September 1927.

Criminal P. C., S. 356—Non-compliance is only irregularity.

Where the evidence was recorded in the language of the Court by Magistrate's Reader and the Magistrate did not make a memorandum of the statement of each witness, but he applied his mind to the evidence, and took considerable care in sifting the evidence and arrived at a correct conclusion,

Held: that in the circumstances the irregularity did not occasion a failure of justice and was covered by the provisions of S. 537, Criminal P. C. [P 112 C 2]

Hyder Husein—for Applicants.

Judgment.—I sent for the record in this application owing to the fact that the learned Sessions Judge had in his first order expressed the view that the matter should come before the Chief Court, although he subsequently changed his opinion and by a later order refused to send the record. I considered it only fair to the learned counsel who presented the application to see the record. The application is concerned with proceedings under Chap. 12, Criminal P. C. The police having reported that the present applicants were endeavouring to take forcible possession over a certain tank stated to be in the possession of one Jaskaran, the Sub-Divisional Magistrate, who was duly authorized in that behalf, issued an order which purported to be under the provisions of S. 145, Criminal P. C. After having issued the order he proceeded to take documentary and oral evidence; and finally finding that Jaskaran was in possession of the tank and that there was a danger of a breach of the peace directed that Jaskaran should remain in possession and warned the other side not to interfere with his possession. He further directed that they should seek any remedy which they alleged against Jaskaran by a suit in the civil Court. This order is objected to on two main grounds. One that there was no order drawn up within the terms of S. 145 for the initiation of proceedings, and the other that the Magistrate did not record the evidence of the parties as provided for under S. 356, Criminal P. C. The examination of the record shows that there is no force in the first objection. There was a regular order properly drawn up.

On the second point it is true that the Magistrate has not complied with the provisions of S. 356. The evidence was recorded in the language of the Court, that is to say, in Hindustani, by his Reader. There was no objection to this being done but under the section the Magistrate should have made a memorandum of the statement of each witness. The Magistrate will kindly note in future that in proceedings under Chap. 12, he must follow the instructions of S. 356. But in my opinion this omission in no way vitiates the proceedings. The irregularity is in the proceedings. I have gone through the record carefully. I am satisfied that the Magistrate applied his mind to the evidence, that he took considerable care in sifting the evidence and that he arrived at a correct conclusion. It did not in fact make the slightest difference whether he did or did not record a memorandum of the evidence. He heard the evidence and he clearly appreciated its gist.

In these circumstances the irregularity did not occasion a failure of justice and is covered by the provisions of S. 537, Criminal P. C. There are occasions when it is advisable to send the case back to the Magistrate, who has omitted to carry out

the provisions of the law and direct him to try it over again. But in this particular case it appears to me that I should not only be wasting the time of the Magistrate but I should be wasting the time of the parties also. If I take this course, it would do the applicants no good. The tank clearly is in possession of Jaskaran. There clearly is an apprehension of a breach of the peace and I fail to understand what good there will be either to the parties or to the community by sending the case back to have the evidence recorded over again with a memorandum superadded according to the law with the result that exactly the same order will be passed again which has been passed already. I therefore reject this application.

N.D. *Application rejected.*

A. I. R. 1928 Oudh 113

RAZA, J.

Dukhi Singh and *another*—Appellants.

v.

Sarju Dei and *another*—Respondents.

S. A. No. 275 of 1927, Decided on 16th November 1927, against the decree of the Addl. Sub-J., Fyzabad, D/- 18th May 1927.

Hindu Law—Joint family—Member not in exclusive possession of a plot—Transfer by 'birt' deed is not valid.

A member of a Hindu joint family who was never in exclusive possession of a plot cannot transfer it by the deed of 'birt' which generally implies an under-proprietary right : 14 *O. C.* 41; *A. I. R.* 1924 *Oudh* 60; *A. I. R.* 1927 *Oudh* 467, *Rel. on.* [P 114 C 1]

Naziruddin—for Appellants.

Ali Zaheer—for Respondent 1.

Judgment.—This is an appeal from a decree of the additional Subordinate Judge, Fyzabad, dated 18th May 1927, modifying a decree of Munsif, Havali, at Fyzabad, dated 12th March 1927.

The facts of the case so far as it is necessary to state them for the purpose of disposing of this appeal are as follows :

The plaintiffs Dukhi Singh and Pudan Singh are the cousins of defendant 2, Inderjit Singh. Sheoambar Singh had two sons, namely, Pirthi Singh and Chattar Singh. The plaintiffs are the sons of Pirthi Singh deceased. Defendant 2 is the son of Chhattar Singh deceased. The dispute in this case relates to plot 184 in village Bargoara, district Fyzabad. It is not disputed that the plot in suit was owned by Sheombar Singh and on his death it was owned by his two sons in equal shares. It is not also disputed that the descendants of Sheombar Singh were not living jointly as members of a joint Hindu family. The plaintiffs brought the present suit, alleging that defendant 1, Mt. Sarju Dei, had taken possession of the plot in suit wrongfully, in collusion with defendant 2, Inderjit Singh. Defendant 1 alone resisted the plaintiffs' claim. She alleged that there was a private partition between Pirthi Singh and Chhattar Singh about 20 or 22 years ago, that the plot in suit fell to the share of Chhattar Singh in that partition, that the plot in suit was thus owned and possessed by Inderjit Singh exclusively, that Inderjit Singh transferred the plot to her by a birt-deed dated 12th June 1917 and that she was thus in rightful possession of the plot in suit. She pleaded limitation also.

The learned Munsif held that the plot in suit was the joint property of the plaintiffs and defendant 2, that there was no private partition under which the plot in suit fell to the share of defendant 2 or his father, that defendant 2 was never in exclusive possession of the plot in suit, that the plaintiffs were in possession of the plot within limitation and that the birt-deed executed by defendant 2 in favour of defendant 1 was void. The plaintiff's claim was therefore decreed with costs.

The defendant 1 appealed and the result was that the decree of the learned Munsif was modified by the learned Additional Subordinate Judge on 18th May 1927. The learned Additional Subordinate Judge agreed with the learned Munsif's findings of fact generally, but he accepted defendant 1's contention that defendant 2 is still bound by the deed and it is possible that on partition the plot may fall to his (defendant 2's) share. He was of opinion, therefore, that, the plaintiffs should not be given a decree for possession of the plot in suit. He gave them a decree for a declaration to the effect that the 'birt' deed executed by defendant 2 in favour of defendant 1 is not binding on them (plaintiffs). As the appeal failed substantially the parties were ordered to bear their own costs. Plaintiffs have now come to this Court in second appeal. They contend that the lower appellate Court was wrong in not passing a decree for possession of the plot in suit in their favour. Defen-

dant 1 has filed cross-objections. She contends that the whole of the plaintiffs' suit should have been dismissed and that she is entitled to costs of the suit in the Court of first instance and also in the lower appellate Court.

I have examined the record. It has been found that the plot in suit is the joint property of plaintiffs and defendant 2 and that defendant 2 was never in exclusive possession of the plot. We have the concurrent findings of the lower Courts on these points. These findings are supported by admissible evidence and cannot be impugned in second appeal. As defendant 2 was never in exclusive possession of the plot in suit, he was wrong in transferring the plot to defendant 1 by the 'birt' deed dated 12th June 1917. The word 'birt' generally implies an under-proprietary right: see *Ram Autar* v. *Drigpal* (1). The deed in question shows clearly that defendant 2 attempted to make defendant 1 an under-proprietor of the plot in suit and gave her a heritable and transferable right of property in the plot by the deed. He had no power to do so when the plot in suit was the joint property of the plaintiffs and defendant 2. It was held in the case of *Lal Mahomed Khan* v. *Mt. Amatul Fatima* (2) that a joint co-sharer has no right to execute a perpetual lease of the joint property and a lease violating the above rule is null and void against persons who are not a party to the lease. In that case also there was a lease by means of which the lessor had carved out a tenure of the nature of an under-proprietary interest. It appears that defendant 2 had executed the deed in question in favour of defendant 1 during the minority of the plaintiffs. The deed in question is null and void as against the plaintiffs and cannot affect their interests in the property in suit. As pointed out in the case of *Jalaluddin Khan* v. *Rampal* (3), one co-sharer has no right to appropriate to himself a specific portion of the common land to exclude his co-sharers from all use and enjoyment of the same without a lawful partition. But where a person has been in possession of a piece of joint land for a long time without any let or hindrance by the other co-sharers, the latter have no right to eject him or his transferee or to disturb his possession or enjoyment otherwise than by seeking partition. Such a cosharer or his transferee is entitled to continue in such possession so long as such user does not interfere with the use by other cosharers of what is in their possession.

I hold that the deed in question is null and void as against the plaintiffs and they are entitled to possession of the plot in suit to the extent of their share. The plaintiffs have a half-share in the plot in suit. It was admitted on behalf of the plaintiffs in the first Court that the share of defendant 2 in the plot in suit is half: see proceedings of 5th March 1927, page 14. The plaintiffs are, therefore, entitled to a decree for joint possession of the plot in suit to the extent of a half-share. They have nothing to do with defendant 2's halfshare in the property. There is no substance in the cross-objections. The result is that the appeal is partly allowed and the decree of the lower appellate Court is set aside. The decree of the first Court is modified. The plaintiffs will get a decree for joint possession of the plot in suit to the extent of a half-share. They will get half of their costs from defendant 1 in all the three Courts. The cross-objections are dismissed with costs.

N.D. *Appeal partly allowed*

(1) [1911] 14 O. C. 41=8 I. C. 725.
(2) A. I. R. 1924 Oudh 60=26 O. C. 239.
(3) A. I. R. 1927 Oudh 467.

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* A. I. R. 1928 Oudh 114

PULLAN, J.

G. C. Foster—Applicant.

v.

A. B. Foster—Respondent.

Divorce Cases Nos. 5 and 6 of 1927, Decided on 8th November 1927.

* (*a*) *Divorce Act* (4 *of* 1869), *S.* 10—*Isolated acts of violence are not cruelty.*

Cruelty may be defined as conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger. In order to establish a case of cruelty against her husband a wife must prove more than isolated acts of violence. The degree of violence varies in accordance with the status of the parties but merely proving certain isolated assaults, all of which arose on the spur of the moment and on some real or fancied provocation is not enough.

[P 116 C 1 & 2]

* (*b*) *Divorce Act, S.* 10—*Adultery condoned —Offence less than adultery again committed— Previous adultery is not revived.*

There is no authority for the view that an offence by a wife less than adultery with an

other person revives an adultery committed by her previously and which has been condoned by her husband. At least the second offence, if it is not adultery, must be one of which a Court can take cognizance: *Collins* v. *Collins*, (1883) 9 *A. C.* 205, *Rel. on.* Mere familiarity does not revive adultery. [P 120 C 2]

(c) *Divorce Act, S.* 22—*Circumstances justifying judicial separation Indicated.*

It is easy for a wife, who has some grievance against her husband, to say that she would rather take an allowance and live apart from him but it is not the object of the law to make such separations easy. They are merely a short road to prostitution and there are certain things which a wife must put up with. Where the husband has shown himself to be suspicious, jealous and occasionally violent but it is not proved that he is unfaithful or that he has failed to support her or her children in decency or that he is habitually cruel. It is neither for her advantage nor in the interest of justice that she should be given a separation from her husband under such circumstances. [P 121 C 1]

H. G. Walford and *S. N. Roy*—for Applicant.

S. M. Ahmad for *Ghulam Husain*—for Opposite Party.

Judgment.—Grace Caroline Foster has sued for the dissolution of her marriage with Alfred Bertram Foster on the allegation that he has habitually treated her cruelly and beaten her and also that he has committed adultery with Miss Cynthia Bartlett, a young lady of 17 years of age, who lived in the house adjoining that of the parties. This suit was filed on 5th May 1927, the day on which the Court closed for the Vacation. A cross-suit was filed by Mr. Foster on 13th July when the Courts re-opened in which he sought to divorce his wife on account of her misconduct with one Charles Holloway who has been impleaded as a co-respondent. The two suits have been tried together and issues were framed which covered the facts alleged in both cases. (The judgment after narrating the issues proceeded). Before proceeding to discuss the issues in detail, I shall state briefly the events which led up to these cross-cases. The parties were married at Lucknow on 16th October 1915, Mrs. Foster being then apparently about 15 years of age. Mr. Foster was then, and is now, employed in the Government Secretariat. His duties took him to various places and the parties lived together in Lucknow, Nagpur, Calcutta and Naini Tal. It is not necessary to consider whether the parties were or were not a happily married couple prior to the year 1921. They had several children and they lived together. They have now for the purposes of this case made attacks on each other, but they have not been supported by evidence and each of them contradicts the allegations of the other. In 1921, however, there is no doubt that Mrs. Foster became implicated with a man named Gordon, and, as the result of this affair which I shall discuss later, the parties went to Calcutta where Mr. Foster brought a complaint against Gordon of adultery, and ultimately withdrew from the case on receiving payment of Rs. 1,000. After that the parties continued to live together as man and wife and more children were born. In 1925 they had a quarrel and Mrs. Foster made a complaint in the Magistrate's Court at Lucknow. The complaint was of a trifling nature and was not pressed and after that it appears that the parties lived together as before, received and entertained their friends and there was no open breach until the present year. On 12th April 1927 Mr. Foster's duties took him to Allahabad. On 17th April, which was Easter Sunday, Mrs. Foster followed him to Allahabad. She went accompanied by the co-respondent Charles Holloway, her small child of 3 or 4 years of age, and a young unmarried woman named Silvia Bartlett.

It is admitted that while they were in Allahabad they attended a dance at the Railway Institute and put up at the Grand Hotel. On 19th April they met Mr. Foster. It is admitted that he came to the hotel and found Mrs. Foster, Mr. Holloway, the child, and Miss Bartlett resting in one room, that he was extremely annoyed and used violent language to his wife, and committed some assault upon her of a trivial nature and took away her wedding ring. After that it appears that he himself came and stayed in the hotel. Holloway went back to Lucknow that night, but Mrs. Foster and the child and Miss Bartlett stayed on and their hotel bill was settled by Foster, who took them back to Lucknow himself on the night of 21st April. After they reached Lucknow there was a quarrel, the details of which are by no means clear, and Mrs. Foster left her husband and went to live with her father. During the succeeding days Mrs. Foster and her husband appear to have seen each other occasionally and to have had more than

one quarrel over the custody of the youngest child. It may be remarked that the elder children were at school in Calcutta. I find from a letter sent to Mr. Foster by the Deputy Commissioner of Lucknow, which is dated 30th April that Mrs. Foster and her father went to see the Deputy Commissioner, presumably on that date, and accused Mr. Foster of having assaulted them. This must refer to some incident in connexion with the attempt to recover the child but it does not appear to be the occasion on which Mrs. Foster received an injury, namely a black eye, which was visible when she filed her suit on 5th May. Mr. Foster did not go to see the Deputy Commissioner but on the following day he took the child away in a motor car and made a report at the police station. He returned accompanied by a constable and had a further altercation with his wife and her father when he was attempting to leave the house with the child on his way to Naini Tal to resume his duties. It is probably on that occasion that Mrs. Foster received her black eye and it is also on that occasion that she damaged her first finger and thumb in an attempt to assault her husband That night Mr. Foster left for Naini Tal and Mrs. Foster's suit was filed four days later.

The first allegation of the wife relates to cruelty. Cruelty is defined in Halsbury's laws of England, (para. 975 of Vol. 16) as

> conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger.

In order to establish a case of cruelty against her husband a wife must prove more than isolated acts of violence. No doubt the degree of violence varies in accordance with the status of the parties. The parties in this case are Anglo-Indians and although Mr. Foster draws a good salary, they do not live in such circumstances that a blow between husband and wife would be considered very seriously. Mr. Foster admits that when she went to the Magistrate in 1925 she had no visible injury and, whichever version of the affair is believed, it was the result of a momentary quarrel. She says that her husband beat her because she reproached him for coming home late at night in a state of intoxication, and he says that he beat her because he saw her being kissed by a man at a dance. Such an affair standing by itself would hardly be taken account of in divorce proceedings, especially as the parties lived together peacefully for the next two years. The more recent assaults are first of all that at Allahabad, where the husband, who did not know that his wife intended visiting Allahabad, found her at the Grand Hotel in one room with a young man and a girl and it can hardly be said that he had no justification if he felt angry. Here too there is no allegation that the assault was a serious one or left any considerable mark of injury, and there remains only the incident in Lucknow. Now Mrs. Foster stated that there were two assaults in Lucknow, one on 25th April and one on 29th. But the injury that she showed the Court on 5th May was seen by a doctor on 3rd May who gave it as his opinion that the injury was two days old and as Mr. Gwynne says nothing about this injury in his letter of 30th April it seems to be much more probable that Mrs. Foster received this injury in the free fight which she had with her husband over the person of the child on 1st May. If that were so the injury was caused in a sudden quarrel and not under circumstances which could be held to amount to cruelty.

There are some vague allegations that her husband was addicted to wine and women and gambling, also that he did not give her his pay or allow her to manage the expenses herself, but none of these allegations are pressed and they are not supported by any reliable evidence, nor is there any evidence of neighbours or others that Mr. Foster was in the habit of assaulting his wife. On the contrary, as I have stated above, there is evidence that they were giving evening parties and remained on friendly terms until his departure for Allahabad. In my opinion all that she has proved on the score of cruelty are certain isolated assaults all of which arose on the spur of the moment and on some real or fancied provocation. The allegation of cruelty, therefore, fails and my finding on the first two issues is that although Mr. Foster has from time to time assulted his wife, it is not true to say that he did so habitually, or that these assaults amount to legal cruelty.

Mrs. Foster's second allegation is that her husband committed adultery with Miss. Cynthia Bartlett between the 25th April, the date on which Mrs. Foster says

she left her husband's house and the 1st May. The Bartlett family at that time lived next door to the Fosters and the two houses were connected by a door leading from the bedroom of one house into the bedroom of the other. The Bartletts were apparently in a poor condition financially and there were actually six persons living in a house which only had one bedroom.

Under such circumstances it is not surprising that the two families saw a good deal of each other and, considering that Miss. Silvia Bartlett, the elder sister, was the person who had accompanied Mrs. Foster to Allahabad, on the occasion which gave rise to the quarrel, it is not surprising that Mr. Foster, after his wife left him saw and conversed with the Bartlett family on many occasions. That he should have under these circumstances committed adultery with the younger sister, a girl of 17, who was engaged to be married is, prima facie, improbable. The near proximity of her father, her mother. her sister and her brothers, rendered it unlikely that opportunities would arise for misconduct of the kind even if the girl herself were willing.

There are three witnessess who have given evidence indicating that there was misconduct between the two. The first is Mrs. Foster herself who says that she went to the house in order to try and secure the person of her son on the 29th April, she went into the bedroom and that there she found her husband and Miss. Cynthia Bartlett, that she then turned Miss. Cynthia Bartlett out, apparently through the door leading into the adjoining house, which was open, and that then her husband turned her out. Mrs. Foster is physically a very weak woman and it seems in the highest degree improbable that, in the presence of her husband, she would have been able to turn Miss. Cynthia Bartlett out of the room and, even had she been able to do so, I am unable to believe that any guilty connexion could have been contemplated by the pair with the door open between the two houses. Moreover Mrs. Foster must be regarded in a matter of this kind as a highly interested witness and I cannot place implicit confidence on her statement. The next witness is one OcGuire, one of the numerous persons who appears to have aroused Mr. Foster's unreasonable jealousy. All that he says is that he saw Mr. Foster and another man sitting with the two Bartlett girls. It is extremely probable that he did, but in my opinion this does not indicate any undue intimacy in the case of such close neighbours. The third witness is a darzi who used to work for Mrs. Foster, but who says that he was commissioned by Mr. Foster to make a dress or dresses for Mrs. Bartlett and her two daughters. There is nothing in this man's evidence to give the impression that he is speaking the truth. His story is in the highest degree improbable, as he would not have been admitted to the room when the parties were engaged in the manner described by him. He failed to answer the one searching question put to him in cross-examination, namely what was the material of the dresses which he had made. This is a thing which no darzi could have forgotten. Thus in my opinion Mrs. Foster's allegation that her husband committed adultery with Miss. Cynthia Bartlett is improbable in itself and unsupported by reliable evidence, and I find accordingly on the third issue.

I now turn to Mr. Foster's case against his wife. Learned counsel relying upon his interpretation of the law of divorce has sought to re-introduce in this case two previous instances in which it is said that Mrs. Foster was guilty of adultery but her offences were condoned by her husband. As his argument is one which must be met, I think it necessary to consider the two previous cases. The first relates to a man named Arthur George Stubbs, with whom it is said that Mrs. Foster committed adultery in Calcutta in the month of April 1920 when her husband was in Naini Tal. Mr. Foster produced a letter written by his wife which was suggested to be some sort of a confession, but it is not so nor does it appear that it was written at that time. Apart from this there is absolutely no evidence worthy of the name that Mrs. Foster committed adultery with Stubbs. It appears that she was engaged to him before she married her husband and this fact may have aroused her husband's jealousy, but I find on this issue that no such adultery was committed.

The fifth issue relates to the case of Mr. Gordon and this cannot be disposed of in so summary a fashion. In the hot whether of 1921 Mr. and Mrs. Foster were living in Naini Tal in Brookhill Cot-

tage. The other half of the cottage was occupied by Mr. Alexander and his family, both Mr. Alexander and Mr. Foster being employed at the time as shorthand writers to the Hon'ble Finance member, Sir Ludovic Porter. Mr. Foster brought into his house a school friend named Gordon and very unwisely left Gordon in the house with his young wife when he went on duty to Simla. He is thus responsible for anything that may subsequently have occurred. When he came back from Simla a complaint was made by Mr. Alexander about the conduct of Mrs. Foster and Gordon. Mr. Alexander has been examined as a witness and I see no reason to disbelieve his statement in this matter. There is on the other hand nothing to support Mrs. Foster's allegation that the report was really made about Mr. Foster's misconduct with Mr. Gordon's sister. It appears that orders were given by Sir Ludovic Porter for Mr. Gordon to be turned out of the house. These orders were carried out, but not only did Mr. Gordon leave the house, but Mrs. Foster also left the house and they travelled together to Calcutta. Even Mrs. Authray, who has been examined on commission in Calcutta on behalf of Mr. Foster and who is clearly in favour of Mrs. Foster and wished to help her in every way, admitted that Mrs. Foster came to her house in Calcutta accompanied by Gordon, and there is the further evidence of a Calcutta pleader Mr. D'Silva, who shows that Mr. Foster consulted him with regard to his projected case against Gordon, and Mrs. Foster in his presence admitted that she had committed adultery with Gordon.

No doubt Mrs. Foster now denies this and, for that matter, she denied it at the time because she refused to make any such statement to the Magistrate. But taken together the evidence of the intimacy of the parties in Naini Tal, the report against their departure for Calcutta, their arrival at Calcutta together and Mrs. Foster's confession before a pleader, are sufficient to establish the adultery. It is not necessary to take into account the evidence of a servant that he actually saw the parties in a most compromising attitude. His statement is on the face of it improbable and not worthy of belief, but I have no doubt whatever that they were guilty. Whether Mrs. Foster and her husband had colluded in the matter in order to obtain damages out of Gordon is a point on which I can give no opinion, but undoubtedly Mr. Foster decided to forgive his wife and he came to that decision very quickly, because he began to cohabit with her as soon as he reached Calcutta and before he had received the substantial sum of Rs. 1,000 for withdrawing the case. I find, therefore, on this issue that Mrs. Foster actually committed adultery with Gordon in 1921 and that that adultery was condoned by Mr. Foster. This fact, of course, only becomes relevant to the present case, if I can accept the legal argument produced on behalf of Mr. Foster, and even so it depends greatly on my finding on the next issue which deals with the alleged adultery between Mrs. Foster and Charles Holloway.

There is evidence, which there is no reason to doubt, that the Hclloways are close friends of the Fosters. Charles Holloway is now a youth of about 19 years of age and in letters written four years ago by Mrs. Foster to Mr. Holloway she refers to him in affectionate terms as a boy. There is no doubt that Charles Holloway went with Mrs. Foster and Miss. Bartlett to Allahabad. They travelled together in the same compartment in the train. They went to a dance together and they spent the last few hours of the night and the following morning in the same room in the hotel at Allahabad. Living as these people live it cannot be supposed that there was anything improper in these three persons and the child travelling together or even occupying a a single room, while they were waiting after the dance to return to Lucknow. No doubt each of the parties and Miss. Bartlett have been anxious to say as little as possible against themselves and they have, therefore, given different versions of the affair, but to my mind it is quite immaterial whether Mr. Holloway asked Miss Bartlett to go and took Mrs. Foster as a chaperon, or whether Mrs. Foster and Bartlett intended to go unaccompanied and picked up Mr. Holloway at the station. All these suggestions have been put forward but it is most probable that they all agreed together that they would go to the dance. When they got to Allahabad on the following morning they did nothing unnatural or improper. They went to the house of Mr. Lewis, who is employed in the Finance Department and knows Mr. Foster very well, and they asked

if he could put them up. He refused and they had to find some place where they could stay after the dance was over. They had not much money and they decided to share a room. In doing so they did nothing wrong, but Charles Holloway was in a difficult position, because he was at that time under suspension from his duties in the railway and he was afraid to let his name appear in the hotel register; consequently the party was entered as "W. James and family." Mr. Foster has made capital out of this by incorrectly stating in his petition that his wife and Charles Holloway were entered as Mr. and Mrs. James. Mr. Foster has alleged that his wife and Charles Holloway committed adultery in the train and again in the Grand Hotel. His only informant could have been Miss Silvia Bartlett; the latter has appeared as a witness. She is certainly not favourably disposed towards Mrs. Foster. She is annoyed, I may say justifiably annoyed, at the fact that her young sister has been cited as a co-respondent, but she has not said one word in her evidence which would indicate that either in the train or in the hotel any adultery took place or even any familiarity between Mrs. Foster and Charles Holloway.

Mr. Foster alleges that when he came into the hotel he found Mrs. Foster and Charles Holloway on one bed with Charles Holloway's arms around Mrs. Foster's neck. Miss Bartlett denies that she saw anything of the kind. She says that she was asleep and when she awoke she saw Charles Holloway standing and Foster attacking his wife. Prima facie it is very improbable that any woman, let alone a married woman and a mother of several children, would have sexual intercourse with a young man in the presence of a young and unmarried woman. It is in fact almost incredible and when the unmarried woman in question who is hostile to her, gives evidence indicating that no such event occurred, it is impossible for any Court to assume that adultery took place under these unlikely conditions. But apart from this there is much evidence in this case to show that not only did no such adultery occur, but Mr. Foster himself never supposed that it did. He says that he turned Charles Holloway out of the room and he subsequently went back to his work, took no further interest apparently in the proceedings of the parties and came back between 6 and 7 in the evening to see what had happened to them. The hotel manager, who was called as a witness by both parties, states that a lodger came to him complaining that there was a fight going on in the room next to hers and he went to see what was the matter. When he got there there was no noise and he concluded that it was all over but he saw no body come out of the room either Foster or Holloway and had either of them done so he must have seen them.

Consequently I am more inclined to believe the story that Mr. Foster stayed quietly with the party and had a meal with them as is indicated by the hotel bill which shows that luncheon was given to four persons on that day. Then as to the events of the evening they are not the doings of an outraged husband. Even on his own showing he was so little disturbed by this evidence of his wife's misconduct that he went to see the Manila Carnival. As a matter of fact he either went with the whole party or met them there and stayed in their company until it was time for Charles Holloway to catch the night train to Lucknow which would be about halfpast nine. Thus he was in their company for something over two hours before Charles Holloway departed, and he remained with them in the Carnival for some considerable time after that and took his wife and Miss Bartlett to the hotel where they remained for the night. He then stayed in Allahabad, which presumably he had to do on account of his duty, but he also kept his wife and Miss Bartlett at the Hotel and spent a considerable part of his time with them. He also paid the hotel bill and took them back to Lucknow. Mrs. Foster states that he actully cohabited with her but I am not able to say whether this is true or not. Even if he did not, his conduct would be so remarkable in the case of an outraged husband that it might very well be considered to be condonation. It is not necessary to go further into the evidence as to this incident. Mrs. Foster has on the main been corroborated by Mr. Lewis and the co-respondent, and the differences between her statement and those of Miss Bartlett have already been noted. It must be remembered

that Miss Bartlett has her own character to consider and it might not be considered proper for her to admit that she had been present had these two persons actually committed adultery in her presence. But in my opinion no such incident can have occurred, and I find without hesitation that there was no adultery between Charles Holloway and Mrs. Foster either in the train or in the hotel in Allahabad.

There remain two further incidents spoken to by Miss Bartlett before the parties went to Allahabad. Now if Miss Bartlett really saw what she says, it is hardly likely that she would have consented to go with this couple to Allahabad kowing that Mr. Foster was on duty there and that there was a grave danger of their being detected. She says that she went twice into the house after Mr. Foster's absence and found Holloway and Mrs. Foster on each occasion in what might be considered a compromising attitude, that is to say, they were alone in the room and one or other of them was lying on the floor. She also says that Holloway on the first occasion looked nervous and turned over on to his stomach. This may mean that he had something to conceal or that he merely realized that he should not have been there with Mrs. Foster when her husband was away. But I am not inclined to accept Miss Bartlett as evidence on this point. She was on her own showing employed in a boot shop in Lucknow at the time and it does not appear likely that she would have been in her house at 2 o'clock in the afternoon, and her statement must be discounted by the fact that her sister was implicated in this case and that she was only too anxious to say anything that she could, that would damage Mrs. Foster without damaging herself. It is very easy to make an assertion that two persons had been found in a compromising position but such a statement uncorroborated does not go very far and the other evidence shows that Charles Holloway was a friend of the family, both of Mr. Foster and Mrs. Foster, that he was treated as a boy, that he was often in and out of the house and I am inclined to think that some perfectly innocent episode has been exaggerated by Miss Bartlett in return for the attack upon her sister. I, therefore, find on issue 6 that no adultery took place between Mrs. Foster and Charles Holloway, and, that being so issue 7 does not arise.

I now turn to the point of law raised by Mr. Ghulam Husain on behalf of Mr. Foster. His argument is that, even if adultery is not proved between Charles Holloway and Mrs. Foster, there has been a matrimonial misconduct which enables him to revive the previous adultery with Gardon in spite of its condonation. This is not the law and the rulings to which I have been referred establish no such proposition. The law is as stated in Halsbury's Laws of England (Vol-16, para 1003) :

> If such a subsequent offence should arise the forgiveness is cancelled and the old cause of complaint is revived even if the offence is not ejusdem generis with the original offence.

The first ruling to which I have been referred is *Pereira* v. *Pereira* (1), but there it appears that the case was one in which the respondent had committed adultery with the co-respondent on a previous occasion and subsequently behaved in some manner short of adultery with the same person and it was held that the first adultery was revived. All the other rulings refer to the case of a husband and are based on the fact that it requires a combination of offences for a wife to divorce her husband. Such rulings have no application to a case like this, and I can find no direct authority for the view that an offence by a wife less than adultery with another person revives an adultery committed by her proviously and which has been condoned by her husband. At least the second offence, if it is not adultery, must be one of which a Court can take cognizance. This is the view expressed by Lord Blackburn in a decision of the House of Lords, *Collins* v. *Collins* (2), Now there is nothing that has passed between Charles Holloway and Mrs. Foster of which the Court could take cognizance. It is difficult to see what offence short of adultery could have been committed between Charles Holloway and Mrs. Foster. At most it may be said that they were guilty of familiarity but familiarity is not an offence, and it is stated in para 1004 of Lord Halsbury's Laws of England that the doctrine, which is that on which Mr. Ghulam Husain relies, does not go the length of making mere familiarities revive adultery. Thus in my

(1) [1882] 5 Mad. 118 (F. B.).
(2) [1883] 9 A. C. 205.

opinion no facts have been brought to light in this case which can revive the adultery of 1921 between Mrs. Foster and Gordon. That has long ago been forgiven and could only become relevant in a subsequent case if Mrs. Foster renewed her relations in some manner with Mr. Gordon or actually committed adultery with another person.

I have now to consider what order I can pass in this case. In my opinion neither party has made out a case for divorce and it only remains to be considered whether the case is one in w ich I should allow Mrs. Foster a separation. Now it is easy for a wife, who has some grievance against her husband, to say that she would rather take an allowance and live apart from him but it is not the object of the law to make such separations easy. They are merely a short road to prostitution and in my opinion there are certain things which a wife must put up with. In this case her husband has shown himself to be suspicious, jealous and occasionally violent but I am not satisfied that it has been proved that he is unfaithful, that he fails to support her or her children in decency or that he is habitually cruel. I neither think that it is for her advantage nor in the interest of justice that she should be given a separation from her husband under such circumstances. Rather it is a case in which both parties have rushed into Court without sufficient cause and expended a great deal of venom against each other and implicated unnecessarily other innocent persons. I must, therefore, decline to grant the alternative relief which Mr. Walford asked for his client and I dismiss both suits. The parties to bear their own costs throughout.

D.D. *Suits dismissed.*

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* A. I. R. 1928 Oudh 121

STUART, C. J. AND PULLAN, J.

Rampal Singh — Defendant — Appellant.

v.

Jai Ram Singh—Plaintiff — Respondent.

S. A. No. 350 of 1927, Decided on 5th December 1927, against the decree of the District Judge, Fyzabad, D/-30th July 1927.

1928 O/16 & 17

(a) Civil P. C., S. 100—Proof of custom is a question of fact.

Decision to the effect that no family or tribal custom has been establ shed by reliable evidence is a finding of fact which cannot be interfered with in second appeal. [P 121 C 2]

* *(b) Deed—Construction—Meaning of words is question of fact—Their effect is one of law.*

The expression "construction" as applied to a document includes two things: first, the meaning of the words; and secondly, their legal effect The meaning of the wordo is a question of fact and the effect of the words is a question of law: *Chatenay* v. *Brazilian Submarine Telegraph Co.* (1891) 1 *Q. B.* 79 *Rel on.* [P 121 C 2]

R. D. Sinha and *G. C. Sinha*—for Appellant.

Judgment.—We have been at length through the judgment of the learned District Judge and are satisfied that his decision to the effect that no family or tribal custom to the effect that the property left by a female of the family devolves upon all the existing collaterals of the husband of the lady per stirpes without any regard to nearness or remoteness and in the manner that the descendants of the first born in every line get 19 shares as against the 16 shares to be got by the rest of the line has been established by reliable evidence is a finding of fact with which we cannot interfere in second appeal. He has considered the whole of the evidence before him. No point of law arises on the question of construction of documents. As was laid down by Lindley, L. J. in *Chatenay* v. *Brazilian Submarine Telegraph Co.* (1), the expression "construction" as applied to a document, at all events as used by English Lawyers, includes two things; first, the meaning of the words; and secondly, their legal effect or the effect which is to be given to them. The meaning of the words is a question of fact in all cases, whether the subject under discussion is a poem or a legal document. The effect of the words is a question of law. Applying these principles it is clear that the decision of the learned District Judge is a decision of fact. We, therefore, dismiss this appeal under O. 41, R. 11, Civil P. C.

N.D. *Appeal dismissed.*

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(1) [1891] 1 Q. B. 79=60 L. J. Q. B. 295=39 W. R. 65=63 L. T. 789.

* A. I. R. 1928 Oudh 122

STUART, C. J. AND PULLAN, J.

Chandrika Singh—Applicant.

v.

Emperor—Opposite Party.

Cr. Ref. No. 42 of 1927, Decided on 2nd December 1927, made by the Ss. J., Sitapur, D/- 1st October 1927.

(a) *U. P. Land Revenue Act* (3 *of* 1901), *S.* 147—"*Citation*" *means a notice or summons.*

Pullan, J.—The word "citation" employed in the Land Revenue Act means a direction of some kind to appear in Court. The word "citation" itself means a notice or a summons and it is probable that the draftsman of the Land Revenue Act was using it, not in a technical sense such as that employed in the Succession Act, but merely as a variant for a notice.

[P 125 C 1]

Stuart, C. J.—A citation is not necessarily an order to appear. It is a notice or an order to do something : *A. I. R.* 1927 *All.* 122, *Diss.*

[P 123 C 2]

* (b) *Penal Code, S.* 174—*Person disobeying the order under S.* 147, *U. P. Land Revenue Act is liable.*

S. 147, U. P. Land Revenue Act, when it gives a revenue official exercising fiscal functions authority to issue a citation to a defaulter to appear, gives him authority to order that person to appear before him and the person is obliged to appear before him, if so ordered under the penalty laid down by S. 174, Penal Code : 13 *O. C.* 55, *Foll.* ; *A. I. R.* 1927 *All.* 122, *Diss.* [P 124 C 2]

A. P. Sen—for Applicant.

H. K. Ghosh—for the Crown.

Stuart, C. J.—This is a reference from the learned Sessions Judge of Sitapur, suggesting that the conviction of Chandrika Singh should be set aside and that the fine paid by him should be refunded. Chandrika Singh is a zamindar in the Sitapur district. In the month of July 1927 he was late with his land revenue instalment. He owed the Crown Rs. 344. In consequence, the Tahsildar of Sitapur issued a citation upon him under the provisions of S. 147, Local Act 3 of 1901 (Land Revenue Act), directing him to appear at the Sitapur Tahsil on the 12th July 1927. He did not appear on that date. but he remitted on 12th July 1927, a sum of Rs. 160 and three days later he paid up the balance. The Tahsildar, however, thought fit to prosecute him under the provisions of S. 174, I. P. C. and the Deputy Magistrate who tried the case convicted him under that section and fined him Rs. 50. The learned Sessions Judge has submitted this reference upon the ground that there is considerable doubt as to whether such a conviction is legal and also upon the ground that, in any circumstances, as the man paid Rs. 160 on the date fixed for his appearance and the balance three days afterwards, the fine was excessive. I note at the beginning that we agree with the learned Sessions Judge on the second point. We consider that if an offence were committed by the applicant it was of a technical and venial nature. Upon the facts there is no reason to find that he was contumacious in his disobedience and it is my intention, in event of upholding his conviction, to suggest the reduction of the fine to the nominal fine of Re. 1.

The point of law before us is one that requires our close consideration in view of the fact that there is a complete difference of opinion on it between the late Judicial Commissioner's Court of Oudh and a Bench of the Hon'ble High Court of Allahabad. In 1910 a Bench of the Judicial Commissioner's Court consisting of Mr. Chamier (now Sir Edward Chamier) and Mr. Evans decided in *Rambali Singh* v. *Emperor* (1), that a citation to appear issued under S. 147, of local Act 3 of 1901 is an order to the defaulter to appear at the time and place named therein within the meaning of S. 174, I. P. C. and that intentional disobedience of it is an offence under that section. The decision in question does not contain full reasons. It is in the main a decision construing the words. There has been a recent decision in the Allahabad High Court : *Emperor* v. *Bhirgu Singh* (2), in which a Bench of the Hon'ble High Court consisting of Mr. Justice Dalal and Mr. Justice Boys decided that the issue of a citation to appear to an alleged defaulter under S. 147 of Local Act 3 of 1901, does not involve him in any legal liability to attend, and that non-compliance with it does not render him guilty of an offence under S. 174, I. P. C. The view taken by these two learned Judges is shortly that the ordinary meaning of the word 'citation" is that it is rather in the nature of an invitation to appear than of an order to attend. They thought that the meaning of the word "citation" as used in S. 147 of Local Act 3 of 1901 was similar to the word 'citation' as used in the present Ss. 235 and 283 of Act 39

(1) [1910] 13 O. C. 55=5 I. C. 805.

(2) A. I. R. 1927 All. 122=49 All. 205.

of 1925 corresponding to S. 199, Act 10 of 1863 and S. 250 of the same Act and S. 169, Act 5 of 1881.

In deciding the question referred to us I propose to look first at the wording of S. 147. The words are as follows :

> When an arrear of revenue becomes due, a writ of demand calling on the defaulter to pay the amount within a time therein stated, or a citation to appear, may issue.

There is nothing in the section to prevent both "the writ of demand" and "the citation to appear" being issued simultaneously. I note first that the words used are "a citation to appear." The words used are more than "a citation." There can be no doubt as to the fact that the Board of Revenue considered that this section gave them the authority to order a person to appear, for the form of the citation to appear is as follows :

> Whereas a sum of Rs.....on account of arrears of instalment in respect of.....is due against you, you are hereby directed (hidayat) that in case the entire arrears aforesaid and process fee in respect of this summons are not paid immediately you should appear before this Court at.....on.....Failure to attend shall be punishable under S. 174. I.P.C.

The citation is headed in the Vernacular 'Summons hazri.' It is true, as the learned Judges of the Allahabad High Court have stated, that the construction placed upon the section by Board of Revenue is immaterial and the declaration that failure to attend is punishable criminally is also immaterial in so far as the consequences of neglect to attend are concerned. But the words are of importance as showing that the Board of Revenue, on the assumption that they have authority to direct a defaulter to attend in person clearly are exercising that authority. If they do not have the authority to order him to attend, the fact that they assert such authority is immaterial ; but if they have authority to order him to attend, the words used in the form place beyond any reasonable doubt the fact that they do so order him. This carries me on to the question as to whether the words "citation to appear" are or are not to be construed as an order to appear. The learned Judges composing the Bench of the Allahabad High Court, to whose decision I have already referred, have not laid the same stress which I lay on the words "citation to appear." They have laid stress rather on the word "citation" standing alone, and they have said that the ordinary meaning of the word "citation" is in the nature of an invitation to appear rather than of an order to attend. I do not know whence they derived that meaning. I have been unable to discover in Stroud's Judicial Dictionary any definition of the word "citation." The learned Judges of that Bench do not appear to have wished to look at the legal meaning of the word so much as the ordinary meaning of the word. For the ordinary meaning of the word I have referred to the 1926 Edition of Webster's New International Dictionary. The word 'citation' is derived from the Latin word citatio which is formed from the Latin verb citare, to cite. Webster gives the following meanings :

> (1) An official summons or notice given to a person to appear, as before tribunal of Justice ; hence, any summons ; the paper containing such summons or notice.
>
> (2) Act of citing a passage from a book, or another person, in its own words; also the passage or words cited ; quotation; a reference to decided cases, or books of authority.
>
> (3) Enumeration; mention ; as, a citation of facts.

I am unable to discover from this that the word "citation" necessarily would ever mean an invitation. It is a summons or notice. I do not say that a citation is necessarily an order to appear. I should prefer to consider it as a notice or an order to do something. The word 'summons' to which the learned Judges of the same Bench have made reference at length is also not necessarily an order to appear. A man may be summoned to appear, or he may be summoned to do an act which does not involve appearance. The word "summons" used by itself will not convey an indication as to whether appearance is or is not required. Similarly I should interpret the word "citation," and on this view proceed to consider the analogy which the learned Judges have drawn from the procedure under the testamentary law in India.

The citation to which they refer are : first the citation under S. 235 of the present Act, 39 of 1925, which states that letters of administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration ; and the second citation to which they refer is the citation mentioned in S. 283 of the same Act,

where in application for probate or letters of administration the District Judge may issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration issues. That section continues that the citation shall be fixed up in a conspicuous part of the Court house and also in the office of the Collector of the District and otherwise published or made known in such a manner as the Judge or the District Delegate issuing the same may direct. The ordinary method of publishing citations of this nature is by notice in a newspaper. Now it is to be noted that on the forms of these citations as used by this Court (and by most others) the citation is in the first place a notice. It is issued frequently not upon persons by name. It has a legal effect.

Persons interested in the matter of the probate or administration, who have had an opportunity of seeing such a notice, are bound by their omission to object upon the date fixed. The citation is not only a notice, but it is a notice involving consequences in event of subsequent inaction. It is not "a notice to appear" but it is considerably more than an invitation. A refusal to accept an invitation involves no consequences. An omission to object after receiving this notice involves the consequence that consent is presumed. I look upon the use of the words 'citation to appear" in S 147 as meaning an order to appear. Why the word "citation" was used in this portion of Local Act 3 of 1901, I am in no position to decide. I should not go so far as to consider that any subtle meaning was indicated by the use of the word. It is, I think, too much to attribute significance to the use of individual word by the draftsman. Why the word "citation" is used in this Chap. 8 whereas the word 'summons" is used in S. 193 in Chap. 9 is possibly because Chap. 8 is concerned with the purely fiscal act of collecing land revenue which is in no sense a judicial or a quasi judicial act, and Chap. 9 is concerned with the procedure of revenue Courts and revenue officers when exercising judicial or quasi judicial functions. Under Chap. 8 the Tahsildar and the Collector are collecting revenue. They are not performing judicial functions. Under Chap. 9 the Court of the Tahsildar and the Courts of the Assistant Collector and the Collector are directed to use a certain procedure in exercising judicial and quasi judicial functions It may have been that the draftsman of the Act considered that an order to a person to appear before a revenue officer exercising fiscal functions was best called a citation to appear and that an order to such a person to appear before a Court exercising judicial or quasi judicial functions was best called a summons to appear. I am not in a position to decide the point and personally I consider it of very little importance. After giving full consideration to the views of the learned Judges composing the Allahabad Bench, I am unable to accept those views and accept the views of Sir Edward Chamier and Mr. Evans in the Oudh Case. I, therefore, find that S. 147 when it gives a revenue official exercising fiscal functions authority to issue a citation to a defaulter to appear, gives him authority to order that person to appear before him and the person is obliged to appear before him, if so ordered, under the penalty laid down by S. 174, I. P. C. which is in the following words :

> Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same, intentionally omits to attend at the place or time.....shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

These are the penalties for disobedience to obey an order of a public servant legally empowered to issue the order. The section that if the order comes from a Court of Justice the imprisonment may extend to six months and the fine may extend to one thousand rupees. I am satisfied that Chandrika Singh was legally bound to attend in person. I am satisfied that he intentionally omitted to attend and I consider that he was rightly convicted. I consider, however, that his offence was not of a serious nature and I propose that, while his conviction should be upheld, hi fine should be reduced to Re. 1 and that the balance of Rs. 49, if paid by him, should be refunded.

Pullan J.— In expressing my agreement with the judgment just delivered I have very little to add. S. 174, I. P. C., prescribes the penalty for omission to attend in obedience to a summons, notice order or proclamation by a person who is

legally bound to attend. The word "citation" is not used in the Penal Code and as far as I am aware the word had not at that time been imported into any Indian statute. The word was introduced from the English law in the old Indian Succession Act and Probate and Administration Act and is there used in a technical sense. These Acts have now been combined in the Indian Succession Act, 39 of 1925, and the word appears in Ss 235 and 283. In neither case is it used to mean an order to attend the Court or a direction to attend the Court. It gives certain parties an opportunity of attending the Court in order to put their own case before the Court and make their own claim if they wish to do so. When the word is employed in the Land Revenue Act it has no such meaning. It undoubtedly means a direction of some kind to appear in Court and this appears to have been overlooked by their Lordships of the Allahabad High Court in the case cited They have regarded this citation as being an invitation. If so, it is an invitation couched in unusual terms because the person invited was threatened with a prosecution under S. 174, I. P. C., if he did not attend. I cannot myself regard this as an invitation. It was a direction to attend the Court. The word "citation" itself means a notice or a summons and it is probable that the draftsman of the land Revenue Act was using it, not in a technical sense such as that employed in the Succession Act, but merely as a variant for a notice. The intention of the Court which issued this citation was that the man should appear and the Court was empowered to direct his appearance and in my opinion he was legally bound to comply with that direction. This being so I am of opinion that his failure to attend laid him open to punishment under S. 174, I. P C. I agree, therefore, with the view of law taken in the judgment which has just been delivered. As to the sentence I consider that the circumstances of the case do not call for severity and I agree in the proposed reduction of the fine to one rupee.

By Court. - The order of the Court is that the conviction be maintained but that the fine be reduced to a fine of Re. 1 (Rupee one) and that the balance Rs. 49, if already paid, be remitted to Chandrika Singh.

N.D. *Sentence reduced.*

A. I. R. 1923 Oudh 125

STUART, C. J. AND WAZIR HASAN, J.

Jang Bahadur Singh and *others*—Plaintiffs—Appellants.

v.

Arjun Singh and *others*—Defendants—Respondents.

F. A. No. 11 of 1927, Decided on 8th November 1927, from the decree of the Judge of the Chief Court of Oudh, D/- 9th October 1926.

Evidence Act S. 32 (6)—Family pedigree—Construction should not be according to English standard—Pedigree embracing names of persons from remotest ancestors is a record of family traditions—It is admissible.

The word "family pedigree" in Cl. 6 should not be construed according to the standard adopted by Courts of England in regard to pedigrees of English families. Peoples of India and peoples of England widely differ in their habits of thought, modes of expression and indeed in their entire system of family life. [P 131 C 2]

Where a pedigree brings one down from the remotest ancestor to the generations living contemporaneously with a person in whose time it is prepared, the document is a record of family traditions as to pedigree and of the existence of persons contemporaneously alive. The authenticity of that part of the record which embraces the names of persons who existed before the living memory rests on the absence of anything showing directly or inferentially, that the pedigree was prepared with any motive other than the natural motive of preparing and preserving a record of family traditions relating to the family pedigree. Such a pedigree is admissible in evidence : 30 *All.* 510 (*P. C.*). *Dist.*; 14 *Cal* 296, *Ref.* [P 132 C 1]

K P. Misra, T. N. Ghose and *Rajbi Prasad*—for Appellants.

S. N. Sen, Niamat Ullah, Ali Zaheer, Bisheshwar Prasad Misra, Harish Chandra, Bisheshar Nath, L. S. Misra, C. H. Harkauli, Mohammad Hasan Imam, J. K. Tandon, K. B. Bhargava, and *Hyder Husein*—for Respondents.

Judgment.—These seven appeals arise out of four suits. Appeal No. 11 is the plaintiff's appeal in suit No. 1. Appeal No. 7 is the plaintiff's appeal in suit No. 2. Appeal No. 18 is the plaintiffs' appeal in suit No. 3 and appeal No. 22 is the plaintiffs' appeal in suit No. 4. The other three appeals are defendants' appeals in suit No. 3. It will thus appear that only suit No. 3 has succeeded and the three other suits have failed in the trial Court. The successful plaintiff in suit No. 3 is Arjun Singh. He is also dissatisfied with a part of the decree of the trial Court. Hence appeal No. 18.

For the purposes of this judgment we will mention the name of the first plaintiff only in each suit. The other plaintiffs are the transferees in the character of financiers of certain portions of the estate in suit. Accordingly in suit No. 1 Sripal Singh or Sripat Singh is the plaintiff. In suit No. 2 Jangu Singh is the plaintiff. In suit No. 3 Arjun Singh is the plaintiff as already mentioned. In suit No. 4 Surajbali Singh is the plaintiff.

One Raja Harihar Bakhsh Singh died on 8th February 1923 possessed of the taluqdari estate of Saraura and other immovable property of considerable value situate within the district of Sitapur in the province of Oudh. Raja Harihar Bakhsh Singh had no issue. His widow, Rani Vishunath Kuar, succeeded to the estate of her deceased husband and remained in possession thereof till 23rd June 1924, on which date she died. The question as to title to succession arose on the death of the widow and as is usual in such cases a scramble ensued. The scene of scramble was first laid in the revenue Court of Sitapur which took up proceedings for mutation of names consequent on the death of Rani Vishunath Kuar. The number of claimants was large but we are now concerned with the plaintiffs of the suits mentioned above. There were alsosome proceedings under the provisions of S. 145, Criminal P. C. The result has been that the disputed estate was placed into the hands of a receiver whose possession was maintained by the trial Court until execution proceedings were taken by the successful party under the decree of that Court. The nature of the relief, therefore, sought in these suits is one of declaration of title. The Court of revenue accepted the title of one Jagmohan Singh in respect of the taluqdari estate and some other villages. In respect of the non-taluqdari immovable property title was adjudged in favour of Arjun Singh. The claims of all others were rejected.

In suits Nos. 1, 2 and 4 the plaintiffs attack the title of Arjun Singh to the non-taluqdari immovable property and each sets up title in himself. They do not challenge Jagmohan Singh's title to the taluqdari estate. In suit No. 3 Arjun Singh claims title to the taluqdari estate and certain moveable property. The chief defendant in his suit is Jagmohan Singh who obtained the order of mutation of names in his favour from the Court of revenue.

The trial Court has dismissed Arjun Singh's suit in so far as the relief for a declaration of title to the taluqdari estate and five other villages was concerned and has decreed it in respect of some non-taluqdari immovable property which was not awarded to him by the Court of revenue and some moveable property.

On the question of title as to the taluqdari estate the trial Court has found that Jagmohan Singh belongs to the senior line though remoter in degree than Arjun Singh to the common ancestor. The finding that Jagmohan Singh belongs to the senior line was challenged in the memorandum of appeal No. 18 filed by Arjun Singh but was expressly abandoned by his learned advocate, Dr. S. N. Sen, at the hearing of the appeal. The matter argued on his behalf in so far as the question of title is concerned is that his ancestor, Shahji, son of Girdhar Das, and Raja Harihar Bakhsh Singh's ancestor, Bhim Singh, another son of Girdhar Das, were born of the same mother while Jagmohan Singh's ancestor, Rai Gaj Singh, a third son of Girdhar Das. was born of a different mother. It is contended that if these premises are established in fact Arjun Singh has a preferential title to the taluqdari estate under Cl. 10, S. 22, Act 1 of 1869. As to the five villages, the finding of the trial Court is that in the events which have happened those villages must be treated as taluqdari property. Arjun Singh impugnes the correctness of this finding and it is argued on his behalf that these villages should be treated as non-taluqdari property to which he is entitled according to the finding of the trial Court. These are the only two points involved in Arjun Singh's appeal No. 18 and, as already stated, appeals Nos. 8, 10 and 21 are the defendants' appeals against the trial Court's decree in favour of Arjun Singh's title to non-taluqdari property in Arjun Singh's suit No. 3. Arjun Singh's title to such property rests on the finding of the trial Court that he is the 7th in degree in descent from the common ancestor. If this finding is correct then it is agreed that the plaintiffs Jangu Singh and Suraj Bali Singh must fail as they are lower in degree than Arjun Singh. As regards the title of the plaintiff, Sripat Singh, the finding of the trial Court is that Sripat

Singh has failed to establish his relationship with the propositus, Raja Harihar Bakhsh Singh. If this finding is reversed then it is agreed that Sripat Singh and Arjun Singh will share in equal moities in the non-taluqdari estate if the finding that Arjun Singh is in the 7th degree is upheld.

The case of the plaintiffs, Jangu Singh and Surajbali Singh, is that they stand in the 8th degree and Arjun Singh in the 9th degree of descent from the common 'ancestor. The precise matter for determination, therefore, as between these two plaintiffs and Arjun Singh is the relative nearness of their degree of relationship with Raja Harihhar Bakhsh Singh.

On the statement of the case and the findings of the trial Court as given in the preceding portion of this judgment three main questions of fact emerge for decision : (1) Is Sripat Singh a relation of the propositus ? (2) Is Arjun Singh 9th in degree of descent from the common ancestor ? (3) Were Shahji and Bhim Singh born of one mother and Rai Gaj Singh of a different mother ? A further subsidiary question for decision is as to whether the five villages mentioned above are taluqdari or non-taluqdari property.

We desire to state broadly at the outset that in spite of the elaborate criticizm which we have heard in the arguments addressed to us from the Bar we find no serious defects in the 'grounds on which the learned Judge of the trial Court has accepted or rejected the oral testimony produced by the parties in these cases. In the midst of the alarming conflict in the oral testimony we propose to adopt for our own guidance two tests : (1) Which set of this conflicting evidence is consistent with documentary evidence : and (2) with facts established beyond reasonable doubts and with probabilities.

Is Sripat Singh a relation of Raja Harihar Bakhsh Singh ? As already stated, the trial Court's answer to this question is in the negative. After prolonged and careful consideration of the merits we have come to the conclusion that the finding of the trial Court must be affirmed. Having regard to our agreement with the trial Court we do not think that it is necessary for us to enter into any elaborate discussion of the evidence produced in support of or in opposition to Sripat Singh's case. We propose to confine our attention to prominent and outstanding characteristics of the evidence in this behalf.

In the pedigree at the begining of the trial Court's judgment it will be noticed that none of the six sons of Girdhar Das was Shahji. Sripat Singh claims to be the descendant of Shahji. The precise line of descent on which he relies is as follows:

Girdhar Das	...	...	1
Shahji	...	...	2
Kumba Singh	...	...	3
Mohkam Singh	...	...	4
Jawahir Singh	...	...	5
Ranjit Singh	...	...	6
Sripat Singh, plaintiff		...	7

There is no controversy upto and inclusive of Mohkam Singh. There is also no serious controversy as to the fact that Sripat Singh is the son of Ranjit Singh, who was the son of Jawahir Singh. The controversy, therefore, centres on the question as to whether Jawahir Singh, grandfather of Sripat Singh, was the son of Mohkam Singh. The sheet-anchor of Sripat Singh's case in proof of the link in dispute is a document which exists on the record of a file of the second summary settlement of the Saraura estate, which is the estate now in dispute, in the district of Sitapur. A certified copy of this document (Ex. 6) is on the record of Sripat Singh's case. We have before us, as the trial Court had before it, the whole of the settlement file in which this document exists. If this document is genuine, there is no doubt whatsoever that Sripat Singh's case is entirely proved and furthermore, Arjun Singh is removed one degree lower down that is from the 7th to the 8th degree in descent from the common ancestor. On an elaborate consideration of every material circumstance bearing on the question as to whether this document is a genuine document or otherwise, the trial Court has come to the conclusion that it is not.

It may be that we do not agree with some part of the reasoning adopted by the learned Judge of the trial Court but it will serve no useful purpose to emphasize the points of difference between the learned Judge and ourselves

because we find ourselves in entire agreement with the final conclusion of the learned Judge that this document is not a genuine document. It is much to be regretted that papers of such serious importance as the settlement file contains could be approached for the purpose of being tampered with.

The province of Oudh was annexed to the British territories by Lord Dalhousie, Governor-General of India, on the 13th February 1856. Immediately following the annexation inquiry regarding land tenures in Oudh and rights in such tenures was undertaken. Little progress was made in this direction before the Mutiny of 1857 broke out. Most, if not all, of the information which was at an immense expense and labour obtained and recorded in the course of the inquiry then made was destroyed in the Mutiny. The inquiry came subsequently to be known as the first summary settlement or the summary settlement of 1856. After the military occupation of the province of Oudh by the British troops and the establishment of peace in the land consequent thereon Lord Canning's famous proclamation of the 15th March 1858 was promulgated. By the effect of this proclamation the proprietary right in the soil of the province of Oudh was confiscated to the British Government. The Government reserved to itself the authority to dispose of that right "in such manner as to it may seem fit." The first step taken in the direction of bestowing and settling titles in the lands of Oudh was the inquiry which subsequently came to be known as the second summary settlement. The decision of the tribunals conducting this second summary settlement constitutes the Magna Charta of the people of Oudh in the matter of their proprietary rights in the soil of the province. The sanads subsequently granted to the taluqdars of Oudh merely recognised title adjudged in their favour at the second summary settlement as Lord Canning's letter of the 10th October 1859 shows.

The above are historical facts. Those who have knowledge of the procedure adopted by the Courts of the second summary settlement can safely vouch for the fact that the files of those Courts constitute in a large majority of cases the fountain-head of titles and no titles after the *tabule erasa* created by Lord Canning's Proclamation of the 15th March 1858. Everybody who has or had connexion with any piece of land in Oudh is aware of it. Therefore every person who conceives the prospect of a claim on title to any landed estate in Oudh first turns his attention to the files of the second summary settlement in search of proof or disproof of such claims. Raja Harihar Bakhsh Singh died in February 1923. Virtually the question of succession to his estate opened then. His widow lived for a short period afterwards and died on the 23rd June 1924. Raja Harihar Bakhsh Singh had died without any issue. The search for the heir or heirs to his estate was to be made amongst his distant collaterals.

In the natural course of things this search must have begun immediately after the death of the said Raja. This is a natural presumption in the circumstances of the case but it is in evidence that the scramble for succession commenced almost before the last breath had gone out of the body of Rani Vishunath Kuar. Sripat Singh stands up as one of the claimants. The first application which he makes is dated 16th July 1924 (Ex. A-41), which does not seem to have reached the hands of the Tahsildar in charge of the inquiry until the 18th July, the last date fixed for receiving the claims and objections. Sripat Singh did not present this application to the Tahsildar in person. He sent it by registered post. We think that had this document been in existence on the settlement file at any time previous to 16th July 1924 Sripat Singh would either file a certified copy of the same along with his application of the 16th July or at the least some mention of it would have been made in the application itself. Neither of the two things happened.

We infer, therefore, that this document now under consideration was not in existence at that time. (The judgment then discussed the evidence relating to this and concluding that the document was not a genuine document, proceeded.) After the finding recorded above very little remains of Sripat Singh's case. It is said that several members of the family visited on several occasions the holy places of Benares and Muttra on pilgrimage and that entries were made of the names of visitors and also of some of their immediate ancestors in the books kept by the priests, who attended on the visitors.

Some of such books are produced in the case. Those of Muttra priests are not before us. They were apparently taken back by the witnesses who produced them in the trial Court and no attempt was made by Sripat Singh or on his behalf to produce them again for our observation. In the absence of the originals, therefore, we have no reason whatsoever to disagree with the finding of the trial Court that the books are wholly unreliable. The only book, therefore, which remains to be examined and has a direct bearing on the issue in question is the one which has come from Benares and the relevant entry is Ex. 16/3. The appearance of the book, the manner in which it is maintained, the blank pages at frequent intervals and the position of the person from whose custody it has come will not justify any presumption in favour of the genuineness of the entry in question under S. 90, Indian Evidence Act, 1872. The trial Court has refused to make any such presumption and we think rightly. The writing of the entry is sought to be proved by the evidence of a witness called Ganpat Rai. According to him this entry is in Bisram Singh's handwriting with which the witness professes to be familiar but he broke down in cross-examination when he was confronted with another writing in the same character which he identified as Bisram Singh's writing though admittedly it was not his. The learned Judge in the trial Court does not accept the statement of Ganpat Rai as worthy of credence and we have heard nothing in arguments to induce us to come to a contrary opinion.

For the reason already stated, we refrain from entering into any discussion of the oral evidence produced by Sripat Singh in support of his case. This evidence was read to us in extenso by the learned counsel, Sir Ali Imam, who argued the appeal on behalf of Sripat Singh. If documentary evidence produced by Sripat Singh fails to establish his case either directly or even by furnishing any corroboration of the oral evidence we feel no hesitation in accepting the opinion of the trial Court as to the value of the oral evidence produced by Sripat Singh.

Apart from the oral evidence produced by Arjun Singh in rebuttal of Sripat Singh's case there is one document which leads to an inference that had there been any other descendant than Bisram Singh alive at the time of the regular settlement of the district he would have been mentioned in this document. It is Sripat Singh's case that his father, Ranjit Singh, was then alive. Ranjit Singh's name is, however, not mentioned: only Bisram Singh's name is mentioned in this document. This is Ex. C88. It purports to be the history of Saraura family prepared by some official of the British Government during the progress of the first regular settlement of the district of Sitapur. So far as it is a record of traditions as to ancient events, it is hardly of much evidential value but there is no reason to doubt its authenticity as to the record of contemporaneous events. We may mention here that there appears to be some interpolation in describing Bisram Singh's degree of relationship with Shahji and it is agreed at the Bar on both sides that the apparent interpolation should be discarded altogether. Sripat Singh's appeal, therefore, fails.

The second question framed by us, namely, is Arjun Singh ninth in degree of descent from the common ancestor brings into relief the issue which the other plaintiffs have raised against Arjun Singh's claim of being the nearest collateral alive of the late Raja Harihar Bakhsh Singh. Arjun Singh traces his descent as follows:

Girdhar Das	... ...	1
Shahji	... ...	2
Kumbha Singh	... ...	3
Mohkam Singh	... ...	4
Ram Bakhsh Singh	... ...	5
Bisram Singh	... ...	6
Arjun Singh plaintiff	...	7

His opponents set up the following pedigree :

Girdhar Das	... ...	1
Shahji	... ...	2
Kumbha Singh	... ...	3
Mohkam Singh	... ...	4
Gosha Singh	... ...	5
Fateh Singh	... ...	6
Ram Bakhsh Singh	... ...	7
Bisram Singh	... ...	8
Arjun Singh, plaintiff	...	9

On a comparison of the two pedigrees it will be seen that Arjun's opponents introduce two more names successively, Gosha Singh and Fateh Singh, between Mohkam Singh and Ram Bakhsh Singh. If the defence is true then obviously Arjun Singh has no title in any portion of the estate in dispute. The title in that event would vest in Jangu Singh and Suraj Bali Singh, who are 8th in degree from the common ancestor. The relevant portion of the pedigree tracing down the descent of Jangu Singh is as follows:

Girdhar Das	... ...	1
Rai Gaj Singh	... ...	2
Sadhan Singh	... ...	3
Inayat Shah	... ...	4
Ajab Singh	... ...	5
Umrao Singh	... ...	6
Bhabhuti Singh	... ...	7
Jangu Singh plaintiff	..	8

And that of Surajbali Singh is as follows:

Girdhar Das	... ...	1
Harbans Rai	... ...	2
Dulah Rai	... ...	3
Mohkam Singh	... ...	4
Nehal Singh	... ...	5
Bhup Singh	... ...	6
Balwant Singh	... ...	7
Surajbali Singh plaintiff	...	8

These pedigrees are no longer in dispute. They were expressly admitted before us. The trial Court has found that Gosha Singh and Fateh Singh are mythical persons introduced by Jangu Singh and Surajbali Singh for the purpose of defeating Arjun Singh's title as against their own. We think that the finding is correct. (The judgment then discussed the evidence and proceeded.) We have already observed that there is no documentary evidence in support of the same. In this state of things we are not prepared to disagree with the opinion of the learned Judge in the trial Court that the oral evidence produced by Jangu Singh and others in support of the case just now mentioned is unreliable and cannot be safely made the foundation for a judicial finding as to the existence of Gosha Singh and Fateh Singh. This being so, Arjun Singh's case that he is in the 7th degree of descent from the common ancestor and that consequently he is the nearest collateral alive entitled to succeed to the estate of Raja Harihar Bakhsh Singh remains unrebutted. It was not seriously disputed that if the two steps constituted of Gosha Singh and Fateh Singh did not exist in fact and Sripat Singh's case fails on merits altogether Arjun Singh must be taken to have proved his case.

We may, however, briefly state the merits of Arjun Singh's claim. It is not disputed now, and indeed it was not seriously disputed in the trial Court, that Arjun Singh is the de-cendant of Shahji, one of the sons of Girdhar Das. It is also not disputed that Mohkam Singh was the grandson of Shahji. It is further proved by documentary evidence of unimpeachable nature that Arjun Singh is the son of Bisram Singh (Exs. A8 and A9). It is also proved by similar evidence that Bisram Singh was son of Ram Bakhsh Singh (Ex. A7). What remains now for Arjun Singh to prove for the success of his title is the fact that Ram Bakhsh Singh was the son of Mohkam Singh. This link of relationship is proved by oral evidence. (The judgment here discussed the evidence of some witnesses and proceeded).

There is, however, one piece of documentary evidence produced in this case by Thakurain Sheoraj Kuar at the instance of Arjun Singh, which needs mention here. This is a pedigree (Ex. A53). The lady states that it has been with her for the last 21 years and that it has been all along with her amongst the papers relating to the estate of Saraura. The mutation, to which the lady refers, should not be confused with the mutation following on the death of Raja Harihar Bakhsh Singh. She means the mutation following on the death of her husband which was made in her favour. When originally the pedigree was found 21 years ago in the papers of the lady's husband it was Mahraj Bahadur her mukhtar, who had made the search. The papers were kept in the mardana portion of the house and were in charge of the diwan. The learned Judge of the trial Court has accepted the statement of the lady as true and we have no reason to take a contrary view.

Dargahi Lal (D. W. 18) has given evidence in proof and in support of this pedigree. He is a patwari of 50 years of age. He was in the service at Saraura about 30 years ago. He was a moharrir under Bhawanidin who was the mukhtar of Ganesh Bakhsh Singh, husband of Thakurain Sheoraj Kuar. He states that the pedigree is in the handwriting of Bhawanidin and that he had seen it while he was in service at Saraura. It was kept in the office of Diwan Mahtab Rai. At that time, he says, Ganesh Bakhsh Singh was alive and was the owner in part of the Saraura estate. We think that the witness is a truthful witness and nothing was elicited in cross-examination which could throw doubt on his credibility. The fact that Bhawanidin was in the service of the family is proved by documentary evidence (Exs. C46 and A10) : the former of the year 1867 and the latter of the year 1864. Ex. C46 is a pedigree existing in the settlement file of village Alaipur. It seems to have been made for the purpose of preparing the khewat of village Saraura and bears the signature of Uman Prasad in the handwriting of Bhawanidin, general agent. Ex. A10 is the wajib-ul-arz of village Alaipur. Amongst others it bears, at the end, the signature of Uman Prasad written by the pen of Bhawanidin, general agent.

There is no reason to doubt the authenticity of these signatures. It will be remembered that Uman Prasad was the father of Ganesh Bakhsh Singh, husband of Thakurain Sheoraj Kuar. It will thus appear that a part of the statement of Dargahi Lal is supported by documentary evidence. It follows that Ex. A53 is a pedigree kept and maintained by Ganesh Bakhsh Singh and has now come before the Court from the custody of his widow who found it amongst the papers of her husband. There is little doubt, therefore, as to its genuineness. The learned Judge of the trial Court has, however, ruled it out of evidence on the ground that it is not a "family pedigree" within the meaning of Cl. (6), S. 32, Indian Evidence Act, 1872. We do not agree with the learned Judge. The words "family pedigree" in the clause mentioned above should be construed to mean a "pedigree of the family" and having regard to the class of people to which the clause was intended to apply generally we have no doubt in our mind that the pedigree in question is a family pedigree.

It seems to us that the words "family pedigree", in Cl. 6, should not be construed according to the standared adopted by Courts of England in regard to pedigrees of English families. Peoples of India and peoples of England widely differ in their habits of thought, modes of expression and indeed in their entire system of family life. Its very form and appearance impresses it with the characteristics of a pedigree of an Indian Hindu family. The first name mentioned is Maldeo and he is described as the highest ancestor. The name is placed between two figures of peacocks facing each other. On the crests of the birds is placed the name of Karandeo in a circular flower form. From this circle spring two lines one on the right and the other on the left and each line is made up of two fishes. On the head of the last fish on the right side is the name of Harihar Das Then come Harihar Das's two sons whose branches cover nearly the exact half of the entire space on the right hand side. On the head of the last fish on the left side is the name of Nanda Das, the second son of Karandeo. After Nanda Das, and issuing from him there are two branches of his two sons, Jagat Singh and Girdhar Das.

As against Jagat Singh, the entry is that he embraced Islam and his descendants are to be found in the village of Gauria Hasanpur. Jagat Singh's line is not traced down. From Girdhar Das, the other son of Nanda Das, issue six branches showing his six sons, Rai Gaj Singh, Bhim Singh, Shahji, Kesri Singh issueless, Hansrai zamindar of Bijwamaue and Harbans Rai. The line of Rai Gaj Singh is traced down to Ganesh Singh, father of Jagmohan Singh, who has succeeded to the taluqdari estate under the orders of the mutation Court. It is also traced down to Bhabhuti Singh, father of Jangu Singh, the claimant in suit No. 2. In the line of Bhim Singh the pedigree comes down to Raja Harihar Bakhsh Singh, and also to Gajadhar Bakhsh Singh, husband of Thakurain Sheoraj Kuar. The line of Shahji brings us down to Arjun Singh, plaintiff in suit No. 3, who has succeeded to the non-taluqdari estate under the orders of the mutation Court. The line of descent from Mohkam Singh claimed by Sripat

Singh does not exist. The line of Harbans Rai is traced down to Surajbali Singh, plaintiff in suit No. 4.

It will be seen from what has been stated above that the pedigree under consideration brings us down from the remotest ancestor to the generations living contemporaneously with Gajadhar Bakhsh Singh, husband of Thakurain Sheoraj Kuar, in whose time it was prepared. The document is, therefore, a record of family traditions as to pedigree and of the existence of persons contemporaneously alive. The authenticity of that part of the record which embraces the names of persons who existed before the living memory rests on the fact that there is nothing on the record to show, directly or inferentially, that the pedigree was prepared with any motive other than the natural motive of preparing and preserving a record of family traditions relating to the family pedigree.

As against the admissibility of the pedigree (Ex. A53) our attention was drawn to a decision of their Lordships of the Judicial Committee in *Kalka Prasad* v. *Mathura Prasad* (1). In this case the plaintiffs gave in evidence at the trial three pedigrees; the last one was ruled out of evidence as having been made post litem moto. The second was admitted as a declaration made by deceased member of a family touching the family reputation or tradition on the subject of his descent made ante litem moto. The first pedigree was also admitted in evidence under the same conditions as the second. As regards all the three pedigrees their Lordships observed :

> They are not ancient family records handed from generation to generation and added to as a member of the family dies or is born but documents drawn up on a particular occasion for a specific purpose by members of the family, and must accordingly be treated as mere declarations made by the persons who respectively drew them up or adopted them.

As to the pedigree before us it is not shown to have been drawn up on a particular occasion for a specific purpose as the three pedigrees before their Lordships were nor do we think that the first portion of the observation of their Lordships is intended to lay down an exhaustive definition of "family pedigree" as used in Cl. 6, S. 32, Indian Evidence Act, 1872. Those two words simply indicate the highest and the best type of a family pedigree. The decision does not show that a pedigree not conforming to that standard cannot be a family pedigree. On these grounds we think that Ex. A53 is admissible in evidence.

This pedigree proves facts which stand proved independently of it as has already been shown. Those facts, it will be remembered, are these : (1) Sripat Singh is not a descendant of Mokham Singh and (2) Arjun Singh stands in the 7th and not in the 9th degree of descent from the common ancestor. There is, however, one more fact proved by this pedigree, which has a very serious effect on Arjun Singh's claim to the taluqdari estate. This is a document which has been produced before the Court at the desire of Arjun Singh and he has all along relied on it. As already observed, Arjun Singh's chief, indeed the only opponent, in the matter of his claim to the taluqdari estate, is Jagmohan Singh. Jagmohan Singh's learned advocate, Mr. Bisheshar Nath Srivastava, admitted both the genuineness and the admissibility in evidence of this pedigree (Ex. A63). The exact significance of what we have just now said will appear when we come to deal with the third question in the case This finishes the appeals of Jangu Singh and Surajbali Singh, both of which fail.

The third question for decision is as follows:

Were Shahji and Bhim Singh born of one mother and Rai Gaj Singh of a different mother ?

This question exclusively relates to Arjun Singh's claim for the taluqdari state and the contest to that estate is between him and Jagmohan Singh. The second summary settlement, following the suppression of the Mutiny of 1857, of the Saraura estate in the district of Sitapur was made with Ganga Bakhsh Singh, father of the last male holder, Raja Harihar Bakhsh Singh, in the year 1859. Subsequently his name was entered at No. 85 of List 1 and at No. 32 of List 2 of the list prescribed by S. 8, Act I of 1862. On the death of Ganga Bakhsh Singh, succession to whose estate came to be governed by the provisions of S. 22 of the Act, his only son, Harihar Bakhsh Singh, succeeded. On the death of Harihar Bakhsh Singh, intestate, his widow, Rani Vishwanath Kuar, succeeded under Cl. 6 of the same Act and it is agreed

(1) [1909] 30 All. 510=1 I. C. 175 = 35 I. A. 166=11 O. C. 362 (P. C.).

that on the death of the widow succession to the Saraura estate is controlled by Cl. 10, S. 22, Act I of 1869. It was admitted by Arjun Singh's learned counsel before us that Rai Gaj Singh was the eldest of the six sons of Girdhar Das and therefore Jagmohan Singh, descendant of Rai Gaj Singh, though four degrees lower from the common ancestor than Arjun Singh is, if nothing else is proved, entitled to succeed to the taluqa- of Saraura under the provisions of Cl. 10, S. 22, Act I of 1869 as being the nearest male agnate according to the rule of lineal primogeniture. 'Arjun Singh's case, however, is that his ancestor, Shahji, and Raja Harihar Bakhsh Singh's ancestor, Bhim Singh, the two brothers, were born of one mother while Rai Gaj Singh, the third brother, the ancestor of Jagmohan Singh, was born of a different mother and, therefore, on the principle of preference of full blood over half blood he is entitled to oust Jagmohan Singh from his right to the Saraura estate

Obviously the first step which Arjun Singh must prove for the success of his case is the question of fact just now mentioned. The finding of the trial Court is against Arjun Singh and after a careful consideration of the evidence and the arguments in this connexion we have come to the conclusion that the finding must be maintained. (The judgment discussed the evidence on this part of the case and proceeded.) We are of opinion that the most effective and almost conclusive rebuttal of Arjun Singh's case on this point is furnished by his own document (Ex. A53), the pedigree produced at his instance by Thakurain Sheoraj Kuar and which we have discussed already at some length. It will be remembered that Bhim Singh, one of the six sons of Girdhar Das and from whom Raja Harihar Bakhsh Singh descended, had a son Sadhai Singh. According to this pedigree Sadhai Singh had two sons, Dulare and Man Singh. Against the name of Dulari the entry is "born of one wife" and against the name of Man Singh the entry is "born of the second wife." It is therefore, highly probable that if Shahji and Bhim Singh were born of one mother and their other four brothers of a different mother this pedigree would have mentioned that fact. There is at least one more such entry in this pedigree amongst the descendants of Harihar Das, one of the sons of Karandeo, grandfather of Girdhar Das. There is another document on this record which leads to the same conclusion. Ex. D5 is a pedigree which Raja Harihar Bakhsh Singh had filed in a suit between himself and his grand-uncle, Uman Prasad, in the Court of the District Judge of Sitapur in the year 1881. The authenticity and the admissibility in evidence of this pedigree has been all along conceded by all parties. In this pedigree also Sadhai Singh's son Dund Singh (or Dulare Singh) is stated as born of the first wife of Sadhai Singh and his second son, Man Singh, is stated as born of his second wife. There is no such entry against the names of any of the six sons of Girdhar Das. We, therefore, uphold the finding of the trial Court on this question.

Having regard to this finding of fact it is not necessary to decide the question as to whether full blood should be given preference over half blood in selecting an heir under Cl. 10, S. 22, Act I of 1869.

It now remains to decide the subsidiary question in Arjun Singh's appeal as to whether the five villages (1) Baunabhari, (2) Mau (3), Jajaur, (4) ¼ of Kathwa and (5) ¼ of Himmat Nagar should he treated as taluqdari property or as non-taluqdari property. Arjun Singh's case is that it is non-taluqdari property. Jagmohan's case is that it is taluqdari property. The trial Court has decided this question in favour of Jagnohan Singh by applying the doctrine of merger and the argument on behalf of Arjun Singh before us was merely devoted to showing that there was no merger. We, however, think, as we intimated at the hearing, that there was no question of merger in the circusmtances bearing on this part of the case. It was agreed and it is also proved by the kabuliat issued at the settlement of 1864 (Ex. C6) that the villages mentioned above formed part of the Saraura estate in respect of which Ganga Bakhsh Singh's name was entered in the two lists 1 and 2 prepared under S. 8, Act 1 of 1869. It follows and was not disputed that the villages in question formed part of the taluqdari estate of Saraura which on the death of Ganga Bakhsh Singh devolved by right of inheritance on his only son, Raja Harihar Bakhsh Singh, under Cl. 1, S. 22, Act 1 of 1869.

In spite of the settlement of the entire Saraura estate with, and the grant of a sanad for the same to, Ganga Bakhsh Singh claims were made by Uman Prasad, uncle, and Bisheshar Bakhsh, the first cousin, of Ganga Bakhsh Singh for a share in the estate of Saraura. This dispute was settled by a compromise dated 4th May 1864. According to this compromise the whole estate was divided into three portions, viz.,

Ganga Bakhsh Singh ... One half.
Bisheshar Bakhsh ... One fourth.
Uman Prasad ... ... One fourth.

In recognition of the taluqdari title conferred by the settlement and the sanad on Ganga Bakhsh Singh, Uman Prasad and Bisheshar Bakhsh agreed to pay to Ganga Bakhsh Singh taluqdar

along with the instalment (of revenue) Rs. 10 per cent on account of taluqdari right on the present Government revenue or on such amount as may hereafter be assessed from time to time.

Subject to this superior right in favour of the taluqdar, Ganga Bakhsh Singh acquired complete proprietary rights in the property allotted to him under the compromise of the 4th May 1864. The construction of this compromise was the subject-matter of a contoversy between Harihar Bakhsh Singh and Uman Prasad which arose after the death of Bisheshar Bakhsh Singh's widow. Harihar Bakhsh Singh's claim was that on the true construction of the agreement of the 4th May 1864 the property allotted to Bisheshar Bakhsh Singh reverted to him on Bisheshar Bakhsh Singh's death in the year 1864 but that under an agreement in a litigation of 1867 between Ganga Bakhsh Singh and the widow of Bisheshar Bakhsh Singh, the widow was allowed to retain possession till her death which took place in October 1879 (Ex. C52). This controversy was finally set at rest by their Lordships of the Judicial Committee in *Thakur Harihar Bakhsh* v. *Thakur Uman Pershad* (2). According to this decision Bisheshar Bakhsh Singh was held to have acquired under the agreement of the 4th May 1864 heritable estate in the properties allotted to him thereby. The true nature of the estate, therefore, which Bisheshar Bakhsh Singh and Uman Pershad acquired was "under-proprietary," which is only equivalent to saying that they had full proprietary rights subject to a liability of 10 per cent, on the Government revenue in favour of the superior proprietor, the taluqdar. In the village papers the tenure was also described as under-proprietary (Ex. D11). The villages now in question had fallen to the share of Uman Prasad. Uman Prasad had therefore the right just now mentioned in those villages.

On the 30th September 1902 Harihar Bakhsh Singh purchased those villages, in other words, the rights of Uman Prasad in those villages from Gajadhar Bakhsh Singh, grandson of Uman Prasad (Ex. C54). On the facts stated above the case on behalf of Arjun Singh is that this property being the self-acquired property of Raja Harihar Bakhsh Singh is non-taluqdari property.

We are unable to accept the argument. The villages in question were included in the taluqdari sanad of Ganga Bakhsh Singh. They were also included in the kabuliat which he executed at the settlement. There can be no doubt, therefore, that having regard to the provisions of S. 3, Act 1 of 1869 they formed part of Saraura estate to which the provisions of Act 1 of 1869 applied and we think have continued to apply all along subject to the under-proprietary interest in favour of Uman Prasad under the agreement of the 4th May 1864. The legal effect of that agreement was to carve out and set apart a particle of the taluqdari title. This particle ceased to exist on the purchase made by Harihar Bakhsh Singh on the 30th September 1902. The taluqdari estate remained where it was and the subordinate right which had existed for a period of about 38 years vanished. On these grounds we are of opinion that the five villages in question are taluqdari property.

While this judgment was nearing completion the two bahis which were produced in the trial Court and marked as Exs. 19 and 20 respectively and to which we have alluded in our judgment at pp. 15 to 17 were produced before us with the prayer that they may be kept on the record of the case. We have examined these bahis which have come from the custody of a panda of Muttra. They are fully considered by the learned Judge of the trial Court at p. 181 of his judgment and we entirely agree with the criticizm which he has made as to the unreliable character of those books. The precise

(2) [1887] 14 Cal. 296=14 I. A. 7=4 Sar. 766 (P. C.).

entry in Ex. 19, on which reliance is placed, is to the following effect: " Ranjit Singh, son of Jawahir Singh, grandson of Mohkam Singh. Thakur Panwar, resident of Kuarpur."

There is no date and no signature and no endorsement and the entry only occupies one and a half lines. It has been crowded into the bottom of a page just beneath the entry Ex. 19/3 and two others,

as the learned Judge of the trial Court observes.

The entry in Ex. 20 purports to bear the signature of Ranjit Singh and is dated 1937 Sambat. It is in the middle of the page. The entry immediately preceding it is dated 1954 Sambat. We think that the fact that the entry of an earlier date comes after the entry of a later date and much lower down in the page entirely extinguishes its authenticity. The bahi contains an index of villages from which the Jajmans came in alphabetical order but Kunarpur, the village of Ranjit Singh, does not appear in this index. Evidence to prove the signature of Ranjit Singh was given by one Ganpat Rai. He failed in this attempt as he failed in his attempt to prove the handwriting in the Benares bahi. Another witness produced for the same purpose is Bishunath Singh (P. W. 20). His evidence is no better. In agreement with the trial Court, therefore, we are unable to place any reliance on these bahis. On the grounds stated above, all these appeals fail and they are dismissed with costs.

N.D. *Appeal dismissed.*

A. I. R. 1928 Oudh 135

STUART, C. J. AND PULLAN, J.

Tulshipat Ram and *another*—Plaintiffs—Appellants.

v.

Kamakhiya Dat Ram and *others*—Defendants—Respondents.

S. A. No. 50 of 1927, Decided on 29th November 1927, against the decree of the Addl. Sub-Judge, Fyzabad, D/- 13th January 1927.

Civil P. C., O. 6, R. 17—Amendment—Amendment introducing matter of a more contentious nature cannot be allowed unless good cause is shown for its previous omission.

The rule allows a wide discretion to the Court in permitting an amendment, but the discretion is with the Court, and where that discretion has been exercised on materials which have been admitted legally and for judicial reasons, that discretion should not be lightly interfered with. [P 136 C 2]

Where the plaintiffs some months after they had filed their original plaint applied to amend the plaint and introduce into it matter of a much more contentious nature than the matter which it previously contained,

Held : that no Court has right to permit an amendment of this kind unless very good cause is shown for the previous omission. [P 137 C 2]

Niamat Ullah—for Appellants.

Judgment.—This is a plaintiffs' appeal. Rai Sri Ram Bahadur, C. I. E., was a vakil, who practised in the Lucknow Courts. He was a resident of Fyzabad, where he possessed extensive property. He died on 26th August 1914, leaving three sons B. Sitapat Ram, B. Rampat Ram and B. Tulshipat Ram. He executed on 22nd May 1911, a registered will by which he devised his property to his sons and their heirs. His eldest son B. Sitapat Ram died on 3rd November 1925. He was predeceased by his younger brother, B. Ramapat Ram. The plaintiffs in the suit out of which this appeal arises are B. Tulshipat and B. Ambikadat Ram, son of the deceased B. Ramapat Ram. Their case was that a simple money decree was passed against B. Sitapat Ram in favour of Jagjiwan Das and that Jagjiwan Das in execution of this decree brought to sale as the property of B. Sitapat Ram the village of Miranpur Sadar Ali in the Fyzabad district and that the whole village was sold in execution of this decree to Lala Kishan Narian.

The allegations in the plaint were to the effect that under the will of the late Rai Sri Ram Bahadur the village in question had been devised in three equal shares to B. Sitapat Ram, B. Ramapat Ram and B. Tulshipat Ram and that in consequence the sale in execution, in so far as it exceeded the sale of the one-third share belonging to B. Sitapat Ram, was invalid as against the plaintiffs. The date of the sale is not mentioned in the plaint, but it admittedly took place on 27th October 1925. The plaintiffs arrayed as defendants the heirs of B. Sitapat Ram, Lala Jagjiwan Das, the decree-holder, and Lala Kishan Narain the auction-purchaser. The plaint was filed on 25th August 1926. The heirs of Babu Sitapat Ram and the decree-holder Jagjiwan Das did not enter an appearance and proceedings against them were ex parte. Lala Kishan Narain did not defend the suit as it stood ori-

ginally. He admitted that a mistake had been made and that he had only acquired by virtue of his purchase in the Court sale, one-third in the village of Miranpur Sadar Ali. In so far as he was concerned the suit came to an end by confession of judgment, but the trial Judge adjourned the hearing to the 30th November 1926 in order to record evidence as against the defendants who had not entered an appearance. Upon that date the plaintiffs made an application for leave to amend the plaint. This application does not state accurately the relief which they sought. That relief is, however, stated accurately by the learned counsel who has appeared for them in the present appeal. It appears that Rai Sri Ram Bahadur was the holder of an usufructuary mortgage of what is known as the Ilaqa Jaipur. Included in the Ilapa Jiapur is one village known as Salahpur Rajao. In the sale in execution of Jagjiwan Das's decree, which took place on 27th October 1925, not only was the village of Miranpur Sadar Ali sold, but the mortgagee rights possessed by Rai Sri Ram Bahadur in Salahpur Rajao only out of the mortgagee rights in the whole Ilaqa Jaipur (which consists of a large number of villages) were brought to sale and purchased by Lala Kishan Narain The plaintiffs sought to amend the plaint by seeking in addition a relief in respect of two-thirds of the mortgagee rights in Salahpua Rajao and they put in this application for amendment on 30th November 1926. Lala Kishan Narain opposed the application for amendment. The learned trial Judge then proceeded to decide it. He decided it in a lengthy order in which he refused to allow the amendment. He then proceeded to decide the suit in respect of Miranpur Sadar Ali and he decreed that suit in favour of the plaintiffs. The plaintiffs appeal here solely against the refusal to permit them to amend their plaint. The respondents have not appeared and the hearing of this appeal has been ex parte.

The portion of the rules under the Code of Civil Procedure which deals with alteration or amendment of pleadings is contained in O. 6, R. 17. The rule is as follows :

> The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

The rule allows a wide discretion to the Court in permitting an amendment. but the discretion is with the Court, and where that discretion has been exercised on materials which have been admitted legally and for judicial reasons, that discretion should not be lightly interfered with. The question for decision has been somewhat complicated by the fact that Lala Kishan Narain pressed certain objections which in our opinion had little force. The learned trial Judge has not always arrived at the conclusions at which we should have arrived upon these objections For example Lala Kishan Narain put forward that the claim of the plaintiffs to two-thirds of the mortgagee rights in Salahpur Rajao was obviously barred by limitation. The learned trial Judge found that it was obviously barred by limitation We do not agree there. That claim may be barred by limitation or it may not be barred, but on the materials before the learned trial Judge it was impossible to decide one way or another. The trial Judge has, however, based his decision, amongst other grounds, upon the ground that the plaintiffs had not been able to show that they had made a bona fide mistake and this carried him to the point as to whether they had made out a case for the indulgence which they sought ; and here we conside that he was on firm ground when he decided that they had not shown that they had made a bona fide mistake and that consequentially they had made out no claim for indulgence.

The principles which in our opinion should apply in a matter such as this are these. It is the duty of a plaintiff to frame his plaint properly before he brings it into Court. It is for him to see that it includes the whole of the claim which he is entitled to make in respect of the cause of action unless he wishes to relinquish some portion of the claim. Relaxations can be made, and may be made, to meet the case of an ignorant plaintiff who has not had the advantage of proper legal advice. The plaintiffs in this case, however, are not ignorant people. They are men of position and standing, and admittedly have engaged on more than one occasion in litigation. They were presented by legal advisers who were in a position to know

the law and to apply it. In preparing the plaint it was necessary for them to look at the sale of the 27th October, 1925. According to the learned counsel for the appellants there can be no doubt as to the fact that that sale, not only covered the proprietary rights in Miranpur Sadar Ali but that it also covered the mortgagee rights in Salahpur Rajao. We can find no excuse for the omission to include the mortgagee rights in Salahpur Rajao in the plaint if the plaintiffs wished to bring a suit in respect of them. What have the plaintiffs done? They filed this plaint on the 25th August 1926. Various proceedings took place. Lal Kishan Narain admitted their claim as it stood. Nothing was left except the final recording of evidence against those persons who were absent and at the very end they asked on the 30th November 1926, for permission to amend the plaint.

It is to be noted that by the proposed amendment they brought into contest matters which were foreign to the matter previously in contest. We have referred already to the will which was executed by Rai Sri Ram Bahadur on the 22nd May 1911. In this will he divided his property partially by lists. He left villages in one list to one son; villages in another list to another son and so on. Miranpur Sadar Ali was included in list 2 and by the eleventh clause of the will the list 2 property was clearly divided in equal shares amongst his three sons, but the mortgagee rights in Salahpur Rajao are mentioned in none of the lists and Salahpur Rajao is not itself mentioned anywhere in the will, although in the eleventh clause the mortgagee rights in Ilaqa Jaipur are mentioned. The division of certain of the property amongst three sons was subject to certain preliminaries, and it was necessary to prove exactly what had happened before it could be determined with any certainty, whether Ramapat Ram and Tulshipat Ram had acquired any interest in the mortgagee rights in Salahpur Rajao. Those mortgagee rights might have been divided according to villages. Many points of contest could arise in respect of the mortgagee rights. The determination of the rights in Miranpur Sadar Ali was comparatively simple and provoked no contest. As we have seen, Lala Kishan Narain admitted the claim in respect of Miranpur Sadar Ali. We thus have it that after Lala Kishan Narain had, as far as he knew, terminated his connexion with the case the plaintiffs, some months after they had filed their original plaint, applied to amend the plaint and introduce into it matter of a much more contentious nature than the matter which it previously contained. No Court would have any right to permit an amendment of this kind unless very good cause was shown for the previous omission. But so far from good cause being shown for the previous omission, no cause of any kind was shown. The plaintiffs came forward with a statement that they had made a mistake for which they were very sorry and gave no explanation as to how their legal advisers, while reading the account of the sale of the 27th October 1925, had left out half the relief which they could have claimed as a result of that sale.

In these circumstances we do not consider that we should be justified in interfering with the discretion of the learned trial Judge in refusing to permit the amendment. Our reasons have not been stated exactly as he has stated his reasons, but he had good grounds upon which he could exercise his discretion judicially and we consider that he did exercise his discretion judicially and correctly. The learned counsel for the appellants has urged that as an effect of our refusing to grant this appeal his clients may be debarred from claiming any relief in respect of the mortgagee rights in Salahpur Rajao. We do not express any opinion as to whether they are or are not so debarred. It is true that O. 2, R. 2, directs that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and that when a plaintiff omits to sue in respect of any portion of his claim he shall not afterwards sue in respect of the portion so omitted. But the question, as far as we are concerned, is open as to whether the claim for the mortgagee rights in Salahpur Rajao should be included in the claim for the proprietary rights in Miranpur Sadar Ali as having arisen out of the same cause of action. We do not consider we should be justified at this stage in deciding the point one way or another. It is certainly open to the plaintiffs, should they so desire, to bring a fresh suit for a portion of the mortgagee rights

in Salahpur Rajao and should they do so the Court will then decide whether such a suit is or is not barred under the provisions of O. 2, R. 2. At this stage we do not wish to express an opinion upon the latter point. We, therefore, dismiss this appeal. The appellants will pay their own costs. The respondents incurred no costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 138

STUART, C. J., AND WAZIR HASAN, J.

Mitar Sen Singh—Plaintiff—Appellant.

v.

Maqbul Hasan and *others*—Defendants—Respondents.

F. A. No. 46 of 1927, Decided on 2nd December 1927, from decree of Addl. Sub-Judge, Fyzabad, D/- 14th Feb. 1927.

(*a*) *Oudh Laws Act*, (1876), *S.* 3 (*b*) (2)—*Custom in entire abrogation of personal law cannot be entertained.*

A plea of custom may be entertained in modification of the personal law, Hindu law or Mahomedan law, but not in entire abrogation of such law. [P 139 C 1]

(*b*) *Caste Disabilities Removal Act* (21 *of* 1850)—*Hindu convert to Shia—Heirs to the estate of such person must be determined by Shia law and not by the Act—Mahomeadan law.*

In determining the heir or heirs to the estate of a person who has renounced the Hindu religion and embraced the Shia faith of Islam recourse must be had to the Shia law of inheritance and not to Act 21 of 1850: 10 *M. I. A.* 511 (*P. C.*), *Rel. on.* [P 139 C 2]

(*c*) *Caste Disabilities Removal Act* (1850)—*Reg. 7 of* 1832—*Applicability to Oudh—Conversion before date of annexation—Acts do not apply.*

Regulation 7 of 1832 or Act 21 of 1850 can be held to be applicable to the Province of Oudh from the date of annexation at the earliest, i. e, on 13th February 1856 and therefore the Regulation and the Act do not apply to the case of convert who renounced his religion before that date. [P 139 C 2]

(*d*) *Caste Disabilities Removal Act*, *S.* 1—*Scope—Ancestor of propositus changing his religion—Act will not apply for determining the heirs of such propositus.*

The Act has no application to a case where the claimant of rights has neither renounced nor has been excluded from the communion of any religion or been deprived of caste, and S. 1 cannot be read in any wider sense than that it removes the personal disability of the person who has changed his religion from enforcing his rights which he possessed prior to the change. Therefore, if any ancestor of the propositus in any degree of ascent has changed his religion the Act would not apply in determining the status of an heir to such a propositus: 33 *All.* 356; 40 *Mad.* 1118; 1 *Lah.*; 376, *Rel. on*; 11 *All.* 100, *Expl.* and *Diss. from.* [P 140 C 2, P 141 C 1]

P. L. Banerji, *Jaijai Ram*, *Radha Krishna* and *H. D. Chandra*—for Appellant.

Bisheshwar Nath, *Ali Zaheer*, and *Ali Mohammad*—for Respondents.

Judgment.—This is the plaintiff's appeal from the decree of the Additional Subordinate Judge of Fyzabad, dated the 14th February 1927. By the decree under appeal the appellant's suit for the recovery of certain moveable and immovable property described in the two Schedules A and B attached to the plaint has been dismissed.

The property in suit was last held in full ownership by one Hasan Khan, who died on the 11th October 1921. Agha Hasan Khan had a daughter, Mt. Sajjadi Begam. The daughter predeceased her father. The daughter's children Maqbul Hasan Khan, son, defendant 1, Mt. Amatul Kubra, defendant 2, and Mt. Amatul Sughra, defendant 3, daughters, are now in possession of the estate of their grandfather Agha Hasan Khan. Agha Hasan Khan's widow, Mt. Kaniz Zainab, also died on the 5th November 1922. The plaintiff, Babu Mitar Sen Singh, claims title to the estate in suit by right of inheritance as the nearest reversioner and pleads family custom of the exclusion of daughters and their issue in defeasance of the natural rights of the defendants in the estate of their grandfather, Agha Hasan Khan. This is the plaintiff's case as set forth in the plaint.

The custom pleaded by the plaintiff was denied by the defendants and the issue relating to it has not been tried so far. Besides the daughter's issue, who are the defendants in the suit, it also appears that Agha Hasan Khan had a sister, Mt. Askari Khanam, who survived him and that Mt. Askari Khanam on her death has left children as heirs-at-law. The defendants denied the plaintiff's right of succession to the estate of Agha Hasan Khan and this is the issue which has been tried and found in favour of the defendants by the Court below.

The facts are as follows: Agha Hasan Khan's father, Ali Hasan Khan, embraced the religion of Islam in the year 1843 A. D. It is admitted that the sect to which he attached himself on conversion

was the Shia sect. Ali Hasan Khan's name before his conversion was Jagardeo Singh. It is agreed that his father Sarabdawan Singh was a Hindu, as were his ancestors from the earliest times. Sarabdawan Singh has a brother, Ranjit Singh, and the plaintiff, Mitter Sen Singh, is the great-grandson of Ranjit Singh. It is also agreed that the plaintiff's father, his grandfather and his great-grandfather were all born and died in Hindu faith and that the plaintiff is a Sanatan Dharam Hindu both by birth and conviction.

Before proceeding further we desire to state at the outset that at some stage of the proceedings in the trial Court the plaintiff seems to have set up the case of his right to succeed to the estate in suit upon some general custom of the family whereby a Hindu is permitted to succeed to the inheritance of a Moslem blood relation. This was the subject-matter of issue 2. At the hearing of the appeal, however, this case was expressly abandoned by the learned advocate, who appeared before us on behalf of the plaintiff. He rested his client's right to succeed on law alone subject of course to the proof of the custom of exclusion of daughters. For the purposes of the decision of the case in the trial Court and the appeal before us it was assumed that the last-mentioned custom exists. During the progress of the arguments at the Bar there was some confusion as to the precise nature and extent of the custom pleaded by the plaintiff but we are quite clear in our minds that a plea of custom may be entertained in modification of the personal law, Hindu law or Mahomedan law, but not in entire abrogation of such law. This conclusion is fully borne out by S. 3, sub-S. (b), Cl. (2), Oudh Laws Act, 1876. The plaintiff's case as to the modification of the personal law by custom is set forth in para. 4 of the plaint. It may be mentioned here that it was agreed by the parties in the Court below and the agreement was adhered to before us that the property now in suit is not the property which Ali Hasan Khan might have acquired from or after the death of his brother Amresh Singh. It was also stated on behalf of the plaintiff that Ali Hasan Khan on his conversion ceased to be a member of the joint Hindu family.

The first question which on the premises stated above arises for determination is what law of inheritance governs the succession to the estate of Agha Hasan Khan. The answer to this question does not appear to us to be involved in any doubt. We think that in determining the heir or heirs to the estate of such a person recourse must be had to the Shia law of inheritance which was the personal law of the propositus. As observed by their Lordships of the Judicial Committee in the case of *Jawala Buksh* v. *Dharam Singh* (1):

> The written law of India has prescribed broadly that in questions of succession and inheritance the Hindu law is to be applied to Hindus and the Mahomedan law to Mahomedans; and in the judgment delivered by Lord Kingsdown in *Abraham* v. *Abraham* (2) it is said that this rule must be understood to refer to Hindus and Mahomedans, not by birth merely but by religion also.

It is quite clear that the plaintiff is not an heir-at-law according to that law even if the children of the daughter of the propositus are also not his heirs by virtue of the family custom. This conclusion was not seriously disputed by the learned advocate for the appellant. It was argued, however, that though the plaintiff has no right of inheritance according to the Mahomedan Shia law to the estate in suit yet he has such a right under the provisions of Act 21 of 1850 and this was the only point argued at the Bar.

We think it necessary to note that the annexation of the Province of Oudh to the British territories took place on the 13th February 1856. Previous to that day it must be presumed that the law regulating rights to property was the Hindu law in case of Hindus and the Mahomedan law in case of Mahomedans and that conversion from one religion to another entailed all the consequences and penalties provided by those laws. Therefore when Jagerdeo Singh (afterwards Ali Hasan Khan) renounced the Hindu religion and embraced the faith of Islam he forfeited his rights to property under the Hindu law and acquired rights under the Mahomedan law. One of such rights was the "status" with all its consequences with which he came to be endowed on his conversion by the Mahomedan law. Reg. 7 of 1832 or Act 21 of 1850 can be held to be applicable to the Province of Oudh from the date of annexation at the earliest. This being so, we seriously doubt that those enactments will have

(1) [1865] 10 M. I. A. 511=2 Sar. 189 (P.C.).
(2) [1863] 9 M. I. A. 195=1 Suther 501=2 Sar. 10 (P.C.).

the effect of restoring rights lost and of divesting persons of their "status," acquired before the date of the annexation. This will not be so in the Province of Agra which was a part of the Presidency of Bengal on the date of the Regulation and part of the British teritories in India on the date of the Act. It was assumed in the Court below and in the arguments before us that the Act of 1850 will apply if it is applicable in terms thereof to the facts of this case.

The trial Court is of opinion that the provisions of Act 21 of 1850 have no application to the facts of this case and we agree with that opinion. Before interpreting those provisions certain preliminary observations fall to be made. Act 21 of 1850 neither professes to nor does in fact create a new class of heirs constituted of persons who are not heirs under the personal law of the propositus. The Act does not lay down any Code of inheritance prescribing the line of succession to the estate of a convert. It does not create new rights. It only removes obstacles to the enforcement of existing rights. The obstacles intended to be removed are clearly obstacles arising by reason of the claimant renouncing his religion, having been excluded from the communion of any religion or being deprived of caste. We think that the substantive enactment may be interpreted in no other sense and we think that this interpretation is supported by the preamble. The substantive enactment is :

1. So much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.

The interpretation which we place on it can best be brought on surface by analyzing S. 1, as follows :

So much of any law or usage as.....

(1) inflicts on any person forfeiture of rights or property.	By reason of his or her	
or	(a) renouncing	
(2) may be held in any way to impair or affect any right of inheritance.	or	
	(b) having been excluded from the communion of	any religion
	or	
	(c) being deprived of caste	

shall cease to be enforced as law.....

We are of opinion that both class of cases covered by Cls. 1 and 2 as given above are controlled by the condition precedent of conversion or exclusion or deprivation from caste of the person whose rights are questioned in a given case, such rights being rights which such a person has under the law which was applicable to him immediately preceding the change of religion or deprivation of caste.

Clause (1) deals with one class of rights while Cl. 2 deals with another class of rights Under the former fall rights which have come to be vested prior to conversion in the person who has changed his religion and under the latter fall inchoate rights of the nature of spes successionis. The former class of rights may be illustrated by the right of a member of a joint Hindu family who has acquired his right in the family property from the moment of his birth, by the right of a legatee in the subject-matter of bequest after the death of the testator and generally by the right which a person has acquired by right of inheritance after the death of the propositus. Cl. (1) provides for the protection of such vested rights as against the effect of the rule of personal law entailing the destruction of such rights by reason of conversion. Cl. (2) contemplates protection of rights of a person who has changed his religion prior to the vesting of such rights ; in other words if an heir has changed his religion before the opening of succession that fact will not stop the devolution of inheritance on him whenever it comes to happen. In each case it seems to us rights, whether vested or inchoate, are protected by the statute but only of the person whose rights are forfeited in one case or affected in the other by reason of that person renouncing or having been excluded from the communion of any religion or being deprived of caste.

We are of opinion that the Act has no application to a case where the claimant of rights either of one class or of the other has neither renounced nor has been excluded from the communion of any religion or been deprived of caste as the present case is. The words "forfeiture" and "impair or affect any right" in the first part of the section and the words "by reason of his or her" in the second part of the section are important words. In short, we are unable to read the sec-

Advocate High Court
Jammu & Kashmir
Srinagar.

tion in any wider sense than that it removes the personal disability of the person who has changed his religion from enforcing his rights which he possessed prior to the change. Further, even if the Act be assumed to be applicable to a case where the person whose inheritance is in question has changed his religion the present case is not of that nature and therefore it is not necessary to give reasons against the soundness of the assumption. But surely it cannot be contended that if any ancestor of the propositus in any degree of ascent has changed his religion the Act would apply in determining the status of an heir to such a propositus. If it were so the results would be startling, if not revolutionary. In families of more than half the population of Muslims of British India and similarly in Indian Christian families, conversion from Hinduism may well be traced to some near or remote ancestor and when the inheritance comes to fall on collaterals the Hindu relations of the Muslim or the Christian convert must be held to displace if nearer in degree the rights of the Muslim collaterals more remote. Not only that, the females who have succeeded in the past must be held to possess only such rights of property as they would have possessed if their ancestor had remained a Hindu.

The interpretation which we have placed on the substantive enactment contained in Act 21 of 1850 is, it appears to us, supported by the preamble as well. The important words of the preamble are:

> The laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled.

This language clearly means the recognition and subsistence of pre-existing rights either under the Mahomedan or the Hindu law and it does not create new rights. It, however, removes the penalty of losing existing rights which the personal law imposes on the party or parties by reason of difference in religion. The removal of penalty is clearly intended for the benefit of the party who has incurred the penalty and not for others.

We think that the interpretation which we have placed on Act 21 of 1850 is also supported by the decision of their Lordships of the Judicial Committee in the case of *Khunni Lal* v. *Gobind Krishna Narain* (3). A few facts of that case may first be stated. A joint Hindu family possessed of considerable property within the British territories consisted of two persons, Ratan Singh and his son Daulat Singh. Each of these two persons was thus entitled in joint tenancy to a moiety of the family property. In 1845 Ratan Singh abandoned Hinduism and adopted the Mahomedan faith. Change of religion, however, made no change in the status of the family until the death of Daulat Singh in January 1851. Daulat Singh left him surviving a widow named Sen Kuar and two daughters, Chhattar Kuar and Mewa Kuar. Ratan Singh died in September 1851. Thereafter the name of his widow, Raj Kuar, was recorded in the revenue register in place of her deceased husband in respect of the entire family property. After the death of Sen Kuar and also of Raj Kuar a settlement was arrived at between the daughters of Daulat Singh and one Khairati Lal, who was the son of a daughter of Ratan Singh. According to this settlement Chhattar Kuar and Mewa Kuar obtained an $8\frac{1}{2}$ annas share while Khairati Lal received the remaining $7\frac{1}{2}$ annas share. Possession followed in accordance with the allotment. Chhattar Kuar died first and then died Mewa Kuar in 1899.

The plaintiffs in that case were the sons of Mewa Kuar. The defendants were transferees from Khairati Lal. The case of the plaintiffs was that on the abandonment of Hinduism by Ratan Singh he forfeited his half share in joint property which vested in Daulat Singh. They claimed the entire 16 annas in the character of heirs of Daulat Singh, challenging the validity of the compromise under which Khairati Lal had acquired the $7\frac{1}{2}$ annas share. On the question of the effect of the abandonment of Hinduism by Ratan Singh on his rights in the joint property their Lordships of the Judicial Committee interpreted S. 9 of Regulation 7 of 1832 and the provisions of Act 21 of 1850. After having quoted these enactments their Lordships said as follows:

> The intention in both enactments is perfectly clear; by declaring that the Hindu or Mahomedan law shall not be permitted to deprive any party not belonging to either of those persuasions of a right to property, or that any law or usage, which inflicts forfeiture of rights or property by reason of any person renouncing his

(3) [1911] 33 All. 356 = 10 I. C. 477 = 38 I. A. 87 (P. C.).

or her religion, shall not be enforced, the Legislature virtually set aside the provisions of the Hindu law which penalize renunciation of religion or exclusion from caste. The effect of the legislation of 1832 and 1850 was that on Ratan Singh's abandonment of Hinduism Daulat Singh did not acquire any enforceable right to his father's share in the joint family property which he could either assert himself or transmit to his heirs for enforcement in a British Court of Justice.

This pronouncement clearly means that Daulat Singh by reason of conversion of his father did not come to possess any new right in the family estate which he did not otherwise possess. It further means that Ratan Singh's rights in the family property were not forfeited by conversion. The enactments simply removed the penalty of forferiture of rights imposed by the personal law on conversion.

The learned advocate for the appellant strenuously pressed on us the decision in the case of *Bhagwant Singh* v. *Kallu* (4) and contended that it afforded complete support to his client's case. One of the two learned Judges, who formed the Bench, was Sir John Edge and he delivered the judgment. The other learned Judge simply recorded his concurrence. We feel that out of respect to so eminent a Judge as Sir John Edge we must examine the decision with great care. We have done so and have come to the conclusion that the decision in the first instance is inapplicable to the facts of this case and in the second instance we find ourselves, with utmost respect, in disagreement with the grounds of the decision. The facts were these. In that case the grandfather of the plaintiff, Hari Singh, had three sons Mohan Singh Bacha Singh and Mahipat Singh. Mahipat, who was the father of the plaintiff, was converted to Mahomedanism. The property in suit had belonged to Bacha Singh. The plaintiff was a Muhammadan as was his father, Mahipat. Bacha Singh on his death was succeeded by his widow, Banno, who had alienated the property which had devolved on her by right of inheritance. The alienees were the defendants. The plaintiff Kallu in support of his title to the estate of Bacha Singh relied upon the provisions of Act 21 of 1850. This was upheld by the High Court at Allahabad.

It will be seen that on the facts the case before us is materially different from the case under consideration. In that case the claimant's title was sought to be defeated on the ground that his father had embraced Islam and therefore the right of inheritance which would have devolved upon the plaintiff in the estate of his uncle, Bacha Singh, was killed by reason of the conversion. This defence was sought to be supported by the only argument that Act 21 of 1850 would have saved the situation only if the plaintiff had renounced his religion. The argument was repelled on two grounds. It was observed that the argument, if sound, would have the effect of cutting down or curtailing the principle of S. 9, Regulation 7 of 1832. This could not be allowed for the reason that:

> no one can read S. 9, Regulation 7 without seeing that if Mr. Bajpai's argument is correct the operative portion of the Act, instead of extending the principle to the rest of the Company's provinces, would have limited the relief it was intended to extend.

With great respect the preamble nowhere expresses the intention of extending the scope of the principle. The extension intended is only of the territorial limits and not of the principle. The second ground was that

> If the latter part of the section was restricted to the protection of the right of inheritance of the persons renouncing their religion or being excluded from caste, their case was covered by the words of the early part of the section.

With great respect again we do not agree with this view. As we have already shown, the first portion of the section relates to the forfeiture of rights, that is vested rights by reason of change in religion of the person in whom those rights reside and prevents forfeiture of such rights. The latter portion of the section relates to rights of inheritance before the opening of succession and protects the loss of such rights of the person who has renounced his religion or been excluded from caste while he occupies the status of an heir simpliciter. We are clearly of opinion that the words "renouncing his or her religion" apply to both classes of cases, that is, the law affords protection against the forfeiture of vested rights and protection against the loss of status as an heir and, in both cases, of the person who renounces his or her religion. The Act of 1850 was recently interpreted in the sense in which we have interpreted it by the High Court of Madras in *Vaithilinga Odayar* v. *Ayyathorai Odayar* (5) and the Allahabad case was dissented from. The

(4) [1888] 11 All. 100=(1888) A. W. N. 288.

(5) [1917] 40 Mad. 1118=37 I. C. 753.

decision of the High Court at Lahore in the case of *Rupa* v. *Sardar Mirza* (6) was also quoted on behalf of the appellant. In that case the learned Judges simply followed the decision in the Allahabad case and advanced no fresh arguments in support of the opinion which we have formed and they are noted in the judgment of the trial Court. It will serve no useful purpose to recapitulate them in this judgment. The result is that we uphold the decree of the trial Court and dismiss the appeal with costs.

R.D. *Appeal dismissed.*

(6) [1919] 1 Lah. 376=55 I. C. 420.

* * A. I. R. 1928 Oudh 143
Full Bench

STUART, C. J. AND WAZIR HASAN AND GOKARAN NATH MISRA, JJ.

Lal Harihar Partab Bakhsh Singh—Appellant.

v.

Bisheshar Bakhsh Singh and *others*—Respondents.

Stamp Reference No. 2 of 1927, Decided on 8th December 1927.

* * *Stamp Act, Arts. 57 and 40—Deed agreeing to pay compensation to the Court on failure of the decree-holder's restoring the property in the event of his failure in appeal—Immovable property hypothecated as security—Deed is a contract and Art. 57 applies and not Art 40.*

Where certain persons executed an undertaking whereby they agreed that if the decree-holder did not restore the property in event of his failure in appeal, the executants of the deed would pay compensation to the Court to the extent of a certain sum and in security for the payment of that amount they hypothecated certain immovable property.

Held: that the transaction amounted to a contract and was a mortgage-deed executed by the executants to secure the due performance of the contract by the decree-holder and that Art. 57 and not Art. 40 applied. [P 143 C 2, P 144 C 1]

M. H. Qidwai—for Respondent.

Govt. Advocate—for Secretary to Board of Revenue.

Stuart C. J.—This is a reference made to this Court by the Chief Revenue Authority under S. 57, Act 2 of 1899 (Indian Stamp Act), with a statement of a case under S. 56 and with its opinion thereon. According to the provisions of S. 57, the case has been laid before a Bench of three Judges of the Chief Court and is now being decided under S. 59. A copy of this judgment will be sent under the provisions of S. 59 to the Chief Revenue Authority. The case is :

A certain Bisheshar Bakhsh Singh instituted a suit in the Chief Court of Oudh for possession of certain property. He succeeded. In execution of his decree he applied for possession of certain property. The other side preferred an appeal against the decree. A Bench of this Court by an order of the 1st March 1927, directed that Bisheshar Bakhsh Singh should be placed in possession of the property in question, provided he guaranteed to restore that property in event of his failure in appeal, and provided he filed security for its restoration in such circumstances. In accordance with this order certain persons executed on the 23rd March 1927, an undertaking whereby they agreed that if Bisheshar Bakhsh Singh did not restore the property in event of his failure in appeal, the executants of the deed would pay compensation to the Court to the extent of a lakh and a half of rupees, and in security for the payment of this amount they hypothecated certain immovable property. This document was stamped with a stamp of Rs. 5, and this stamp was considered sufficient by the taxing authorities of this Court, as in their opinion it was a mortgage-deed executed by a surety to secure the due performance of a contract.

Subsequently the Inspector-General of Registration questioned the correctness of this view, and requested a Bench of this Court to assess the deed to a higher stamp duty. The Bench in question, agreeing with the taxing authorities, did not assess the document at a higher stamp duty. The present reference has then been made. In my opinion, the transaction between Bisheshar Bakhsh Singh and the Court amounted to a contract. Bisheshar Bakhsh Singh contracted that if he were allowed to take possession of the property in question he would restore that property in event of his failure in appeal. This deed was a mortgage deed executed by the executants to secure the due performance of the contract by Bisheshar Bakhsh Singh. As such, the executants incurred the liability to pay the stamp duty of Rs. 5 under the provisions of Art 57. It is true that the deed in question is a mortgage-deed and unless it came under the special provisions of Art. 57 it would be liable to pay a much higher duty based ad valorem upon the value of the property secured. I read, however, Art. 57 as making a special concession in favour, inter alia, of mortgage-deeds executed by sureties to secure

the due performance of a contract. Where a mortgage deed is a mortgage deed executed by a surety to secure the due performance of a contract, the executant gains the privileges conferred by Art. 57. The learned Government Advocate has not been able to show us any authority upon the point. It is true that in a commentary of which two learned Judges of the Bombay High Court were the authors, there is a note in which it is made a subject of question as to whether such mortgage deeds are liable to stamp duty under Art. 40. This note, to which the Board of Revenue have referred as authoritative, is of course in no sense authoritative. It is merely an opinion of a commentator. The practice in this Court and in the Court of the Judicial Commissioner has been uniform upon this point. Both Courts have always treated such mortgage deeds as liable to pay stamp duty under Art. 57. It appears to me that this practice is clearly right and that it follows from the words of the Article.

Wazir Hasan, J.—It is agreed that the deed of the 23rd March 1927 is a mortgage-deed. The contention raised in the reference before us is that it was not executed to secure the due performance of a contract and that being so it is liable to be taxed with a stamp duty under Art, 40, Sch. 1, Indian Stamp Act, 1899, and not under Art. 57, of the same schedule. It is true that there is no contract to secure the due performance of which the deed in question was executed floating on the surface, but there is always an implied contract in cases of this nature. The substance of the matter is that the plaintiff asked for delivery of possession of certain property which was decreed to him under a decree passed on the original side of this Court. The prayer for delivery of possession was made to this Court. That was clearly a request. In answer to that the Court agreed to deliver possession as prayed for provided the decree-holder agreed to do certain things in certain events and provided further that he furnished security for the due performance of the same. On these conditions being offered to the decree-holder by the Court they were accepted by him and the result was the execution of the deed of mortgage in question and the delivery of possession to the decree-holder. It is a significant fact to bear in mind that the deed in question is executed in favour of the Registrar of this Court. This clearly means that the Court is a party to the original contract for the due performance of which this mortgage deed has been executed. I accordingly agree with the Hon'ble the Chief Judge that the document has been properly stamped with the stamp duty of Rs 5.

Gokaran Nath Misra J.—I am also of the same opinion as my two learned brothers who have just now delivered their opinion. I think that the mortgage deed executed in the present case was one executed by a surety to secure the due performance of the contract entered into between the decree-holder and this Court in accordance with its order dated 1st March 1927. Under those circumstances the stamp of Rs. 5 paid in the present case is quite sufficient.

R.D. *Reference answered.*

A. I. R. 1928 Oudh 144

RAZA, J.

Inayat Khan—Applicant.

v.

Sardar Husain—Opposite Party.

Civil Revn. Appln. No. 47 of 1927, Decided on 24th October 1927.

Provincial Small Cause Courts Act, S. 25—No substantial injustice from material error in procedure—High Court will not interfere.

High Court will not ordinarily exercise the powers under S. 25 unless it appears that some substantial injustice has directly resulted from a material error in procedure: *A. I. R.* 1926 *Oudh* 264, *Foll.* [P 144 C 2]

Ali Muhammad——for Applicant.

Judgment.—I have heard the applicant's learned counsel. In my opinion there is no force in this revision. As pointed out in *Mahabir* v *Ram Saran Singh* (1), High Courts should not ordinarily exercise the powers under S. 25, Provincial Small Cause Courts Act, unless they have reason to suppose that there has been a real mismanagement of the case or actual perversity in decision. The learned Judge of the Small Cause Court had applied his mind to the decision of the case and I am not satisfied that there was any miscarriage of justice or gross illegality. We should not interfere unless it appears that some substantial injustice has directly resulted from a material error in procedure in the Court of Small Causes. Hence I dismiss this application.

N.D. *Application dismissed.*

(1) A. I. R. 1926 Oudh 264.

A. I. R. 1928 Oudh 145

WAZIR HASAN, J.

Shiwaratan—Plaintiff—Appellant.

v.

Ram Sumran — Defendant—Respondent.

Second Appeal No. 19 of 1927, Decided on 3rd March 1927, from decree of 1st Sub-Judge, Bahraich, D/- 28th Oct. 1926.

Malicious prosecution—Suit for damages—Guilty knowledge or wicked motive of defendant must be proved—Prosecution must be proved to be without probable and reasonable cause.

In the class of actions to which a claim of damages for malicious prosecution belongs the state of the defendant's mind at the time when he did the act is most important. The plaintiff cannot succeed unless he can show either guilty knowledge or some wicked or indirect motive in the defendant. The general principle of the Common Law is that an action for malicious prosecution lies whenever one man puts the process of the law in motion against another maliciously and without reasonable and probable cause. Even in cases in which personal element constitutes the essence of the offence there may be certain facts which may afford an answer to the prosecution and on determination of such facts, will depend the answer to the question as to whether there was or was not reasonable and probable cause for the prosecution : *A. I. R.* 1926 *P. C.* 46, *Foll.* : (1889) *A. W. N.* 189 and 11 *A. L. J.* 125, *not Foll.* [P 145 C 2]

Gopal Chandra for *R. D. Sinha*—for Appellant.

Iqbal Narain—for Respondent.

Judgment.—This is the plaintiff's appeal from the decree of the First Subordinate Judge of Bahraich, dated 28th October 1926, reversing the decree of the Munsif of Qaisarganj, dated 31st July 1926.

The plaintiff laid claim to recover Rs. 300 as damages for malicious prosecution. The Court of first instance decreed the suit for a sum of Rs. 200. On appeal by the defendant the decree of the Court of first instance was reversed and the plaintiff's suit dismissed in its entirety. The main ground of the decision of the lower appellate Court is that the plaintiff had failed to prove that the original complaint which the defendant had made in the criminal Court as against the plaintiff was made without reasonable and probable cause.

In appeal before me the sole point argued was that in a case of the nature of which the present case was it was not necessary in law to prove the absence of reasonable and probable cause. It is said that the offences of which the defendant accused the plaintiff being under Ss. 506 and 352, I. P. C., and S. 22, Cattle Trespass Act, the sole question for decision in the claim for damages was as to whether the complaint was false or true. In support of this argument two decisions of the High Court at Allahabad were cited: *Hira Lal* v. *Bandhu Bhagat* (1), and *Radhe Lal* v. *Munnoo* (2). Neither of these decisions seems to have been reported in the authorized reports of the Provinces.

I have had occasion to consider this matter in the case of *Nand Lal* v. *Debi Din* (Second Civil Appeal No. 8 of 1924, decided on the 13th August 1925) which, as the learned pleader for the respondent brings to my notice, found publication in (3). I still adhere to the opinion which I then expressed. If the two decisions of the High Court at Allahabad referred to above lay down an exception to the general rule governing the success of a claim of damages for malicious prosecution with due respect I differ from those decisions.

In the class of actions to which a claim of damages for malicious prosecution belongs the state of the defendant's mind at the time when he did the act is most important. The plaintiff cannot succeed unless he can show either guilty knowledge or some wicked or indirect motive in the defendant. The general principle of the Common Law is that

an action for malicious prosecution lies whenever one man puts the process of the law in motion against another maliciously and without reasonable and probable cause.

To succeed in this action, the plaintiff must prove : (i) that the defendant instituted criminal proceedings against him before a judicial officer ; (ii) that in so doing he acted wi hout reasonable and probable cause ; (iii) that in so doing he acted maliciously ; and (iv) that the proceedings terminated in the plaintiff's favour —vide the Common Law of England by Blake Odgers, second edition, volume I, p. 516.

Even in cases in which personal element constitutes the essence of the offence there may be certain other ancillary facts which may afford an answer to the prosecution. On the determination of such facts will depend the answer to the question as to whether there was or was not reasonable and probable cause for the prosecution. The second element is therefore an abiding element in all actions for malicious prosecution. The same result

(1) [1889] A. W. N. 189.
(2) [1913] 11 A. L. J. 125=18 I. C. 280.
(3) [1925] 91 I. C. 223.

follows from the recent decision of their Lordships of the Judicial Committee in the case of *Balbhaddar Singh* v. *Badri Sah* (4). The sufficiency or insufficiency of evidence in proof of that element may vary according to the circumstances of each case. I am, therefore, of opinion that there is no ground in the present case for interference with the decision of the Court below.

The appeal fails and is dismissed with costs.

R.D. *Appeal dismissed.*

(4) A. I. R. 1926 P. C. 46=29 O. C. 163=1 Luck 215.

A. I. R. 1928 Oudh 146

STUART, C. J. AND PULLAN, J.

Sat Narain Singh—Defendant—Appellant.

v.

Badri Prasad Singh—Plaintiff—Respondent.

First Appeal No. 40 of 1927, Decided on 7th December 1927, from decree of Addl. Sub-Judge, Fyzabad, D/- 8th December 1926.

(*a*) *Oudh Rent Act* (22 *of* 1886), *S.* 108, *Cl.* 5 *a* (1)—*Suit by a landlord for the ejectment of a trespasser is cognizable by a civil Court.*

A suit by a landlord for the ejectment of a trespasser does not fall within group A covered by sub-Ss. (1) to 5 (a) and as such it is cognizable by the civil Court. [P 147 C 2]

(*b*) *Transfer of Property Act, S* 52—*Transfer during pendency of a contentious suit—Suit subsequently compromised and decreed accordingly—The doctrine of lis pendens is applicable—The transferee can, however, show that the compromise was tainted with fraud or collusion.*

The doctrine of lis pendens as employed in S. 52, Transfer of Property Act, applies to transfers effected during the pendency of a contentious suit or proceeding, even when such a suit or proceeding is subsequently compromised and a decree passed in pursuance of such a compromise, but it is, however, open to the transferee in such circumstances to avoid the consequences of the transfer having been made at that time by establishing that the compromise is tainted by fraud or collusion : 29 *Mad.* 426, *Foll.* [P 148 C 1]

Anand Narain Bahadur—for Appellant.

Bisheshar Nath—for Respondent.

Judgment.—This is a defendant's appeal against a decree passed by the learned Additional Subordinate Judge of Fyzabad on 8th December 1926. The facts of the suit, out of which this appeal arises, are as follows: The plaintiff Badri Prasad Singh came into Court on the following allegations: He alleged that the village of Arusa Azampur in the Fyzabad District had devolved upon his father Sarju Narain Singh, and his fathers's brother Bhola Singh in equal shares, and that on the death of one brother his share devolved upon the survivor. His case was that on Bhola Singh's death in 1918 his widow Dhiraj Kuar had taken possession of Bhola Singh's share, that subsequently a two-annas share in the village was brought to sale in execution of a decree obtained on a mortgage executed by Bhola Singh and that the share had been purchased by the plaintiff's son. He continued that in August 1924, Sarju Narain Singh had sued Mt. Dhiraj Kuar for possession of this six annas, and that he obtained an ex-parte decree against her on 25th September 1924. In execution of this decree, Sarju Narain Singh obtained possession on 24th January 1925. Admittedly, on 26th January 1925, Mt. Dhiraj Kuar, although she then had lost the suit and was out of possession, executed a theka of the six-annas share in favour of the defendant-appellant Sat Narain Singh. This theka was for a period of twenty years. Under it the thekadar was to pay the land revenue as it then stood and pay Rs. 60 a year to Mt. Dhiraj Kuar. The land revenue was then Rs. 241-5-0. In the event of its enhancement Mt. Dhiraj Kuar was to pay the difference.

This ex-parte decree in favour of Sarju Narain Singh was considered on appeal by a Bench of the late Judicial Commissioner's Court on 27th March 1925, and the case then went back for rehearing to the Fyzabad Court. On 1st December 1926, Sarju Narain Singh died and was succeeded by the present plaintiff Badri Prasad Singh. On 2nd February 1926, Mt. Dhiraj Kuar, who had previously been contesting the suit withdrew from contest, and admitted the claim of the plaintiff-respondent. The suit was accordingly decreed in his favour. But in the meantime she had recovered possession over six-annas share and had transferred that possession to Sat Narain Singh under the terms of the theka already mentioned. In consequence Badri Prasad Singh instituted the suit, out of which this appeal arises, on 20th April 1926, in the Court of Subordinate Judge of Fyzabad for the eject-

ment of Sat Narain from the six-annas share, for possession over the six-annas share and for mesne profits.

When the suit came on for hearing Sat Narain Singh took a very large number of pleas. The Additional Subordinate Judge decided the suit on one point only. The position which he took was this. There was no contest as to the fact that Badri Prasad Singh, after Mt. Dhiraj Kuar had admitted judgment in his favour, became the owner and possessor of the six-annas share as against Dhiraj Kuar. Thus if he could show, that Sat Narain Singh had no right to remain in occupation of that share by virtue of his title from Dhiraj Kuar Badri Prasad Singh had a right to eject Sat Narain Singh, and to obtain mesne profits from him. Sat Narain Singh's claim to resist the suit rested upon the validity of the theka of 26th January 1925. If that theka was a good theka he could not be ejected. The learned Additional Subordinate Judge holding that the theka was bad under the provisions of S. 52, Act 4 of 1881, as having been executed pendente lite, drew as the necessary conclusion from that finding that Sat Narain Singh had no title and directed his ejectment. Sat Narain Singh appeals against that decision.

The first point taken by the learned counsel, who has argued the appeal, was that the civil Courts had no jurisdiction to decide the case. That plea was taken in the Court below, but it has not been decided by the learned Additional Subordinate Judge We are inclined to think from our examination of the proceedings that the reason why the learned Additional Subordinate Judge did not decide that plea was because that plea had been in effect withdrawn by the defendant-appellant's counsel. However, we do not wish to stand in the defendant-appellant's way upon the point, and we now decide ourselves whether the Court had or had not jurisdiction, It clearly had jurisdiction. B. Badri Prasad Singh is now the landlord of his share. In order to show that the civil Court had no jurisdiction it was necessary for the defendant-appellant to show that this suit was one of the suits excepted from the jurisdiction of the civil Courts under the provisions of S. 103, Local Act 22 of 1886 as amended. It would have to be included in group A covered by sub-Ss. (1) to (5-a).

The learned counsel suggested that this was a suit brought by a landlord for the ejectment of a tenant. He was unable to suggest any other sub-section on which he could base his plea. Clearly this was not a suit for the ejectment of a tenant. Badri Prasad Singh's main position was that Sat Narain Singh was not a tenant, but a trespasser. He took the position that Mt. Dhiraj Kuar had had no right to execute the theka. If it had been found on the facts that the theka was a good theka the suit would have been dismissed on the ground that Sat Narain Singh was not a trespasser, but a tenant. We, therefore, decide this point against the appellant. In respect of the findings on which the suit was decreed we have gone through the record of the previous proceedings in the suit between Sarju Narain Singh and Dhiraj Kuar. What happened was this. When the suit was originally filed it came on for hearing on 25th September 1924. On that date Mt. Dhiraj Kuar was absent, though duly served. She had not filed a written statement on the date fixed. The learned Additional Subordinate Judge considering that he was justified in taking this course under the provisions of O. 8, R. 10, Civil P. C., at once decreed Sarju Narain Singh's claim against her on 25th September 1924.

On 27th September 1924, two days afterwards, Mt. Dhiraj Kuar applied to have the decree set aside under O 9, R. 13. The successor of the learned Subordinate Judge who had passed the ex-parte decree decided on 8th January 1925, that she had no case under O. 9, R. 13 and dismissed her application. On 2nd February 1925, Mt. Dhiraj Kuar appealed against the order of dismissal of 8th January 1925, to the Court of the Judicial Commissioner. Her appeal was admitted and on 27th March 1925, a Bench of the Judicial Commissioners decided in her favour. The matter was sent back to the subordinate Court. The ex-parte proceedings were then set aside. There cannot be the slightest doubt as to the fact that as far as until a date considerably later than the 26th January 1925, there was a *lis* between Sarju Prasad Singh and Mt. Dhiraj Kuar affecting this six-annas share. The circumstance that the contest was subsequently abandoned in no way affects the fact that the

suit was contentious on 26th January 1925. In support of the view that the doctrine of lis pendens as employed in S. 52, Transfer of Property Act, applies to transfers effected during the pendency of a contentious suit or proceeding, even when such a suit or proceeding is subsequently compromised and a decree passed in pursuance of such a compromise, we need only refer to a decision of a Full Bench of the Madras High Court in *Annamalai Chettiar* v. *Malayandi Appaya Naik* (1). It is true that it is open to the transferee in such circumstances to avoid the consequences of the transfer having been made at that time by establishing that the compromise is tainted by fraud or collusion ; and in this particular suit the appellant has endeavoured to show that the withdrawal of contest by Mt. Dhiraj Kuar was the result of fraud and collusion. The learned trial Judge has found against him upon this point. We have come to the same conclusion.

It is noticeable that, although Badri Prasad Singh was in the witness-box, the appellant's counsel did not attempt to cross-examine him to show that the withdrawal of contest by Mt. Dhiraj Kuar had been obtained dishonestly or fraudulently, or that there was a trace of collusion in the former proceedings. The appellant called two witnesses to establish fraud and collusion. The first witness Sripat Singh has been stigmatized by the learned trial Judge as a shameless liar. This strong condemnation is in our opinion thoroughly deserved. The second witness Ramanand stated distinctly that he knew of nothing dishonest in the litigation, and that he did not know why Dhiraj Kuar had withdrawn her contest. He said that he personally had tried to persuade her that she had a good case, but that she refused to continue the contest. The learned counsel for the appellant has endeavoured to show to us that Mt. Dhiraj Kuar must have succeeded if she continued the contest. We do not agree with him. It appears to us that on the merits Sarju Narain Singh may well have succeeded. But in any circumstances we find that on the facts the compromise was not tainted by fraud or collusion. The learned counsel for the appellant has further taken the ground that the learned trial Judge should have decided all the issues framed in the suit. We consider that the learned trial Judge adopted a very proper course in not deciding the issue to which we have not referred. Badri Prasad Singh being clearly as against Dhiraj Kuar the owner of this six annas and Sat Narain Singh who derived his title from Dhiraj Kuar having thus no title to occupy this six annas, it would have involved an unnecessary waste of time to have determined the other points. We, therefore, dismiss this appeal with costs

S.J. *Appeal dismissed.*

(1) [1906] 29 Mad. 426=16 M. L. J. 372 (F. B.).

A. I. R. 1928 Oudh 143

STUART, C. J., AND PULLAN, J.

Bishun Dayal and *another*—Plaintiffs—Appellants.

v.

Gaya Prasad and *another*—Defendants—Respondents.

First Appeal No. 34 of 1927, Decided on 6th December 1927, against decree of Sub-Judge, Kheri, D/- 28th February 1927.

Contract Act, Ss. 37 and 73—Sale of the mortgaged property—Vendee promising to clear off the mortgage—Vendee dying—Vendee or his sons failing to pay—Mortgagee obtaining final foreclosure decree and property passing into his ownership—There is breach of contract and vendee's son is liable.

The mortgagor entered into a transaction under which he sold half of his property mortgaged to the vendee, who undertook the liability to satisfy the mortgage-deed and clear off the encumbered property, but neither the vendee nor his sons after his death carried out the undertaking to satisfy the claims ; whereupon mortgagee obtained a final decree for foreclosure and the whole of the property passed into the possession and ownership of the mortgagee :

Held : that under the circumstances there had been a breach of contract and the vendee, and if he was dead, his son was responsible for paying damages on that breach of contract to the mortgagor. [P 151 C 1]

Bisheshar Nath, Ali Zaheer and *Radha Krishna*—for Appellants.

A. P. Sen, M. H. Qidwai and *S. C. Das*—for Respondents.

Judgment.—This is a plaintiff's appeal against a decree of the Subordinate Judge of Kheri, dated 28th February 1927, dismissing the plaintiff's suit. The facts of the suit out of which this appeal arises are comparatively simple. The plaintiffs, together with their deceased brother Janki Prasad, to whose property they

have succeeded by survivorship, were originally the owners of a 10-biswas share in the village of Pasgawan together with 19·12 acres of under-proprietary land. They had borrowed money on security of their landed property. Amongst other liabilities there were two liabilities to a certain Mt. Bilasa Kalwarin of Tarwar. They had executed in her favour, on 29th June 1924, a registered deed of mortgage by conditional sale of the whole of this share of 10 biswas and the whole of 19·12 acres of under-proprietary land in consideration of Rs. 6,000. That deed bore interest. On 6th January 1917, they borrowed a further sum of Rs. 300 from the same mortgagee on interest, and executed a deed of further charge for which the same property stood security. In the year 1918, the present plaintiffs (Janki Prasad having died) entered into a transaction under which they were to clear off their liabilities and receive a substantial amount in cash by selling half the property in question. They entered into this transaction with Lallu Ram, the father of the defendants-respondents. On 22nd February 1918, a registered deed of sale was executed, by which they transferred to Lallu Ram a share of 5 biswas and half of the 19·12 acres of under-proprietary land in lieu of the following consideration.

Lallu Ram agreed that he would satisfy the deed of mortgage by conditional sale registered on 7th July 1914, and the deed of further charge registered on 8th January 1917, which were held by Mt. Bilasa. In his deed it was calculated that the amount due in respect of these two liabilities was, on the date of the execution of the deed, Rs. 7,685-6-0. It is clear to us upon our construction of the deed that it was not intended simply to write off Rs. 7,685-6-0 in respect of this portion of the transaction, but that Lallu Ram agreed that he would satisfy the amount due on these two deeds. If he paid up the money at once, Rs. 7,685-6-0 alone were due, but if he delayed in the payment of the amount necessary to discharge these liabilities, they increased daily by the addition of interest. This is the first liability which Lallu Ram undertook, the liability to satisfy the deeds in favour of Mt. Bilasa and to clear the whole of the 10-biswas share and 19·12 acres of under-proprietary land which were encumbered by these deeds. It is to be noted at the beginning that neither Lallu nor his sons after his death ever carried out the undertaking to satisfy those claims. There was further an amount due to Jagdamba Prasad of Rs. 1515-10-0 upon a deed of 12th August 1915, and an amount due to Kirpa Dayal of Rs. 472 on a deed of the 12th July 1916. Lallu Ram undertook to satisfy those amounts. He did so satisfy them and cleared off the liability in respect of those deeds. In addition Lallu Ram paid the vendor Rs. 500 before the date of registration. Rs. 7,827 were paid by him at the time of registration. Lallu Ram agreed to pay Rs. 2,000 to the vendors after registration. It is admitted that he paid that amount. Thus in actual payment of cash and in paying off Jagdamba Prasad and Kirpa Dayal Lallu Ram expended Rs. 12,314-10-0. He should have paid Rs. 7,685-6-0 as soon as the deed was executed to Mt. Bilasa, but he did not do so. If he had paid Rs. 7,685-6-0 to Mt. Bilasa on the day that the deed was registered he would have expended Rs. 20,000 in all, which was the price fixed for the sale of the 5-biswas share and half the 19·12 acres of under-proprietary land. We should note here that it was to the obvious advantage of Lallu Ram to pay off Mt. Bilasa as soon as possible, for, by paying her off, he not only cleared the 5-biswas share and the under-proprietary land which the vendors had retained, but the 5-biswas share and the under-proprietary land which he purchased.

For reasons which have not been explained, and which are very difficult to surmise, although he had expended a considerable amount of money in the purchase, he omitted to pay a little more than a half of what he had originally expended in order to make his title secure. He died about February 1920, having done nothing to satisfy the amounts due to Mt. Bilasa. In 1924 Mt. Bilasa instituted a suit on the deeds already mentioned for the foreclosure of the whole of the 10-biswas share and the 19·12 acres of under-proprietary land. She joined as parties both the plaintiffs-appellants as representing the original mortgagors, and the defendants-respondents are representing the vendees of the half-share. She obtained, on 21st November 1925, a final decree for foreclosure. This decree could

have been satisfied by the payment of Rs. 12,611-11-5, but none of the judgment-debtors under the decree took steps towards satisfying it. The decree became final, and the whole of this property has has now passed into the possession and ownership of Mt. Bilasa. The plaintiffs-appellants then filed the suit out of which this present appeal has arisen against the defendants-respondents demanding compensation from them owing to the failure to satisfy the liabilities to Mt. Bilasa which had been undertaken for good consideration by their father Lallu Ram. The defendants-respondents in their written statement asserted that the sale-deed in favour of their father contained many misstatements and falsehoods. They stated that it was the real intention of the parties that the liability to satisfy Mt. Bilasa should remain with the vendors, that Lallu Ram had never undertaken this liability, but that it had been falsely stated in his deed that he would undertake it, in order that the amount of Rs. 7,685-6-0 should be added fictitiously to the purchase money so that intending pre-emptors might be defeated.

The Court below has rightly held that oral evidence could not be produced to vary the terms of this written agreement and it has also rightly held that there is nothing to justify a conclusion that the sale-deed of the 22nd February 1918 contains other than a genuine statement of what occurred at the period. These conclusions have not been contested by the learned counsel who has represented the defendants-respondents. We thus have it that Lallu Ram actually paid Rs. 10,327 in cash to the vendors, that he paid off liabilities due from the vendors amounting to Rs. 1,987-10-0 and we find on our construction of the document, that he agreed to pay off everything due to Mt. Bilasa in respect of the amounts due on the deed of mortgage by conditional sale and the deed of further charge. His undertaking in the last respect was a contract to pay these amounts. The figure of Rs. 7,685-6-0, set aside for the purpose, was an estimate (and probably a correct estimate) of the amount that was necessary for the satisfaction of those liabilities, if the payment had been made at once. We have no hesitation in finding that Lallu Ram undertook to satisfy Mt. Bilasa and that his undertaking to satisfy Mt. Bilasa formed a portion of the consideration for which the transfer by sale was made in his favour. We can now approach the decision of the learned trial Judge. He has arrived at the conclusion that the plaintiffs-appellants are entitled to nothing. He bases this conclusion on the following reasoning. He says that the defendants-respondents' father had parted with a considerable amount of money amounting to Rs. 12,314-10-0 and, now that the whole of the property has been foreclosed, they have got nothing for that money. He considers that it will be most unjust and inequitable, if in those circumstances they have to pay anything more. He considers further that the plaintiffs-appellants were guilty of contributory negligence, because after the foreclosure decree had been passed against them and the respondents jointly, they did not themselves satisfy it. We are unable to accept the reasons which appealed to the learned trial Judge. He has completely ignored the facts that Lallu Ram had contracted to pay off Mt. Rilasa in full, and that if Lallu Ram had observed his contract, the plaintiffs-appellants would have retained the 5 biswas share and the moiety of the under-proprietary land which they had not sold free of all incumbrances. As a result of Lallu Ram's breach of contract the plaintiffs-appellants have lost that property. The learned counsel for the defendants-respondents did not attempt to support the decision of the learned trial Judge upon the reasons advanced by him. He has further admitted that Lallu Ram committed a breach of contract. He has admitted that Lallu Ram made a contract and that that contract has been broken; but he has argued upon a point, which was not previously raised, that his clients, as the sons of Lallu Ram, are not liable to pay damages in respect of the breach of the contract which their father made.

We must decide against him upon that point. The promise made by Lallu Ram bound his sons when Lallu Ram died before performing it. No contrary intention appeared from the contract. The law on the subject is well known. It is contained in India in the provisions of S. 37, Indian Contract Act (Act 9 of 1872). This much is clear. Lallu Ram undertook to satisfy the claims of Mt. Bilasa, and, because he had undertaken this liability in addition to satisfying other liabilities and paying certain sums of money he obtained

certain property. The defendants-respondents, as his heirs, continued to hold and enjoy that property. At the time their father died, Mt. Bilasa's claims could still have been settled. They remained open to settlement until the enforcement of the final foreclosure decree. The defendants-respondents are clearly liable for damages now that the contract has been finally broken by the passing of the property into the hands of Mt. Bilasa under her decree.

The only question which remains for us now to decide is the question of damages. We are satisfied that there has been a breach of contract and that the defendants-respondents are responsible for paying damages on that breach of contract to the plaintiffs-appellants. The learned counsel for the the defendants-respondents has pointed out to us that the learned trial Judge had formed the view that the plaintiffs-appellants had deliberately avoided satisfying the foreclosure decree because they had formed a sinister plan, that after the decree was passed they would put up a claimant fictitiously to recover the property by means of a pre-emption suit, and that, having at the same time recovered large damages from the defendants-respondents they would be in a better position, than if they had satisfied the foreclosure decree themselves. The learned trial Judge based this conclusion upon the evidence of a schoolmaster of Pasgawan called Bansgopal. This man calls himself a "decree-holder" in addition to being a schoolmaster. He apparently means by this that he has obtained certain under-proprietary rights in land under a settlement Court decree. He is a neighbour of the defendants-respondents and a great friend of theirs. He pays a portion of his rent to them and is distantly connected with one of them by marriage. His statement upon the point is vague to a degree. It refers to a conversation which he alleges had taken place two years before in Pasgawan. According to the note of evidence of this conversation defendant 1 told plaintiff 2 to try to manage for money for the foreclosure suit. Plaintiff 2 said in reply that he could not get money although he tried for it. Plaintiff 2 also said that he would take property by means of a pre-emption suit through his relation. That is all. Although the learned trial Judge heard the evidence and we have not had that advantage, the evidence in question is so scanty and so flimsy that we are not disposed to attach the slightest value to it. The scheme which the learned trial Judge believes existed appears to us fantastic. According to this scheme the plaintiffs-appellants were in hopes of extracting large sums of money from the defendants-respondents (who on this witness's own showing could not find Rs. 12,611-11-5 with which to satisfy the foreclosure decree) and then hoped subsequently to get the property back by a fictitious pre-emption suit filed through one of their relations. If the plaintiffs-appellants had had such financial dreams it would appear to have been easier for them to exchange those dreams for the solid reality of selling in conjunction with the defendants-respondents a portion of the mortgaged property in order to pay off the foreclosure decree.

What appears to us to have happened was this. The plaintiffs-appellants and the defendants-respondents were alike singularly lacking in business sense and in business capacity. They have allowed a valuable property to go out of their hands owing to their inaction and incapacity. But the fact remains that the defendants-respondents were under the liability to pay off Mt Bilasa. They were bound by a contract so to pay her off. They did not pay her off. However foolish the plaintiffs-appellants may have been, the defendants-respondents committed a breach of contract and are liable for damages. What should be these damages? Clearly by their omissions they have deprived the plaintiffs-appellants of a 5 biswas share and a certain amount of under-proprietary land. For an exactly similar share their father paid Rs. 20,000. Arguments have been addressed to us to show that as the land revenue upon the share was only Rs. 90 the property could not possibly have been worth Rs. 20,000; but those arguments have little, if any, force. The land revenue as fixed at the last kheri settlement was sometimes very low, and even the recorded figure of rentals is not always reliable. This much we know. Lallu Ram valued the share at Rs. 20,000. The defendants-respondents have produced no evidence worth consideration to show that it is worth less. In these circumstances we consider that the plaintiffs-appellants are entitled to Rs. 20,000. We accordingly allow this appeal and

grant the plaintiffs-appellants a decree against the defendants-respondents for Rs 20,000 with full costs of this Court and the Court below. We see no reason to allow future interest.

N.K. *Appeal allowed.*

A. I. R. 1928 Oudh 152

STUART, C. J., AND PULLAN, J.

Mahabir Bux Singh—Plaintiff — Appellant.

v.

Sitla Bux Singh and *others* — Defendants—Respondents.

Second Appeal No. 164 of 1927, Decided on 7th December 1927, from decree of Dist. Judge, Fyzabad, D/- 7th February 1927.

Oudh Rent Act (19 *of* 1868) *S. 5—Settlement officer creating occupancy rights in tenants—Tenants subsequently claiming under-proprietary rights—Court cannot go behind the order of the Settlement Officer.*

Where a decree of a Settlement Court in Oudh has from the necessity of the case, been unable to decide whether a man is or is not an under-proprietor, or where there is no decree of a Settlement Court deciding the point, then undoubtedly the question, as to whether a man has or has not under-proprietary rights, must be decided by Civil Court upon other evidence. But where the decree of the Settlement Court can leave no doubt as to the fact that the parties are occupancy tenants and not under-proprietors, it is not open to the Court to go behind it. [P 153 C 1]

Hyder Husein and *Ali Zaheer* — for Appellant.

A. P. Sen and *S. C. Das*—for Respondents.

Judgment.—The question raised in this second appeal is one of importance and of no little difficulty. We have derived great assistance in our decision from the careful and well-thought-out judgment of the learned District Judge, Fyzabad, who was the Court of first appeal. The facts as he found them, and as we find them, may be stated as follows: The predecessors-in-interest of the present appellant applied in the Sultanpur Settlement of 1869 for a declaration that they should be given what they called *sir* rights. They clearly were not able to explain exactly what they wanted, but were ready to take anything which put them in a position better than that of ordinary tenants. They appear to have asked for a sub-settlement. If they did not get that, they were ready to take a decree for under-proprietary rights. If they did not get that they were ready to take the next best thing. The Settlement Officer stated that their family had held the land for generations on a service tenure and considered that they were entitled to no rights of any kind. The Settlement Commissioner stated that these persons were not zamindars, that they had not established an under-proprietary title, but that their position was something better than that of mere tenants-at-will. He accordingly directed that they should be declared to possess a right of occupancy in the lands held by them, taking a right of occupancy to be the right described in Ch. 2, Act 19, 1868*. This right of occupancy is described particularly in S. 5 of that Act, and there can be no doubt that according to Mr. Capper's decision these persons were considered to be tenants, who, having lost all proprietary right, whether superior or subordinate, in the lands which they held or cultivated, were to have, so long as they paid the rent, a right of occupancy.

It appears that after the occurrence of the large number of events which have been detailed carefully by the learned District Judge, the successors-in-interest eventually got their names recorded from 1892 to 1920 as under-proprietors. Recently the superior proprietors of the village asked that the revenue papers should be corrected and that the appellant and his cosharer should be recorded as occupancy tenants. The revenue papers having been corrected accordingly, the appellant and others brought the present suit for a declaration that they are under-proprietors. In support of the claim to be under-proprietors he relies upon certain facts and upon certain facts only. The facts in question are that in a suit for arrears of rent which was brought in 1900 a witness Raghunath Singh, who is alleged to have been the ancestor of some of the defendants-respondents, stated that the predecessors of the appellant were under-proprietors. Further facts were that in certain rent receipts those predecessors are described as under-proprietors and from 1892 to 1920 they are des-

* Oudh Rent Act (19 of 1868) repealed by Oudh Rent Act (22 of 1868)—Ed.

cribed in the revenue papers as under-proprietors. These are all the facts in his favour.

The learned District Judge considers that in view of the fact that Mr. Capper's judgment, which creates the rights, distinctly shows that the rights were only the rights of occupancy tenants within the meaning of S. 5, Act 19 of 1868, no subsequent statements that such tenants are under-proprietors whether contained in the mouths of witnesses, in receipts for rent or in entries in the revenue registers can avail to show that they are under-proprietors. We arrive at the same conclusion as he arrives upon the facts and we arrive at the same finding. Where a decree of a Settlement Court in Oudh has, from the necessity of the case, been unable to decide whether a man is or is not an under-proprietor, where a decree of a settlement Court has left in doubt the fact whether he is or is not an under-proprietor, or where there is no decree of a Settlement Court deciding the point, then undoubtedly the question, as to whether a man has or has not under-proprietary rights, must be decided upon other evidence. But where, as here, the decree of the Settlement Court can leave no doubt as to the fact that the parties are occupancy tenants and not under-proprietors, it is not open to us to go behind it. Even if it were open to us to go behind it, in our opinion the evidence adduced by the appellant would not be sufficient to show that under-proprietary rights existed. For the above reasons we uphold the decision of the learned District Judge and dismiss this appeal with costs.

S.J. *Appeal dismissed.*

A. I. R. 1928 Oudh 153

PULLAN, J.

Kushar Das and *another*—Defendants—Appellants.

v.

Balbhaddar Singh and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 294 of 1927, Decided on 5th December 1927, from decree of Sub-Judge, Lucknow, D/- 16th May 1927.

(a) *Oudh Rent Act* (22 *of* 1886), *S.* 107-*H*—*Muafidar selling muafi rights before he is declared under-proprietor — Revenue Court deciding that the vendee from the muafidar has no title—Civil Court cannot interfere.*

Primarily it is the revenue Courts and not the civil Courts who decide questions of under-proprietary rights and where finding of the revenue Courts is that the muafidar had attempted to sell muafi rights which cannot be sold and that consequently the vendee had no title and it was also held that a muafidar only acquires under-proprietary title under S. 107-H, Oudh Rent Act, when he is declared by a Court to have done so, the civil Courts are justified in declining to admit the case the decision on these points being within the powers of the revenue Courts. [P 154 C 1, 2]

(b) *Oudh Rent Act* (22 *of* 1886), *S.* 107-*H*—*Muafidar, though of more than two generations and* 50 *years standing cannot be an under-proprietor without a declaration by a revenue Court.*

A muafidar though of more than two generations and 50 years standing cannot acquire under-proprietary rights as an under-proprietary right under this section arises only when a declaration has been made by the revenue Court under this section. Such a declaration changes the status of a muafidar into that of an under-proprietor from the date on which it takes effect : 21 *O. C.* 124, *Foll.* [P 155 C 1]

(c) *Landlord and Tenant*—"*Muafi rights*" *explained.*

Muafi rights are rights held by a tenant against the zamindar and against no one else, Such rights cannot be sold because they are resumable by the zamindar and the fact that such a sale is void as against the zamindar makes the sale absolutely void because it can be immediately defeated by the zamindar. [P 154 C 2]

(d) *Transfer of Property Act, S.* 43—*Section does not apply to void sales.*

Section 43 has no application to a sale which is void. It applies to a case where a person erroneously represents that he is authorized to transfer certain property and subsequently becomes able to do so. [P 154 C 2]

Radha Krishna—for Appellants.

Kashi Prasad and *M. M. Ansari*—for Respondents.

Judgment.—This is a second appeal from a decree of the Subordinate Judge of Lucknow in a suit where the plaintiff sought a declaration that he was an under-proprietor of three specific plots in the village of Tipnamau. The suit is a sequel to certain proceedings in the revenue Courts. These plots were originally the muafi of defendants 1 and 2. These persons sold their muafi rights on 16th February 1923, to the present plaintiff and their landlords brought a suit for resumption under S. 108, Cl. (5) (a), Oudh Rent Act. In that suit the present plaintiff was made a party and he pleaded that he had purchased the right of the muafidars, and that he should be held to be an under-proprietor because the muafidars had held the land for more than 50 years and had, in other respects, complied with the requirements of S. 107-H, Oudh Rent

Act. The revenue Courts held that the sale of muafi rights was void, that the muafidar did not become under-proprietors until they were declared to be such by an order of the Court and that accordingly the vendee was in a position analogous to that of a trespasser.

The landlords thereupon brought a suit against the vendee for arrears of rent and the latter filed this suit in the civil Court asking for a declaration that he was under-proprietor and, in the alternative, praying that defendants 1 and 2 be ordered to execute a fresh sale-deed in respect of the same plots. That is to say he pleaded first that he was an under-proprietor because the rights sold to him should be construed to be under-proprietary rights and secondly if the Court found that the under-proprietary rights had not been transferred already the vendees should be required to make good the defect by a new sale-deed. In other words the first sale was to be regarded as a contract to sell and the suit was to be regarded in some manner a suit for specific performance of contract. One of the issues raised in the first Court was that the suit was not cognizable by that Court. Unfortunately the learned Munsif has not decided this issue. He threw out the suit on this finding that the sale-deed of muafi land was void.

The lower appellate Court, in its judgment, which although specious is unsound from beginning to end, set aside the decree of the lower Court and decreed the suit for declaration. In that Court also the question of jurisdiction was raised and was dealt with very briefly at the end of the judgment and regarded by the Court as a point of little or no interest. It appears to me that civil Courts are too ready to take up and decide questions of revenue law which have already been decided in the revenue Courts. There is no question that the same points were in issue in the civil Courts as had already been determined by the revenue Courts and primarily it is the revenue Courts and not the civil Courts who decide questions of under-proprietary rights. The finding of the revenue Court was that the muafidar had attempted to sell muafi rights which cannot be sold and that consequently the vendee had no title and they also held that a muafidar only acquires under-proprietary title under S. 107-H, Oudh Rent Act, when he is declared by a Court to have done so. Unless these points could be decided over again in favour of the plaintiff he could not succeed in establishing the case which he has set up in the civil Court, and as a decision on these points was within the powers of the revenue Court, the civil Courts would, in my opinion, have been justified in declining to admit this case.

As however, the learned Subordinate Judge has dealt at length with the questions in issue, and given findings which are, in my opinion, entirely erroneous, I think it proper to deal with these findings. In the first place he has held that the case is governed by S. 43, T. P. Act. He invokes that section to prove that a vendor having sold an unsaleable right should be bound by that sale when he subsequently obtains a saleable right in the same property. In order to maintain this decision he has found that a sale of muafi right although void against the zamindar is not void ab initio and he refers to certain rulings which he believes to be in favour of his view and he differentiates those rulings which he believes to be against his view. As a matter of fact the only ruling which would directly support him is *Bhairon* v. *Balak* (1), which has been dissented from by the Oudh Chief Court in *Dasrat* v. *Mt. Sandala* (2). It appears to me that muafi rights are rights held by a tenant against the zamindar and against no one else. Such rights cannot be sold because they are resumable by the zamindar and the fact that such a sale is void as against the zamindar makes the sale absolutely void because it can be immediately defeated by the zamindar. S. 43 has no application to a sale which is void. It applies to a case where a person erroneously represents that he is authorized to transfer certain property and subsequently becomes able to do so. A holder of muafi rights who sells those muafi rights can never be in this position because he can never become able to sell muafi rights. He is not selling the land because he is not the landlord. He is only selling certain rights in that land which are unsaleable and the sale is not made good if he subsequently becomes possessed of saleable rights in the same land.

But to make his case more sure the learned Subordinate Judge went on to

(1) A. I. R. 1922 Oudh. 287.
(2) A. I. R. 1926 Oudh 270.

dispute the finding of the Munsif and also of the revenue Courts that a muafidar only becomes an under-proprietor under the terms of S. 107-H when he is declared by a Court to do so. Here too the case-law was against the lower Court, but he has attempted to distinguish some of the authorities and lays down the law that a muafidar of more than two generations and 50 years standing shall be deemed to have become an under-proprietor in the eyes of the law whether a declaration has or has not been made under S. 107-H. It is not necessary to discuss that at length. I need only say that the learned Subordinate Judge is wrong. In *Murli* v. *Gajraj Singh* (3), it was laid down that

> It is well settled that under-proprietary right under S. 107-H only arises on a declaration being made by the revenue Court under that section. Such a declaration changes the status of the muafidar into that of an under-proprietor from the date on which it takes effect.

More recently the Chief Court of Oudh in *Umanath Bakhsh* v. *Ram Bakhsh Singh* (4), has spoken of

> such under-proprietary rights as can be created under S. 107-H, Oudh Rent Act, in other words, where potential rights in the future and not actual rights in the present are set up.

Thus when the sale was made the vendors were not under-proprietors and they could only transfer those rights which they then possessed. The rights which they possessed were the rights of a muafidar and those rights could not be sold. As soon as the landlord came forward to resume the muafi and the Courts declared that the muafi had ceased to exist and the muafidars had become under-proprietors, the vendee had nothing on which to rest a title. Neither of the Courts below have considered the question as to whether the plaintiff can obtain any relief from the vendors. Whether he can do so or not is a question which I have not got to decide but on this point at least I may express an opinion, namely that he cannot obtain the satisfaction he has sought, that is he cannot in these proceedings obtain an order directing the vendees to execute a new sale-deed of under-proprietary rights in his favour, because the first sale-deed of muafi rights has been found to be void. This is relief which no Court can grant.

This appeal has been preferred by the vendors and another Appeal No. 297 of 1927 has been filed by the zamindars. Both of these appeals must succeed and are decreed with costs. I accordinly set aside the order of the lower appellate Court and restore the order of the Munsif who dismissed the suit with costs.

S.J. *Appeal allowed.*

(3) [1918] 21 O. C. 124=46 I. C. 443=5 O. L. J. 241.

(4) A. I. R. 1926 Oudh 428=1 Luck 202.

A. I. R. 1928 Oudh 155

GOKARAN NATH MISRA, J.

Abdul Halim Khan—Plaintiff.

v.

Raja Saadat Ali Khan and *others*—Defendants.

Original Suit No. 8 of 1926, Decided on 16th September 1927.

(a) *Will — Power of appointment means right to nominate successor.*

Power of appointment really means a right to nominate a successor with power to transfer the estate to him. Such right cannot be considered as merely an obligation. The conferment of such power would not merely amount to conferment of a privilege but a testamentary gift of power in favour of the donee. [P 162 C 2]

(b) *Oudh Estates Act, (1 of 1869), S. 29—Widow—Meaning of—Widow of Mahomedan talukdar given power to adopt—Remarriage with another man—She cannot exercise power to adopt.*

The word "widow", as used in S 29, Oudh Estates Act, means "a woman whose husband has died and who has not been married to any other man." If, therefore, a widow of a Mahomedan taluqdar is given by her husband a power to adopt she must exercise that power while she is his widow. If she has ceased to be his widow by her remarriage with another man, the power given to her can no more be exercised by her. The widow of a Mahomedan taluqdar must be considered to be civilly dead, if she remarries herself, so far as her power to adopt is concerned. [P 163 C 1, P 169 C 1]

(c) *Will—Construction—Guiding principle—Various clauses must be read together—True intention and real object must be ascertained.*

In all cases the primary duty of a Court is to ascertain the true intentions of a testator from an examination of the entire will. The Court in fact is entitled to put itself into the testator's chair and say, having regard to the language used in the different clauses, when read together what the true intention of the testator was. Only that interpretation must be placed upon his will, which is reasonable and not one which would tend to defeat his real object: (*Case law discussed.*) [P 167 C 1]

(d) *Evidence Act, S. 74—Magistrate sending an official memo to a Civil Surgeon to examine an accused and report his age—Civil Surgeon's report is not a record of "act" in official capacity—It is not admissible in evidence without formal proof.*

When a Civil Surgeon reports to a Magistrate he is merely giving his expert opinion and is

not making a record of his "act" in official capacity for the use of the public. It is only his act of making a record in such a capacity that would be considered to be an "act" within the meaning of S. 74. A memo written by a Civil Surgeon, who happens to be the Superintendent of a District Jail, cannot be considered to be an act or a record of his act as a public officer. and it merely embodies his opinion as an expert: 20 *Mad.* 189, *Rel. on.* [P 177 C 1]

(*c*) *Civil P. C., S.* 11 — *Expls.* 4 *and* 6 *and S.* 88 — *Interpleader suit — Defendants arrayed on the same side—Adverse interests—one widow adopting a son—Former widow putting forward adoption—Co-widow's duty to contest factum and validity—The point of omission to do the needful must be deemed to have been raised — Court's decision operates res judicata.*

An inter-pleader suit from its very nature, as described in S. 88, Civil P. C., is a suit in which several claimants are to be deemed to be claiming adversely to each other. Consequently, though a widow who adopts a son and another person who is adopted by a co-widow are arrayed in that suit on the same side as defendants, yet they must be deemed to be claiming adversely to each other. If in such a suit the latter puts forward his adoption by the widow under the powers conferred upon her under the will of her late husband it is the duty of co-widow to contest the said adoption, both in respect of the factum as well as its validity, by filing a written statement to that effect. If she does not do so in spite of the fact that she is represented by a pleader on the date, when the issue relating to the adoption was framed on the pleadings of other defendants, she must be deemed to have raised the point, and, if the Court decided it adversely, the matter must be deemed, under Expl. 4 to S. 11, Civil P. C., to be a matter directly and substantially in issue in that suit and it is no more open to her to contest the factum and the validity of the adoption in a subsequent suit, the decision in the previous suit operating as res judicata against her. [P 179 C 2, P 181 C 2]

(*f*) *Civil P. C., S.* 11, *Expl.* 6—*Decision against adoptive mother as to want of authority binds adopted son.*

If in a litigation a decision, fair and square, is obtained against the adoptive mother, to the effect that she possessed no authority to adopt, that decision must be considered to be binding upon the adopted son by virtue of Expl. 6, S. 11, Civil P. C.: (*Case-law discussed.*) [P 182 C 2]

(*g*) *Limitation Act, Ss.* 141, 142, 144—*Adverse possession—Suit by adopted son—Suit brought within* 12 *years of the date of adoption is not time barred—Possession against a person not entitled to claim possession is not adverse—Widow does not represent entire estate for limitation purposes—Rule is applicable to a Mahomedan entitled to the possession of an estate after the death of a female.*

One of the general principles governing the law of limitation is that a person can only be considered to be barred, if he has a right to enter and does not exercise that right within the period fixed by the Limitation Act. Ex facie it must follow that a person who is not in existence cannot be considered to be a in a position to claim whether immediate or otherwise. The cause of action in the case of an adopted son accrues only from the date of his adoption; when therefore a suit is brought by an adopted son within 12 years of the date of the accrual of the cause of action in his favour, the suit cannot be considered to be barred by limitation. So far as a Hindu widow is concerned she cannot for the purposes of limitation be considered to represent the entire estate, so as to bar a suit of a reversioner when her own suit happens to be barred This rule would be applicable not only in the case of a Hindu entitled to the possession of the estate after the death of a female, but also to the case of a Mahomedan occupying a similar position. The wording of Art. 141, Act 15, 1877 and of the present Act 9 of 1908 make this amply clear.: *Case law discussed.* [P 189 C 2, P 192 C 2, P 195 C 1]

(*h*) *Words—"Khandan" means group of persons descending from common progenitor.*

Ordinarily the Vernacular expression "Khandan," of which the corresponding English expression is 'family' means a group of descendants from one common ancestor called progenitor: 36 *All.* 101 (*P. C.*), *Foll.* [P 172 C 2]

Hasan Imam and *H. C. Dutt*—for Plaintiff.

Jinnah and *Mohammad Nasim*—for Defendant 1.

Judgment.—This is a suit for possession of the taluqa of Nanpara. It is a large estate, consisting of over 350 villages mainly situate in the district of Bahraich, in the province of Oudh. It is entered at No. 151 of List I and at No. 58 of List II attached to the Oudh Estates Act (1 of 1869). Raja Jang Bahadur Khan was the first taluqdar of Nanpara. He died on 1st May 1902 and was succeeded by his son, Raja Mohammad Siddiq Khan. The said Raja died on 30th December 1907 leaving no issues but only four widows. He had married five wives having divorced the first wife prior to the marriage of the last one. The names of those five wives in order of their marriages are: Rani Qamar Zamini Begam (1890), Rani Saltanat Begam (1900), Rani Dilafza (1902), Rani Champa (1902), and Rani Nasim Sahri (1905). The divorce of Rani Qamar Zamani Begam is stated to have taken place in March 1905, and the marriage of Rani Nasim Sahri in April of the same year. In February 1905 Raja Mahomad Siddiq Khan had brought his estate under the management of the Court of Wards. Shortly after the assumption of the management of his estate by the Court of Wards he left Nanpara with an intention to go on haj (pilgrimage) to Mecca en route Bombay, where he resided for some time. Before he left for Mecca he executed a will

at Bombay, on 8th January 1906, which was registered on the 23rd January 1906, providing for the succession to the taluqa and the payment of certain annuities and legacies. Except Rani Qamar Zamani Begam, whom the Raja had divorced, all the four Ranis accompanied him to Mecca. Under the terms of that will Raja Mahomad Siddiq Khan gave a life-estate in the taluqa to Rani Nasim Sahri, whom he mentioned in the will as the first Rani, and also authorized her to adopt a boy as son to him in case there was no son born to him of any of the Ranis. The son, if born or adopted, was to get a sum of Rs. 50,000 per annum from the income of the estate by way of maintenance. The period fixed for Rani Nasim Sahri to adopt was a period of two years, counted from the date of the Raja's death.

There was a further condition laid down in the will that the boy to be adopted should be of the Sunni sect and under ten years of age and not belonging to Quli family or to the family of the divorced wife, namely, Rani Qamar Zamani Begam whom he styled in the will as "Dulhan Saheba." He also enjoined that if within the prescribed period of two years no boy was adopted by Rani Nasim Sahri, Rani Saltanat Begam, whom he mentioned in the will as the second Rani, was to adopt after the expiry of that period. Rani Dilafza, whom he mentioned as the third Rani, was to make an adoption in case the second Rani failed to adopt within the same period of two years fixed for her. Rani Champa, whom he mentioned in his will as the fourth Rani, was to adopt similarly within the period of two years to be counted after the expiry of the period fixed for the third Rani. It was also provided in the will that if the first Rani died in the Raja's lifetime, or after his death, without having adopted a boy, the second Rani was to come into possession of the estate and enjoy it till the date of adoption by her but should have no power of transfer : and in case the second Rani died without having made an adoption a similar power was given to the third Rani, and a similar provision was made for the fourth Rani also. It was further provided in the will that, if any of his Ranis contracted a second marriage after his death, she was to forfeit all the benefit which she was to enjoy under the will. For purposes of this case it is unnecessary to mention other provisions of the will at this stage.

After the death of Raja Mohammad Siddiq Khan at Mecca on the 30th December 1907, all the four Ranis returned to India and landed at Bombay early in February 1908. After staying at Bombay for a short time they returned to Nanpara in March 1908. On 28th April 1908 the Court of Wards filed an interpleader suit impleading all the widows of the late Raja including also the divorced wife, his two sisters, namely, Rani Kaniz Begam (Rani of Utraula) and Rani Sarfaraz Begam (Rani of Muhamdi), and all persons who claimed any title to the estate, asking the Court to declare which person was entitled to the said estate. It was alleged that Rani Nasim Sahri, the first Rani, mentioned in the will of the late Raja Mahomed Siddiq Khan married one Sultan Khan on the night of 9th —10th May 1908, and thus lost all her rights in the estate and also her right to adopt as given to her under the will. It was further alleged that after the remarriage of Rani Nasim Sahri, Rani Saltanat Begam, the second Rani mentioned in the will, adopted Raja Saadat Ali Khan, defendant 1 in the present case, who is the late Raja's sister's (Rani Sarfaraz Begam's) son on 9th March 1909. After his adoption Raja Saadat Ali Khan was brought on the record of the interpleader suit as a claimant to the Nanpara estate.

During the trial of that suit, on 7th September 1910, a compromise was arrived at between Rani Qamar Zamani Begam, Rani Kaniz Begam, Rani Sarfaraz Begam and Raja Saadat Ali Khan, under the terms of which Rani Qamar Zamani Begam was to receive one-fourth share of the profits of the entire estate of Nanpara and also full proprietary rights in perpetuity in certain villages belonging to that estate. The rest of the profits of the taluqa were to be divided between Rani Kaniz Begam and Rani Sarfaraz Begam, the natural mother of defendant 1. In the event of the death of Rani Kaniz Begam without leaving a male issue, her husband, Raja Mohammad Mumtaz Ali Khan, the taluqdar of Utraula, defendant 2 in the present suit, if surviving, was to take her share for his life-time. On his death, or if he died before his wife, then, on her death, that half share was to revert to Rani Sarfaraz Begam, if surviving, and, if she did not

survive, then to Raja Saadat Ali Khan. On the death of Rani Sarfaraz Begam, his natural mother, defendant 1, was to succeed to the estate in her possession. On 4th November 1911, the claims of all the other claimants in the interpleader suit were dismissed, and a decree was passed in accordance with the terms of the aforesaid compromise. This decree was upheld in appeal by a Bench of the late Court of the Judicial Commissioner of Oudh by its decision dated 28th May 1914. Defendant 1, Raja Saadat Ali Khan, attained his majority in 1925, when the estate was released from the superintendence of the Court of Wards and its possession delivered to him.

The plaintiff, Abdul Halim Khan, is a minor being the son of one Nawab Abdul Karim Khan, taluqdar of Basit Nagar, district of Hardoi. He financed one Abdul Hamid Khan, a claimant to the Nanpara estate in the interpleader suit (P. R. 416). The plaintiff claims to have been adopted by Rani Champa (the fourth Rani mentioned in the will), under a deed of adoption, dated 25th July 1914, and registered on 27th July 1914. He denies the remarriage of Rani Nasim Sahri and, therefore, contends that the adoption of defendant 1 is contrary to the terms of the will and consequently invalid. It is on this ground that he claims possession of the entire Nanpara estate as the validly adopted son to the late Raja Mohammad Siddiq Khan. This is, in short, his case as stated in the plaint and before me in oral pleadings (P. R 336). His claim to the estate is laid as the adopted son of the late Raja Mohammad Siddiq Khan, under Cl. 7, S. 22, Act 1, 1869.

There are three defendants to this suit. Defendant 1 is Raja Saadat Ali Khan, who is now in possession of the entire Nanpara estate, after its release from the Court of Wards. Defendant 2 is Raja Mumtaz Ali Khan, the taluqdar of Utraula (district Gonda.) He is the husband of Rani Kaniz Begam, who died in 1920 without leaving any male issue. Under the terms of the compromise her husband (defendant 2) became entitled to the rights conferred upon her therein since she died issueless. It is for this reason that he has been impleaded as defendant 2 in the case. Defendant 3 is Rani Qamar Zamani Begam, the first married wife of the late Raja Mohammad Siddiq Khan, whom, it is alleged, he divorced in March 1905. According to the terms of the said compromise she is entitled to one-fourth share in the profits of the estate for her life-time and to certain villages of the estate in perpetuity as absolute owner. It is on this account that she has been impleaded in the suit. It should also be mentioned that Rani Sarfaraz Begam, the natural mother of defendant 1, died in 1921, and, after her death, under the terms of the compromise referred to above, her interest in the Nanpara estate devolved upon him. It would, therefore, appear that the entire Nanpara estate and all the rights appertaining thereto are at present possessed in different portions by the three defendants impleaded in the suit as described above.

Defendant 1, admits genuineness of the will set up by the plaintiff and that under the said will Rani Nasim Sahri was given a life-estate in the Nanpara taluqa with power to make adoption within two years from the date of the death of the late Raja Mohammad Siddiq Khan. It is, however, contended that Rani Nasim Sahri, owing to her remarriage with Mahomed Sultan Khan in May 1908, lost all her rights and privileges under the will. She is alleged to have executed a deed of relinquishment on 29th May 1908 giving up all her rights, which she was to enjoy under the will, and it, therefore, became impossible for her to make an adoption within the prescribed period, or, for the matter of that, at any time. Rani Saltanat Begam, the second Rani mentioned in the will, thereupon became entitled to exercise the power of adoption conferred upon her by the said will, her right of adoption having been accelerated by the remarriage of Rani Nasim Sahri. Rani Saltanat Begam, therefore, adopted defendant 1, and her adoption is valid in law; and in the face of this adoption there was no right left to any other widow to make an adoption under the terms of the will, and the plaintiff's adoption is, therefore, invalid. The factum of the plaintiff's adoption by Rani Champa was also denied.

It is also contended that in the interpleader suit brought by the Court of Wards in April 1908, and decided in November 1911, both defendant 1, Raja Saadat Ali Khan, and Rani Champa, the adoptive mother of the plaintiff, were

impleaded as parties, and the question relating to the factum and the validity of adoption of defendant 1, having been tried and found in his favour the trial of the said question is now res judicata between the parties, the said decision being binding upon the plaintiff. Defendant 1 also contended that the suit was barred by limitation on the ground that, as the person entitled to the estate as the adopted son he should be deemed to have come into possession of the estate in 1909, when his adoption was made and that he has, therefore, been in adverse possession of it for more than 12 years. The adoption of the plaintiff was also challenged by defendant 1, to be invalid on the ground that it was a sham and colourable transaction and, in any case, it was invalid because it was made by Rani Champa subsequent to the adoption of defendant 1, when no right to adopt had been left to any of the widows of the late Raja. Its validity was also denied on the score that Rani Champa, having remarried in 1910, lost her power to adopt under the terms of the will. The contention was that she could not, after her remarriage, be considered any more to be the widow of the late Raja Mohammad Siddiq Khan. The fact that Rani Champa was the legally married wife of the late Raja was also denied.

Defendant 2, Raja Mumtaz Ali Khan, denied the genuineness as well as the validity of the will of the late Raja, dated 8th January 1906. It was contended by him that the said will was invalid because the late Raja was not at the time of its execution, of sound disposing mind. It was also contended by him that defendant 3, Rani Qamar Zamani Begam, had been divorced by the late Raja during his life-time and that his other four Ranis, namely, Rani Nasim Sahri, Rani Saltanat Begam, Rani Dilafza and Rani Champa were not his legally wedded wives. It was further contended by him that, on the date of the death of the late Raja succession opened under Cl. (11), Act 1, 1869, as it existed prior to its amendment by Act 3 of 1910, and that Rani Kaniz Begam, his wife, being the elder sister of the late Raja, was an heir-at-law to the estate under the aforesaid clause and was thus entitled to the entire Nanpara taluqa to the exclusion of everybody else. Other pleas raised by defendant 1 were also adopted on his behalf.

Defendant 3 also denied the genuineness and the validity of the will of the late Raja, dated 8th January 1906. She also denied that she had ever been divorced by the late Raja. The factum and the validity of adoption of the plaintiff was also denied by her. The validity of the plaintiff's adoption was challenged on the same ground as urged by defendant 1. It was further contended on her behalf that, on the death of the late Raja, she was entitled to the possession of the Nanpara estate as his senior widow under Cl. (7), Oudh Estates Act (1 of 1869), as it stood prior to its amendment by Act (3 of 1910 now Cl. 6, of the amended Act).

On behalf of the plaintiff it was contended in reply that Rani Champa had never remarried herself. The factum of the adoption of defendant 1 by Rani Saltanat Begam was denied, and even if made its validity was contested on the ground that it had not been made by her during the period fixed for her under the will of the late Raja ; that the adoption was inoperative because it was made by her for corrupt motive, she having received a sum of Rs. 32,000 from Rani Sarfaraz Begam, the natural mother of defendant 1, as consideration for it ; and that defendant 1 belonged to the Quli family and therefore his adoption was contrary to the terms of the will of the late Raja. The deed of relinquishment, alleged to have been executed by Rani Nasim Sahri, on 29th May 1908, was also denied.

On 1st November 1926, when the case was stated by the counsel of the parties before me, all of them agreed that for the purposes of this case the four Ranis mentioned in the will of the late Raja, namely, Rani Nasim Sahri, Rani Saltanat Begam, Rani Dilafza and Rani Champa should all be treated as his married wives (*P R.* 342). It was also admitted by all the parties to the suit that the matter of the divorce of Rani Qamar Zamani Begam, defendant 3, was not relevant for the purposes of the inquiry in the present suit and that no issue need be framed on the point. The result of these statements was that the questions relating to the marriage of the aforesaid four Ranis with the late Raja Mahomed Siddiq Khan and the divorce of Rani Qamar Zamani Begam remained no more as contested points in the case.

Issues had been originally fixed by Mr. Justice Kendall on 29th March 1926, but after the case had been stated before me on 1st November 1926, I amended them and fixed them afresh. (The judgment then narrated the issues and proceeded to give the findings).

Issue 1.—This issue relates to the factum of adoption of the plaintiff by Rani Champa. The factum of adoption is established by the registered deed, dated 25th July 1914 (Ex. AA). The deed has been proved by the evidence of P. W. 1, Mrs. A. E. Bose, and P. W. 2, Nawab Bahadur Khan. The evidence of P. W. 1 will be found on *P. R* 388 to 400 and that of Nawab Bahadur Khan on *P. R.* 409 to 424. The factum of the plaintiff's adoption was also established by the evidence of Mt. Asghari Begam recorded on commission (*P. R.* 401 to 407). After I had recorded the evidence of these two witnesses (P. W. 1 and P. W. 2) all the parties admitted the factum of adoption of both the plaintiff and defendant 1 and also all the documents relating to the factum of their adoption. I, therefore, passed the following order on 8th December 1926 :

> No evidence will now be produced in the case relating to the factum of the adoption of the plaintiff and of defendant 1. The point will be considered as admitted between the parties. (*P. R* 424).

Issue 4.—This issue relates to the adoption of defendant 1. It is established by Ex. A-1, the registered deed of adoption, dated 9th March 1909. It was also established in the interpleader suit: vide findings on issues 37, 38, 39 and 40. The judgment of the interpleader suit is Ex. 37 (*P. R.* 109 to 253 at pp. 231 and 232). In view of the agreement arrived at between the parties on 8th December 1926, and the order of the Court passed thereon, the point will be deemed as having been admitted between the parties. I, therefore, find the said issue in favour of defendant 1.

Issue 8.—In view of the finding on issue 4, this issue becomes immaterial. After the admissions had been made regarding the factum of the adoption of defendant 1, I ordered, in the proceedings, dated 8th December 1926, that it would not be necessary to decide the first part of issue 8, which relates to the estoppel of the plaintiff from challenging the factum of the adoption of defendant 1. Regarding the second part of the issue, which relates to the validity of the adoption of defendant 1, I will deal with the point under issue 7. Apart from the question of res judicata there is no other estoppel in the way of the plaintiff from challenging the validity of the adoption of defendant 1. This is my finding on the second part of this issue.

Issue 2.—This issue relates to the remarriage of Rani Champa, and is one of the most important issues in the case. I have given my most anxious consideration to this issue during the trial of the case and also during the arguments, and before coming to a finding on the point as recorded in the judgment I have again gone through the entire evidence on the record. The conclusion to which I have come is that the remarriage of Rani Champa with Sher Mohamed Khan is established. (The judgment then discussed the evidence and proceeded). I must, however, refer at this stage to an argument put forward by Mr. Jinnah, the learned counsel for defendant 1, that it was not necessary for the Court to come to a definite finding on the question of the marriage of Mt. Ketki Begam. The question before the Court, he argued, was not whether Mt. Ketki Begam had been married to Sher Mohamed Khan or not. The only question before the Court he said was whether Rani Champa had been remarried to Sher Mohamed Khan. If the plaintiff had set up the case that both Mt. Ketki Begam and Rani Champa had been married and that Rani Champa's marriage was invalid, because Mt. Ketki Begam had been previously married, then a further question would have arisen for determination of the Court as to whether Mt. Ketki Begam had actually been married first. In that case defendant 1 might have led evidence to prove that it was really Rani Champa who had been married first and that her marriage was therefore quite valid and operative under Mahomedan law. Without any issue to that effect he contended it was impossible for defendant 1 to lead evidence on the point as to who was married first. He pointed out that, unless this matter had been specifically raised by the plaintiff, it was not possible for defendant 1 to meet it, and consequently, without any issue to that effect, the plaintiff could not ask the Court to decide that Mt Ketki Begam had actually been married first and that Rani Champa, if at all, was

married subsequently. It was urged by him that it was no business of the Court to set up on behalf of any party a case, which that party had never chosen to set up for himself. In support of this proposition reliance was placed by him upon the ruling of their Lordships of the Privy Council reported in *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (1).

I am of opinion that the contention urged by the learned counsel for defendant 1 is correct. The only way how the plaintiff could successfully rebut the case relating to the marriage of Rani Champa with Sher Mohamed Khan was either by proving that Rani Champa had never been married, or that she had been married, but, after the marriage of Mt. Ketki Begam, and thus her marriage was illegal. The plaintiff never took up the second position. His counsel clearly took up the first position as would appear from the proceedings recorded in the earlier stages of the trial of the case (*P. R.* 554). This was during the course of the examination of Nawab Ghazanfar Ali Khan alias Abbu Saheb, D. W. 8, who was produced as the first witness in proof of the remarriage of Rani Champa. It is clear that in such a case the plaintiff could not completely rebut the case of defendant 1 by merely attempting to prove the marriage of Mt. Ketki Begam. That could only be done, as stated above, by alleging and proving that her marriage had taken place prior to the remarriage of Rani Champa. It is, therefore, not necessary for me to give a definite finding whether Mt. Ketki Begam was actually married to Sher Mohamed Khan prior to the alleged marriage of Rani Champa. Since this case was never set up on the plaintiff's behalf I am not called upon to decide it. It is enough for me to say that by merely setting up the marriage of Mt. Ketki Begam, the case of remarriage of Rani Champa cannot be successfully rebutted. I may also state here that in my opinion the plaintiff has not been able to prove by good, convincing and reliable evidence the fact of the said marriage also, nor has he been able to prove beyond doubt the exact date of the said marriage if it ever took place.

I may also state here that at the very last stage of the arguments in the case Mr. Jackson, the learned counsel for the plaintiff, urged that I might frame an issue to the effect whether Mt. Ketki Begam had been married to Sher Mohamed Khan prior to the marriage of Rani Champa. I could not, however, accept that request of the learned counsel, since such an action would have involved a change in the pleadings and a de novo trial of the case (*P. R.* 1333).

After having discussed both the oral and the documentary evidence on both sides and after having given my opinion as to the pleadings in the case and also in regard to the plea of the marriage of Mt. Ketki Begam as a piece of rebutting evidence, I must now proceed to deal with the circumstantial evidence. In a case like this where oral evidence is conflicting and where documentary evidence does not help one in coming to a decisive conclusion, the only proper course is, as stated by me in the earlier portion of this judgment, to see what are the admitted facts in the case, and what are the circumstances deducible from the evidence of both sides about the truth of which there can be no doubt. This alone can be the true method of arriving at a correct conclusion. I have already referred to several rulings of the Privy Council, where their Lordships have laid down the same rule, and before I took up the discussion of the oral evidence produced in rebuttal on behalf of the plaintiff, I have mentioned in this judgment that such a course was the only proper course that should be followed. (The judgment then dealt with the circumstances pointing to the remarriage of Rani Champa with Sher Mohammad Khan. and proceeded.) On a review of the entire evidence on the record, my finding therefore, on this issue is that the remarriage of Rani Champa with Sher Mohammad Khan on 21st March 1910, has been established.

Issue 3. This issue relates to the validity or otherwise of the plaintiff's adoption. I have already given my finding on issue 1 relating to the factum of his adoption, that question having been decided in plaintiff's favour as agreed upon by the parties. The validity of the plaintiff's adoption was, however, questioned on the ground that it was a bogus and sham transaction and not actually intended to be operative. Its invalidity was also urged on the grounds that it was made subsequent to the adoption of de-

(1) [1875] 2 I. A. 87=15 B. L. R. 67=23 W. R. 248=3 Sar. 425 (P. C.).

fendant 1 when no right to adopt had been left in any of the widows of the late Raja Mohammad Siddiq Khan, and that it was made by Rani Champa after she had remarried herself.

As to the invalidity on the aforesaid grounds I may state that in respect of the last ground I have already decided the previous issue relating to the remarriage of Rani Champa in the affirmative. If the remarriage of Rani Champa has been established to have taken place in March 1910, it is clear that the plaintiff's adoption having been made by her in 1914 is clearly invalid. In that year Rani Champa had, owing to her remarriage, ceased to be 'the widow of Raja Mohammad Siddiq Khan, and if she did not possess that status at the time of the plaintiff's adoption, it must be considered to be invalid. Under the terms of the will of the late Raja Mohammad Siddiq Khan (Ex. A) if any of his Ranis contracted a second marriage after his death she was not to be entitled to any benefit or privilege conferred on her under any part of the will (*kisi dafa wasiyatnama haza se faeda uthanae ke mustahaq na hogi*). One of the privileges conferred upon the widows of the late Raja by him under the said will was a 'right to make an adoption to him. Rani Champa must, therefore, be deemed to have lost that right under the will, and any subsequent exercise by her of a power conferred upon her by the will, must be deemed to be invalid.

A very ingenious argument was, however, advanced by Mr. Hasan Imam, the learned counsel for the plaintiff, to meet this situation. His argument consisted of two points. The first point was to the effect that on a proper interpretation of the will, the Raja in case of remarriage, deprived his widows only of the rights which he had conferred upon them in respect of his property, but there was no intention on his part to deprive them of the power of adoption which was really a power given to them for nominating an heir to him and could not in any way, be considered as a benefit to the widows themselves. Such a power might be beneficial for the estate or for the Raja himself but was in no way benficial to his widows. I regret I cannot accept this contention. The reply of Mr. Jinnah, the learned counsel for defendant 1, was that the power to adopt was equivalent to a power of appointment as known under the English law. A power of appointment really meant a right to nominate a successor with power to transfer the estate to him. Such a right could not be considered as merely an obligation but must be considered as a substantial power amounting to a privilege conferred upon each of the Ranis under the will. Indeed the conferment of such a power would not merely amount to conferment of a privilege but to a testamentary gift of power in favour of the donee.

I am in full agreement with this contention of Mr. Jinnah. The proposition is supported by a decision of their Lordships of the Privy Council reported in *Bai Motivahu* v. *Bai Manubai* (2).

The power to adopt, i. e. to make an appointment should be 'considered as a power to make a gift of the property in place of the testator to the person appointed. This cannot be considered as merely amounting to a discharge of a particular obligation but this is a very valuable right, viz., a right to make a gift of the property of the testator to a person in accordance with his intentions. A donee of a power, when he exercises the said power, must be deemed in the eyes of law to transfer the property to the appointee. It must be considered as equivalent to transferring the property of the testator in favour of the persons appointed or adopted. It, therefore, amounts to a disposition of the property of the testator under the terms of the will. In the well-known work of "Farwell on Powers" (3rd edn.) a power has been defined as an authority reserved by or limited to a person to dispose, either wholly or partially, of real or personal property either for his own benefit or for that of others. "The donee of a power", according to the same author:

> has a right of disposition over the property subject to the power which may be either limited or unlimited, according to the terms upon which it is granted. Vide p. 1.

It is, therefore, clear that a power amounts to a right of disposition in respect of a particular property. Being a right of disposition over a particular property in a particular way, it cannot be considered to be merely an obligation. It is indeed a very valuable right in relation to a particular property

(2) [1897] 21 Bom. 709=24 I. A. 93=7 Sar. 140 (P. C.).

and must be considered as equivalent to an advantage derived under the will. If this view be taken, the power to adopt must be considered to be a benefit or a privilege conferred under the will of the late Raja, and under the terms of the said will, Rani Champa must be deemed to have lost her right to adopt when she remarried herself.

The second point urged by Mr. Hasan Imam was to the effect that the word "widow" in S. 29, Oudh Estates Act 1, 1869, should not be read as meaning that a woman, who is making an adoption, must be at the time of the adoption a widow. It only means a woman who had been at one time a widow of a Taluqdar, it being quite immaterial whether at the time of the adoption she happened to be the wife of another man. The suggestion was that the fact that a Mahomedan widow remarried herself, would not take away her power of adoption. I regret I am unable to accept this contention also. The word "widow" as used in S. 29, Oudh Estates Act, is in itself a clear expression and must be read in its plain meaning, viz., a woman who is a widow, i. e., whose husband has died and who has not been married to any other man. In Webster's Dictionary we find the meaning of the word "widow" given as a woman who has lost her husband by death and has not married again (P. 2334). The expression cannot obviously mean a woman who was once a widow but may not be so at the time of adoption. The obvious intention of the legislature is that she must be a widow at the time when she exercises her power to adopt. If the power of appointment is given to a particular individual in a certain capacity that power must be exercised by him while he enjoys that particular capacity. If, therefore, a widow of a Mahomedan taluqdar is given by her husband a power to adopt she must exercise that power while she is his widow. If she has ceased to be his widow by her remarriage with another man, the power given to her can no more be exercised by her.

As to the invalidity on the ground, namely that no right to adopt had been left to any of the widows of the late Raja Mohammad Siddiq Khan after the adoption of the defendant 1 my finding is that the adoption of the plaintiff would only be invalid if the adoption of defendant 1 is found to be valid. The question as to the validity of defendant 1's adoption is contained in issue 5 and will be dealt with by me later. Until that issue has been decided no finding can be given on this part of the issue. It will depend on the finding on issue 5. If under that issue it is found that the adoption of defendant 1 is valid then clearly the adoption of the plaintiff being subsequent to the adoption of defendant 1 would be invalid. If, however, it is found that the adoption of defendant 1 is invalid, then obviously the plaintiff's adoption, though made subsequently, cannot be affected by it.

I now proceed to deal with the first part of the issue, namely, whether the plaintiff's adoption was a sham and bogus transaction and not intended actually to be operative.

The contention of defendant 1 was that the adoption of the plaintiff was made by Rani Champa purely with the object of putting pressure on the Court of Wards in connexion with her *guzara* and was not a bona fide adoption. (The judgment then discussed the evidence in support of the contention and, finding that the contention of defendant 1 was true, proceeded.) On p. 457 of Farwell on Powers (3rd edn.,) the very first rule under the chapter dealing with the fraudulent appointments, is given below:

> A person having a limited power must exercise it bona fide for the end designed; otherwise the execution is corrupt and void.

In *Duke of Portland* v. *Topham* (3), it was laid down by the House of Lords that a party having a limited power must fairly and honestly execute it, without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit for himself either directly or indirectly: Lord St. Leonards, p. 56. It was also laid down in the same case that he (the donee) must act with good faith and sincerity and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (sinister in the sense of being beyond the purpose and interest of the power). (The Lord Chancellor, p. 54).

(3) [1864] 11 H. L. C. 32=10 Jur. (N. S.) 501 =34 L. J. Ch. 113=12 W. R. 697=10 L. T. 355.

The reply of Mr. Hasan Imam, the learned counsel for the plaintiff, to the contention put forward on behalf of defendant 1, was that the statement of Sher Mohammad Khan proved only what was passing in his mind, but not what was then passing in the mind of Rani Champa. His argument was that we were really concerned with the purpose of Rani Champa and not with the motive of Sher Mohammad Khan or any other person, and that there was no evidence on the record to show that when Rani Champa made the adoption she did not exercise her power bona fide for the end designed (*P. R.* 1322). Reference was then made to S 10 of Farwell on Powers (3rd edn., p. 484), where it is stated that the Court should not advert to motive, but a distinction should be drawn between motive, intention or purpose. He stated that the meaning of the rule was that if the donee of a power had been given a particular power and exercised that power for the purpose, for which it was meant, there was no point in referring to his motive. The motive which impelled a donee to exercise a power was quite immaterial, and as long as the exercise of the power was made for the end designed, the exercise should be held good. It was, however, admitted that the exercise must be bona fide, and that it must not be intended to be a mere sham and bogus transaction. It was further pointed out that there was a difference between a transaction being merely a sham and bogus transaction and a transaction intended to secure its object, but the motive of which was quite a different one (*P. R.* 1322).

In my opinion on the evidence of Sher Mohammad Khan there can be no doubt that the real purpose for executing the deed of adoption was to exercise pressure on the Court of Wards for the realization of *guzara* of Rani Champa. I am unable to accept the argument that the statement of Sher Mohammad Khan is only evidence of what was passing in his mind but not in that of Rani Champa. (The judgment then commenting upon the plaintiff's evidence proceeded) Under these circumstances I am compelled to hold that the adoption of the plaintiff was never intended to be actually operative. In my opinion it was merely a bogus and sham transaction resorted to for the purpose of putting pressure upon the Court of Wards in order to get the claim of Rani Champa as to maintenance settled.

My finding on this issue is, therefore, against the plaintiff.

Issue—5. This issue relates to the validity or invalidity of defendant 1's adoption, and is an important issue in the case. The validity of his adoption was challenged on three grounds:

(a) That it was not made by Rani Saltanat Begam within the time prescribed for her to make an adoption under the will of the late Raja Mohammad Siddiq Khan;

(b) That it was made by her for corrupt motives, since she received a sum of Rs. 32,000 as a consideration for it; and

(c) That it was bad, because defendant 1 belonged to the Quli family, a member of which could not be adopted under the terms of the will of the late Raja;

(d) Adoption invalid, because not made at the proper time.

The case set up by the plaintiff in paras. 6, 7, and 8 of the plaint (*P. R.* 2) is that under the terms of his will, the late Raja Mohammad Siddiq Khan had fixed a specific period for each of his widows to adopt a son within that period, the time allotted to them being as follows:

From 30th December 1907, i. e., the date of the death of the Raja up to 29th December 1909 (Rani Nasim Sahri).

From 30th December 1909 to 29th December 1911 (Rani Saltanat Begam).

From 30th December 1911 to 20th December 1913 (Rani Dilafza)

From 30th December 1913 to 29th December 1915 (Rani Champa).

The contention of the plaintiff, therefore, is that the adoption of defendant 1 took place on 9th March 1909 and consequently the adoption was not made within the period fixed for Rani Saltanat Begam and it was, therefore, invalid. The same case was set up on behalf of the plaintiff in oral pleadings when the counsel for the parties made their statements before me on 1st November 1926 (*P. R.* 336). The reply to this on behalf of defendant 1, as contended in para. 24 of his written statement (*P. R* 279) and in the oral pleadings (*P. R.* 337), was that Rani Nasim Sahri had, after the death of Raja Mohammad Siddiq Khan, remarried herself to Mohammad Sultan Khan on the

night between 9th and 10th May 1908, relinquishing all her rights which she was to enjoy under the will. Besides. the will of the Raja provided that if any of his widows remarried herself, she was not to enjoy any privilege or benefit conferred on her under the will. Rani Nasim Sahri by her remarriage, therefore, ceased to be the widow of the late Raja, and it was no more open to her to make an adoption, her power to adopt having been extinguished altogether. Under the circumstances, Rani Saltanat Begam's power to adopt, it was contended, had been accelerated and she was, therefore, competent to adopt defendant 1 at the time when she did. The decision of this question, it is obvious, turns on the interpretation of the will.

Before proceeding to interpret the will of the late Raja Mohammad Siddiq Khan I may state what principles should be borne in mind while interpreting a will. A number of authorities was quoted before me on the subject of interpretation. It would be enough to quote the following four rulings of their Lordships of the Privy Council and one of a Bench of the late Court of the Judicial Commissioner of Oudh on the aforesaid point.

Gurusami Pillai v. *Sivakomi Ammal* (4), *Indar Kunwar* v. *Jaipal Kunwar* (5), *Venkata Narasimha Appa Rao* v. *Parthasarathy Appa Rao* (6), *Sher Bahadur* v. *Ganga Bakhsh Singh* (7), *Mohommad Yaqub Khan* v. *Mohommad Shahid Ali Khan* (8).

In the case reported in *Gurusami Pillai* v. *Sivakomi Ammal* (4), there was a will before their Lordships for interpretation in which there was a provision that if both the daughters of the testator had issue, they should divide the property equally, and those who had no issue shall enjoy the income for their lives only, while those that had issues, shall enjoy the whole property. One of the daughters had an issue, but had predeceased the mother. The High Court of Madras decided that the said daughter, in accordance, with the terms of the will, took an absolute estate. It was, however, contended before the Privy Council in appeal against the judgment of the High Court that the said daughter was not entitled to an absolute estate because she had not left any children surviving her. The contention was rejected by their Lordships of the Privy Council who remarked (p. 127) that the words being "having issue" it was impossible to construe them as equivalent to "leave issue." Their Lordships further remarked that a will ought to be interpreted according to the plain meaning of the words, and that no interpretation should be put upon it which could suit the events as they had happened. The sound principle of construction, according to their Lordships, was that where language of a will was clear and consistent it should receive its literal construction, unless there was something in the will itself to suggest a departure from it. The judgment of their Lordships in this case was delivered by Lord Hobhouse.

In the case reported in *Indar Kunwar* v. *Jaipal Kunwar* (5), their Lordships of the Privy Council had to interpret the will of the late Maharaja Drigbijai Singh of Balrampur (Oudh) and the point in dispute was relating to the real meaning of the expression of "Maharani Saheba" according to the true construction of the will. Their Lordships remarked that it would not be proper for them to admit extrinsic evidence of the testator's intentions and the difficulty created by the particular expression ought to be solved by adopting the construction which bespeaks a reasonable and probable intention on the part of the testator and rejecting that which would indicate an intention unreasonable, capricious, and inconsistent with the testator's views, as evidenced by his condnct and by the dispositions of his will, which were not open to controversy (p. 147). The judgment of their Lordships in this case was delivered by Lord Macnaghten.

In the case reported in *Venkata Narsimha Appa Row* v. *Parthasarathy Appa Row* (6) their Lordships had to interpret a particular will to find out the true intention of the testator and observed (pp. 70 and 71) that in all cases the primary duty of a Court was to ascertain from the language used by the testator

(4) [1895] 18 Mad. 347=22 I. A. 119=5 M. L. J. 106=6 Sar. 610 (P. C.).
(5) [1888] 15 Cal. 725=15 I. A. 127 (P. C.).
(6) [1913] 37 Mad. 199=23 I. C. 166=41 I. A. 51 (P. C.).
(7) [1913] 36 All. 101=17 O. C. 68=22 I. C. 293=41 I. A. 1 (P. C.).
(8) A. I. R. 1922 Oudh 87=25 O. C. 21.

what were his intentions, which meant to construe the will. It is true, they said, that they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense and many other things which are often summed up in somewhat picturesque figure : "The Court is entitled to put itself into the testator's armchair." Their Lordships further observed that among such surrounding circumstances, which the Court was bound to consider, none would be more than race and religious opinion, and the Court was bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom. But all this, according to them, was 'solely as an aid to arriving at a right construction of the will and to ascertain the meaning of the language when used by that particular testator in that document but in so interpreting the will the Court should not add anything to the dispositions contained in the will. The will must be considered as it stands and not as it would stand after something has been added to it. The judgment of their Lordships in this case was delivered by Lord Moulton.

In the case reported in *Sher Bahadur* v. *Ganga Bakhsh Singh* (7), their Lordships laid down the rule (p. 116) that the true rule of decision was to 'ascertain the wishes and the intentions of the testator as revealed by the language of the particular instrument, viewed through the light of the circumstances which surrounded the testator at the time when he made the will. The judgment of their Lordships in this case was delivered by Lord Atkinson.

In accordance with the rules of law laid down by their Lordships of the Privy Council in the above-mentioned cases, the learned Judges of the late Court of the Judicial Commissioner of Oudh in the case reported in *Mohommad Yaqub Khan* v. *Mohomed Shahid Ali Khan* (8) remarked that in all cases the primary duty of a Court was to ascertain the true intentions of a testator from an examination of the entire will. The Court was, in fact, entitled to put itself into the testator's chair and say, having regard to the language used in the different clauses, when read together, what the true intention of the testator was.

Bearing these principles in mind I now proceed to interpret the will. (The judgment then narrated the clauses of the will and proceeded.) Reading the will as I do, three things seem to me to be quite clear :

(1) That the condition laid down in Cl. 4 of the will as to adoption within two years of the death of the Raja was obviously to apply to the first Rani, i. e., Rani Nasim Sahri as long as she was alive. It could not apply if she died whether during the lifetime of the Raja or after his death without making an adoption, This is clear from Cls. 5 and 6 of the will. The said period of 2 years was given to her obviously with the object that she might be able to select a good suitable boy according to her choice.

(2) That if she died at any time after the Raja's death, without making an adoption, the second Rani was at once to come into possession and become entitled to make an adoption subject to the aforesaid conditions, meaning thereby the conditions laid down in Cl. 4 viz., that the boy must be of the Sunni sect and under ten years of age and should not belong either to the Quli family or to the family of Rani Qamar Zamani Begam. The word "sharait-i-bala" does not include the condition as to the time during which the second Rani is to make the adoption, i. e., after the expiry of two years fixed for the first Rani, because in Cl. 5 where this condition is laid down, the condition as to the time for the second Rani is laid down for the first time. In Cl. 4 it is merely stated that the first Rani is to adopt within the period of two years of the death of the Raja. It, therefore, appears to me that if Rani Nasim Sahri died within two years of the death of the Raja the second Rani was at once to come into possession and could immediately exercise her right of adoption without waiting for the expiry of two years counted from the Raja's death. There would obviously be no point in providing for such a waiting in that case. She, i. e , the second Rani would, however, have to wait for the expiry of the period of two years, if the first Rani remained alive for that period after the death of the Raja.

(3) That the power to adopt was given by the Raja to all the Ranis from the

very beginning, but they were to exercise it only subject to certain conditions, otherwise the provisions contained in Cl. 6 of the will would become meaningless, and incapable of being enforced.

To put it in a nutshell : the condition of two years stated in Cl. 5 applies only to the case falling under the clause, but it cannot apply to a case falling under Cl. 6. If it were so, then it would lead to absurd results, which could not have been the intention of the testator. Only that interpretation must be placed upon his will which is reasonable and not one which would tend to defeat his real object. It appears to me to be clear from the will that the Raja was anxious that a provision should be made for the appointment of his successor. He did not want that any of his Ranis should be permanent and absolute owners of Nanpara estate. Even the first Rani (Rani Nasim Sahri) was given only a life estate. Other Ranis were allowed to retain the estate only till they made an adoption. None of them was given any power of transfer. The successor to the estate was to be either a son born to the Raja from any of his four Ranis or a son adopted to him by any one of them. The interpretation which would result in taking away the power of adoption from the Ranis and thus leaving the estate without a successor should as far as possible, be avoided.

In order to put a true construction on the will we must, as stated above, put ourselves in the position of the testator as far as it is posible for us to do. Supposing for argument's sake that the period of two years specified for each of the Ranis under Cl. 5 be made applicable even when one of them succeeded to the estate on the death of the Rani previously mentioned in the will, it would be clear that in the case of the last surviving Rani she could not exercise the power of adoption till the expiry of six years from the death of the late Raja, although the previous three Ranis might have died soon after the death of the Raja, and although under Cl. 6 of the will she was to adopt within two years of her coming into possession. In short, if such a construction were to be placed on the will, it might happen that all the four Ranis might die before the time limit fixed for them might arrive, without having made any adoption at all, which would be defeating the very intention of the testator. The real object of the Raja was, as I have indicated above, to provide for the nomination of a successor to his estate, in case he left no male issue and the object of giving each Rani a time limit of two years under Cl. 5 of the will was to give her a period during which she could select a suitable boy whom she would like to adopt. This was also necessary in view of the fact that he had four Ranis and had given each of them power to adopt, and that there might be no clash among them by each of them exercising her powers to adopt at one and the same time.

Where, however, the previously mentioned Rani had died, there would be no point in making a subsequently mentioned Rani to wait till the expiry of the period prescribed for the former. There could be no risk of such a clash. Besides this, such a construction would also give rise to a conflict between Cls. 5 and 6 of the will. According to the suggested construction of Cl. 5 a Rani, though succeeding under Cl. 6 and authorized to adopt within two years of her succession, would have to wait till the period prescribed in Cl. 5 for the previously mentioned Rani expired. The conflict would be between her right to adopt within the period of two years from the date of succession as provided in Cl. 6 and her right to adopt being at the same time postponed till the expiry of the period prescribed for the previously mentioned Rani under Cl. 5. I would like to make my meaning still clearer by taking the example of the 4th Rani mentioned in the will. Supposing the first three Ranis died without having made an adoption within one year from the date of the death of the Raja, then according to Cl. 6 of the will she would be entitled to succeed to the entire estate for a period of two years and to adopt within that period. She would not, however, be able to exercise her power to adopt within this period if she had to wait till the expiry of the period of six years which would be the limit of time prescribed for the three Ranis under Cl. 5. It, therefore, appears to me that the period of two years fixed for each Rani under Cl. 5 is quite different from the period of 2 years fixed under Cl. 6. I am, therefore, of opinion that if the first Rani, i. e., Rani Nasim Sahri died soon after the death of the Raja, the second

Rani, i. e., Rani Saltanat Begam, would be entitled, according to Cl. 6 of the will, to succeed at once to the possession of the estate for two years and could exercise her power to adopt within this period waiting for the expiry of the period of two years which had been given to the first Rani, i. e., Rani Nasim Sahri, under Cl. 5 of the will, for making an adoption. Indeed, as already stated, there would be no point in imposing such a restriction.

Keeping this construction of the will in view, it was argued on behalf of defendant 1 that, in the case of any of the widows of the Raja, remarriage by her should be deemed equivalent to her civil death. After remarriage she could no more be reckoned as the widow of the Raja, and for all practical purposes she must be deemed to be civilly dead. Under Cl. 10 of the will a widow of the late Raja, if she remarried herself, was to lose all the powers and privileges that had been conferred upon her under the will. On her remarriage her power to adopt must be considered to have been extinguished, rather to have necessarily been brought to an end.

This contention was met on the plaintiff's side in two ways. Firstly, by interpreting the will as consisting of two portions, one the testamentary portion and the other the portion relating to conferment of the authority to adopt. It was stated that Cl. 10 could only apply to the privileges conferred upon each of the Ranis under the testamentary portion and not to any power given to her under the other portion. Secondly, by interpreting, as already stated the word 'widow' used in S. 29, Oudh Estates Act 1 1869 ,under which a widow of a Mahomedan taluqdar derived her power to adopt, to mean a lady, who had once been a widow, though she may have subsequently remarried herself.

Regarding the first contention: I have already expressed my opinion in the earlier portion of this judgment that a power to adopt really means a power to nominate a successor, which again could only mean power to give the property of the testator to whomsoever the donee of the power liked, subject, of course, to the conditions and restrictions laid down by the testator. Such a power could not be considered to be merely an obligation and not a privilege. The argument has only to be stated and to be rejected. Besides, a testamentary document may contain two portions, one a descriptive portion and the other operative portion conferring upon the testator's widow authority to adopt, but this cannot in any way detract from the character of the document as a will. In short a provision in the will giving the devisee power to nominate a successor does not destroy the testamentary character of the document. Indeed, such a provision is most commonly found both in the wills executed in this country as well as in England. Such instances are to be found in several reported cases, which have gone up in appeal from this province to their Lordships of the Privy Council. One of the recent cases is the case of *Mata Prasad* v. *Kunwar Nageshwar Sahai* (9). I am, therefore, of opinion that the will in dispute is throughout a document of a testamentary character and Cl. 10 fully applies to the power conferred upon the widows of a Raja to make an adoption.

Regarding the second contention also I may state that I have already expressed my opinion in a previous portion of this judgment. In my opinion a widow must mean a widow and not a widow who has already remarried herself. The meaning of the word "widow" in the English language is a lady whose husband is dead and who has not remarried. In S. 29, Oudh Estates Act, a widow of a Mahomedan taluqdar is given power to adopt a son, just as if she had been a Hindu widow. Remarriage is not sanctioned by Hindu law. In any case the law, as it is now understood, does not allow remarriage. According to the notion of the sages responsible for the Hindu law, a Hindu lady, after the death of her husband, remains for all time to come a widow and widow alone. I am fully aware that the British Government has now allowed a Hindu widow to remarry herself under the Hindu Widow Remarriage Act (15 of 1856). That Act also, though legalizing the marriage of a widow, expressly declares—vide S. 2 of the said Act—that by her second marriage she forfeits the interest possessed by her in her previous husband's estate, which then passes to his next heir, as if she were dead. It is, therefore, clear that when the legislature laid down

(9) A. I. R. 1925 P. C. 272=47 All. 883=28 O. C. 352=52 I. A. 398 (P.C.).

that a Mahomedan widow, was only to exercise the right of adoption, just as if she were a Hindu widow, it meant to clearly lay down that she must be a widow at the time of the exercise of that power. It is an elementary principle of law that if the power of appointment is given to a particular individual because he happens to enjoy a certain capacity, that power must be exercised by him, while he enjoys that particular capacity. I am, therefore, unable to accept the argument put forward on behalf of the plaintiff. I have no hesitation in holding that just as on her remarriage a Hindu widow is considered to be in the eyes of the law civilly dead, so far as her husband's property is concerned so must also the widow of a Mahomedan taluqdar be considered to be civilly dead, if she remarried herself so far as her power to adopt is concerned.

If, therefore, the effect of Rani Nasim Sahri's remarriage was that for all practical purposes, so far as the late Raja Mohammad Siddiq Khan was concerned, she was to be considered as dead, Rani Saltanat Begam, the second Rani, would at once become entitled to take possession of the estate and to exercise her power to adopt conferred on her under the will and to remain in possession of the estate till the adoption had actually taken place. To put it briefly: the power of adoption possessed by Rani Saltanat Begam would become accelerated and capable of being exercised at once without waiting for the expiry of the period of two years laid down in Cl. 5 of the will.

Mr. Jinnah, the learned counsel for defendant 1, who argued the case with great ability, laid before me two more positions for consideration. The first position was that, if on an interpretation of the will, Rani Saltanat Begam be considered as possessing an authority to adopt, but capable of exercising it only on the happening of a contingency which in this particular case, was the expiry of two years from the date of the death of the Raja, the exercise of the power even before the expiry of the said period was valid. He contended that if the power was exercised by her before the happening of the contingency, it should even then be considered in law as a good and valid exercise of power, if the contingency had actually happened. In short, the argument was that Rani Saltanat Begam's adoption, though made before the expiry of two years, would not on that ground be deemed to be necessarily invalid, but should remain in doubtful suspense till the expiry of the two years from the date of the death of the Raja. The moment the said period had expired and nobody had been adopted by the first Rani the adoption by her would become valid—vide Farwell on Powers (3rd edn.), Ch. 5, S. 9, p. 166.

The second position was that if Rani Saltanat Begam be held to be a contingent person, who could only be considered to have the power of adoption on the happening of a particular contingency, even then a general power of appointment possessed by her could be exercised by her, if in the event she proved to be the person actually entitled to exercise the power In short, the argument was that, if Rani Saltanat Begam was to be considered as a contingent person, to whom the power of adoption was given on the happening of a particular contingency, she could in law have converted herself into a real person before the happening of the contingency. As long as the contingency did not happen, she was only to be treated as a contingent person, and the exercise of the power of appointment by her would be liable to become infructuous in case the contingency never happened; but the moment the contingency happened, and she became a real person entitled to exercise the power of appointment, the exercise would become valid; and the mere fact that the exercise of that power had been made by her prior to her becoming a real person cannot destroy the validity of an act done in pursuance of the legitimate exercise of the power of appointment, which had been conferred upon her: vide Farwell on Powers (3rd edn.), Ch. 5, S. 14, p. 179.

I will now proceed to examine both of these positions.

As to the first position: it was pointed out that under S. 9 of Farwell on Powers, p. 166, it was necessary to determine whether the power to adopt had been given to the Ranis as persona designata from the very beginning. I fully appreciate that position because, if a power is not to arise until a future contingent event happens, or until a condition is fulfilled, it cannot be exercised until the event happens, for until then it has in fact no existence. It is, how-

ever, in each case a question of the construction of the instrument creating the power, whether the existence of the power is conditional on the happening of a contingency or the fulfilment of the condition, in which case it cannot be exercised at all, until it comes into existence or whether the power exists in any event and can be exercised, although the exercise of the power can have no operation unless and until the contingency happens or the condition is fulfilled. For this purpose we have to interpret the will. If on its correct interpretation we find that the will *presently* gives power to Rani Saltanat Begam to adopt, but she is only to exercise that power on the happening of a contingency, which in this case was the expiry of two years coupled with the fact of Rani Nasim Sahri having made no adoption, then the exercise by her of the said power, but before the expiry of two years, would be valid provided the contingency happened, viz., the period of two years expired and Rani Nasim Sahri did not adopt. I have already given a brief summary of all the provisions contained in the will. It appears to me that the Raja had given presently to each of his four Ranis as persona designata power to adopt. To put any other interpretation would make Cl. 6 of the will meaningless. To make it really operative such a position has necessarily to be taken.

To make my meaning clear: if the power to adopt is not considered as having been *presently* given to each of the Ranis, how could one of them, in case she succeeded to the estate on the death of the previous Rani, make an adoption within the terms of Cl. 6. I have already pointed out that to ask her to wait till the expiry of the period of the two years given to the previously mentioned Rani, in case that Rani had died without exercising the power of adoption, would have no meaning at all; and it would be imposing an unnecessary fetter on her exercise of the power, which might result in her not being able to make an adoption at all in spite of the fact that she might have all the time liked to do so under Cl. 6. It might also result in this that she might not be able to exercise the power at at all, because it might happen that she herself might die before the period fixed for the previously-mentioned Rani expired. Such a position, in my opinion, was never contemplated by the late Raja while executing his will. I am, therefore, of opinion that, on a proper interpretation of the will, especially of Cl. 6., each of the Ranis was a persona designata *presently* given power to adopt. By this it is not meant that all the Ranis were to exercise their powers simultaneously but only one was to exercise the power after the other had failed to do so. If authority is needed for the proposition, it is to be found in the case of *Bijoy Krishna* v. *Ranjit Lal* (10) confirmed on appeal in *Ranjit Lal* v. *Bijoy Krishna* (11). In *Wendsforde* v. *Garrick* (12) it was held that where a power is given to a designated person to be exercised upon a contingency, it may be executed before the happening of the contingency and the execution will be followed on the subsequent happening of the event. In *Johnson* v. *Touchet* (13) the donee of a power of appointment, to be exercised on attaining twenty-five years of age, and "not before," married at twenty-three; and by her marriage settlement covenanted that she would appoint when of the prescribed age. The donee attained the age of twenty-five years, but died without having executed any appointment. It was held that the covenant was in equity a valid execution of the power.

It, therefore, appears to me that the adoption of defendant 1 by Rani Saltanat Begam, though made prior to the expiry of the two years from the Raja's death, became valid on the expiry of the said two years, because Rani Nasim Sahri never exercised her power of adoption. If she had done so, as she could, provided she had not remarried herself, the adoption of defendant 1 would have become infructuous. This, however, did not take place and the adoption of defendant 1 became a valid exercise of the power of adoption possessed by Rani Saltanat Begam under the will of the late Raja.

As to the second position: it was pointed out that the power of appointment under a will mentioned in S. 14 of Ch. 5 of Farwell on Powers (p. 179) must be a general power of appointment and not a limited power. It was urged that the power of appointment given to

(10) [1911] 38 Cal. 694=12 I. C. 460.
(11) [1912] 39 Cal. 582=14 I. C. 17=16 C. W. N. 440.
(12) 5 Ir. H. Q. 486.
(13) [1868] 37 L. J. Ch. 25=16 W. R. 71=17 L. T. 191.

the Ranis under the will of the late Raja was limited and not a general power, and being a limited power it could not be exercised until the person to exercise it had been determined—vide Farwell on Powers 3rd edn. p. 183. I have, therefore, to see whether the power to adopt under the will of the late Raja was a general power or a limited power. The distinction between the two is to be found in Farwell on Powers (3rd edn.) on p. 8, from where I quote the following passage :

> Powers may be either general or limited. General powers are such as the donee can exercise in favour of such person or persons as he pleases including himself. Limited powers, which are sometimes also called special powers, are such as the donee can exercise only in favour of certain specified persons or classes.

I have now to determine whether the power conferred by the Raja upon his Ranis under his will can be called a limited power. It has been held that a power to appoint whomsover the donee pleases to appoint except *A* is to be deemed a general power:—vide *Edie* v. *Babington* (14).

In the present case the power of appointment could be exercised in favour of every Sunni Mahomedan boy except that of the Quli family or of the family of Qamar Zamani Begam. I am of opinion that, in spite of this restriction the power should be considered a general power. The mere fact that the Raja excluded certain persons from the list of appointees, would not make the power a limited one. There remained millions or Sunni boys who could, as contended for by Mr. Jinnah, fall under this description. If it had been provided in the will that the adoption could be made only out of the boys belonging to the Quli family of the family of Qamar Zamani Begam, the power might have been called a limited power. It was urged on behalf of the plaintiff that the power under the will should be deemed to be a limited power, because it was exercisable only in favour of a certain specified class. In English law the word "class" has a peculiar meaning. In Stroud's Judicial Dictionary (edn. 1890) we find the word 'class' defined on p. 131 as follows:

> A number of persons are popularly said to form a class when they can be designated by some general name as 'children' 'grandchildren' or 'nephew'.

I can very well understand, if it be argued that the members of the Quli family can be considered to be a class, since they would all be grandchildren of great-grand children of Nawab Mehdi Quli Khan, but I cannot understand that the entire Sunni world, excluding members of Quli family, can be considered to be a "class."

In *Blight* v. *Hartnoll* (15), Fry, J. observed:

> I think that where a power of appointment amongst a class of people is given, the appointer must know the class—must be able to ascertain the class amongst whom he or she is to divide the property. It is a discretionary power to be exercised with reference to the respective circumstances and merits of the persons who are to take, and that cannot be exercised where the persons are not known. To use an illustration which I put during the course of the argument: if a power were given to *A* to appoint amongst his children who should be living at the return of *B* from Rome, and that was exercised by *A* before *B* returned from Rome, it appears to me to be a bad exercise of the power. Now that is exactly what happened here. Mrs. Christiana Hartnoll was to give it amongst the grandchildren surviving the payment of the mortgages and annuities, and she purported to do that before either one or the other had been satisfied. The gift, therefore, is, in my jndgment, bad.

On the analogy of this case we can say that if the power had been directed to be exercised in favour of only a member of the Quli family after the expiry of the two years from the death of the testator and if the power had been exercised before the expiry of two years, the exercise would have been bad because the donee of the power would not have known his "class." But where the power was to be exercised, as in the present case, in favour of any Sunni, except one who belonged to the Quli family or to the family of Rani Qamar Zamani Begam, the donee (Rani Saltanat Begam) knew her class very well and if she exercised her power of appointment before the happening of the contingency, it was good exercise, provided the contingency happened. I am, therefore, of opinion that the adoption of defendant 1 by Rani Saltanat Begam, even if she be considered to be a contingent person, was good because the contingency did actually happen, and on the happening of that contingency she turned out to be the real person.

I think it would be quite proper for me at this stage to sum up the position which was taken up by Mr. Jinnah, the learned counsel for defendant 1 in his

(14) 3 Ir. Ch. R. 568.

(15) [1882] 19 Ch. D. 294=45 L. T. 524=51 L. J. Ch. 162=30 W. R. 513.

argume ts, a position with which I agree on the whole.

The position was:—All the widows of the late Raja were vested presently with a power to adopt and the conditions provided in the will only related to the exercise of those powers and not to the contingency of the same. Rani Saltanat Begam, being a person, who was vested with such a power, did not make an adoption on the remarriage of Rani Nasim Sahri, which was in the eye of the law equivalent to her civil death. The adoption, therefore, came under Cl. 6 and was not in any way affected by the limitation of two years laid down in Cl. 5. Even if the case be considered to be one falling under Cl. 5 the adoption of defendant 1 by Rani Saltanat Begam, being an exercise of power before the happening of the contingency, was good, because the contingency had happened. The contingency was that two years must expire and no adoption by Rani Nasim Sahri should have taken place. If Cl. 5 be interpreted to mean that Rani Saltanat Begam was to be possessed of the power to adopt only on the expiry of two years from the death of the Raja she would be considered to be a contingent person a d the adoption by her of defendant 1 at a time, when she was merely a contingent person, would be valid and legal because she became the real person on the happening of the contingency, the contingency being the same as stated above. The power of appointment given under the will was a general power of appointment and not a limited one, because it was neither in favour of a specified individual nor in favour of a specified class, it being in favour of all the Sunni boys under ten years of age and not belonging to the Quli family or to the family of Rani Qamar Zamani Begam (*P. R.* 1211 and 1347).

At the end of the arguments on this part of the case, Mr Jinnah urged that the technical rules of English law relating to powers of appointment should not be applied to the present case, and if it be found that the power of adoption exercised by Rani Saltanat Begam was, on a true construction of the will, a valid and legitimate exercise of the power, the adoption of defendant 1 should be held as valid. I merely state the argument, but, in view of my findings, stated above, it is not necessary for me to express a definite opinion on the point.

(*b*) *Adoption invalid since tainted with corruption.*—The second ground on which the validity of the adoption of defendant 1 challenged is the ground of corruption. The case of the plaintiff on this point is contained in his replication, para. 4, which contains a plea to the effect that the adoption of defendant 1 was inval d, because it was procured by his natural mother on payment of Rs. 32,000 to Rani Saltanat Begam as consideration for the adoption. (The judgment here discussed the circumstances on this point and deciding it against the plaintiff and in favour of defendant 1, proceeded.)

(*c*) *Adoption invalid because defendant* 1 *belongs to the Quli family.*—The third ground on which the adoption of defendant 1 is stated to be invalid, is that the will of the late Raja expressly provided in para 4 that no boy belonging to the Quli family was to be adopted. It is contended that defendant 1 belongs to the Quli family, and therefore his adoption is bad. I must state certain facts connected with relationship in order to make clear the meaning of "Quli family," as mentioned in the will. One Nawab Mehdi Quli Khan was the ancestor of this family, and it is after his name that his descendants are called "members of the Quli family." (After describing the family the judgment proceeded) The first thing which I have to do is to determine the meaning of the word "family." Ordinarily the vernacular expression "khandan" of which the corresponding English expression is "family" means a group of descendants from one common ancestor, called progenitor. This is the meaning which was given by their Lordships of the Privy Council to the expression "khandan" in *Sher Bahadur* v. *Ganga Bakhsh Singh* (7).

The oral evidence on this point consists of four witnesses on behalf of defendant 1 and of two witnesses on behalf of the plaintiff, one of whom was examined as a Court witness, and the other as his own witness. (The judgment then discussed the evidence and proceeded.) On the evidence of these four witnesses, of whom the two, D. W. 9, Maulana Kalbe Askari, and D. W. 18 Maulvi Inayatullah, are the most important, I find that the meaning of the word "khandan," as given on behalf of the plaintiff is not correct, and

that defendant 1 cannot be deemed to belong to the Quli family. It is clear that though Rani Sultan Shan Begam belonged to the Quli family, yet, since she was married to a Pathan family, her daughter Sarfaraz Begam could not be considered to belong to the Quli family. Then again when she was married to Raja Ashfaq Ali Khan, she was married to a Saiyid and her son, defendant 1, must be considered to belong to the family of Raja Ashfaq Ali Khan, whose family was a Saiyid family. Defendant 1 can, by no stretch of imagination, be considered to belong to the Quli family, that is, the family of Nawab Mehdi Quli Khan.

This point was also raised in the interpleader suit in appeal before the late Court of the Judicial Commissioner of Oudh. The judgment of the Bench of the late Court is Ex. A-6 (*P. R.* 19 to 160, *Part III*). On p. 123 is to be found the opinion of Mr. Stuart (now Sir Louis Stuart), the then officiating Judicial Commissioner, which was to the effect that the defendant Saadat Ali Khan, being the son of the Rani of Muhamdi, the daughter of Rani Sultan Shan Begam, who was the daughter of Mehdi Quli Khan, could not be considered to belong to the Quli family. He interpreted the provision of the will to mean that no descendant on the male side of the Mehdi Quli family was to be adopted and therefore held that Saadat Ali Khan's adoption could not be considered to be bad, since he was not a member of the family of Mehdi Quli Khan on the male side. On p. 158 is to be found the opinion of the other Judge, Pandit Kanhaiya Lal, A. J. C. According to his view defendant 1, who was described in the judgment as the "boy adopted," did not belong to the family or khandan of Mehdi Quli Khan any more than Raja Mohammad Siddiq Khan did. According to the learned Judge, in India a boy is known by the family of his father or paternal grandfather rather than by the family in which his father or paternal grandfather is married.

I am, therefore, supported in the view which I have taken of the meaning to be attached to the word "khandan" (family) by the judgment of the Bench of the late Court of the Judicial Commissioner of Oudh.

Before closing this part of the case I must mention one argument, which was advanced by Mr. Hasan Imam, on behalf of the plaintiff. He said that the expression "khandan" was used by the late Raja Mohammad Saddiq Khan in his will, not in the ordinary sense but in a sense, which could also be considered to include within the meaning of the word "family" the descendants of a female born in that family since the Raja used the same expression in regard to the descendants of his divorced wife Rani Qamar Zamani Begam. Whatever may have been his meaning, when he used the expression in connexion with Rani Qamar Zamani Begam, his meaning, when he used the word "khandan" in connexion with the Quli family, is to my mind amply clear. I may, however, mention that if the meaning given to the word "khandan" by the plaintiff had been the real sense in which the late Raja used the expression, Rani Qamar Zamani Begam and her descendants would also be considered as belonging to the Quli family, and there would have been, in that case, no point in mentioning the family of Rani Qamar Zamani Begam in express terms. I attach the following pedigree to show my meaning:

MEHDI QULI KHAN

Rani Sultan Shan Begam	Sanjhli Begam
Rani Sarfaraz Begam	Khurshed Begam
Raja Sadaat Ali Khan.	Rani Qamar Zamani Begam.

If the descendants of Rani Sultan Shan Begam, one of the daughters of Mehdi Quli Khan, could be considered as belonging to the Quli family, there is no reason why the descendants of another daughter of the said Mehdi Quli Khan among whom Rani Qamar Zamani Begam was included, should not also be considered as belonging to the Quli family.

On a full consideration of the various points raised in arguments on behalf of the plaintiff, I have no hesitation in holding that there is no force in this contention I, therefore, decide this point against the plaintiff and in favour of defendant 1.

The validity of the adoption of defendant 1 was challenged on the aforesaid grounds, and I have discussed all of them. My finding on each of them is against the plaintiff. The result is that my finding on the whole issue is that the adoption of defendant 1 is valid and operative.

Issue 6.—This issue deals with the remarriage of Rani Nasim Sahri with Mahomed Sultan Khan in May 1908, and the subsequent relinquishment of her rights under the will of the late Raja Mohamed Saddiq Khan. This is again a very important issue in the case, but I have no difficulty in coming to a finding on this issue, since the evidence in proof of the remarriage and relinquishment is overwhelming.

Before dealing with the evidence on the record relating to this issue, I should like to refer to the pleadings of the parties on this point to make one point clear. The plea raised in defence by defendant 1 on this point is contained in para, 24 of his written statement, (*P. R.* 279 and 280). The reply of the plaintiff to this plea is contained in this replication (para. 4 (f) *P. R.* 301). In the plea taken on behalf of defendant 1, two points are urged, one relating to the remarriage of Rani Nasim Sahri; and the other relating to the relinquishment of her rights under the will of the late Raja by means of a registered deed, dated 9th May 1908. The reply of the plaintiff in regard to the plea of the remarriage as contained in para 4 (f) of his replication, is to the effect that Rani Nasim Sahri's alleged remarriage never took place. It was said that she continued to be the widow of the late Raja Mohamed Sadiq Khan throughout the interpleader suit and therefore had not lost her power of adoption in 1900. Relating to the deed of relinquishment, the reply of the plaintiff is contained in para. 4 (e) and para. 5, (*P. R.* 301 and 302). Para. 4 (e) is to the effect that the alleged deed of relinquishment was executed under undue influence and fraud and that Rani Nasim Sahri never got any independent advice while executing that deed; consequently the alleged deed is not valid. In para. 5 it is further stated that Rani Nasim Sahri was a minor when the said deed is alleged to have been executed by her, and, therefore, the deed is inoperative.

When I cleared up the pleadings and asked the parties to state their cases before me, Mr. Makund Behari Lal, the learned pleader for the plaintiff, at first explained the plea contained in para. 4 (e) and gave details of the undue influence and fraud in connexion with the said deed of relinquishment (*P. R.* 340), but he subsequently withdrew that plea (*P.R.* 341). It will thus appear from what I have stated above that although the plea of undue influence and fraud was originally taken regarding the execution of the deed of relinquishment and was subsequently withdrawn, yet so far as the question of remarriage was concerned no such plea was taken at all. The simple reply in connexion with the remarriage of Rani Nasim Sahri throughout the pleadings was that it never took place. Regarding the deed of relinquishment also the only question left for decision after the oral pleadings was whether it was executed or not. It was for this reason that issue 6, as framed by me was in the simple form whether Rani Nasim Sahri remarried Mohamed Sultan Khan in May 1908, and whether she relinquished her rights under the will of the late Raja. The necessity for mentioning this point has arisen because during the trial of the case the counsel for the plaintiff changed their attitude and cross-examined the witnesses produced on behalf of defendant 1 in proof of the remarriage of Rani Nasim Sahri in a manner showing as if their case was one of fraud and undue influence. They also produced witnesses to substantiate such a plea. I pointed out to them during the trial that in view of their pleadings in the case, this was not justifiable. In the course of arguments also the same attitude was taken up by Mr. Jackson, the learned counsel for the plaintiff. He argued that the said marriage was not established, and if it was, it was merely a fictitious transaction and Rani Nasim Sahri was kept unaware of the fact of her remarriage (*P. R.* 1340).

I now proceed to discuss the evidence on the record relating to the marriage of Rani Nasim Sahri with Mohamed Sultan Khan. There is both oral and documentary evidence in support of that marriage. I will, however, first deal with one very important piece of documentary evidence, namely, the nikahnama (Ex. A 61), and the oral evidence produced to prove that deed, thus establishing the remarriage of Rani Nasim Sahri, apart from any other evidence. (The judgment then dealt with the evidence both oral and documentary and proceeded). I have now dealt with all the documentary evidence on the record in support of the remarriage of Rani Nasim Sahri. The nikahnama (Ex. A-61), the

deed of relinquishment (Ex. A-58), the proceedings of the interpleader suit containing the admissions of Rani Nasim Sahri herself, of the other Ranis who were parties to the suit and of Mr. Sladen, Special Manager of the Nanpara estate. the finding of the trial Court in that case, the attitude of Rani Nasim Sahri while effecting the compromise regarding her claim in the Court of appeal, the admissions made by her in 1915 while executing the deed of relinquishment in favour of Mohamed Sultan Khan, and finally the admissions in the will executed by her in 1916 are important pieces of evidence commencing from the very date of the marriage and ending with a date shortly before her death, all tending to one conclusion, viz., that Rani Nasim Sahri was married to Mohamed Sultan Khan. There is, therefore, no doubt of any sort whatever left in my mind that the oral evidence produced in the case as well as the documentary evidence referred to above, constitute an overwhelming proof of the marriage of Rani Nasim Sahri with Mohammad Sultan Khan in May 1908.

I now proceed to deal with the evidence in rebuttal. It consists of evidence both documentary and oral. I will take up the documentary evidence first. (The judgment then dealt with the evidence and proceeded.)

Paternity of Jafar Sultan.—Before finishing this part of the case I must refer to a point which arose during the trial. It is really a side issue in the case but it grew into importance and afforded to the plaintiff's side an opportunity to produce a good deal of manufactured and false evidence, in recording which a great deal of valuable time had to be wasted. Nawab Muzaffar Ali Khan was the first witness examined on behalf of defendant 1. He deposed about the remarriage of Rani Nasim Sahri (*P.R.* 436) and stated in his evidence that a son had also been born to her of Mohamed Sultan Khan, that his name was Jafar and that he was alive being now aged about 16 or 17 years and living at present with his father Mohamed Sultan Khan. He was supported in his statement by Imtiaz Begam, step-mother of Mohamed Sultan Khan examined as defendant's witness on commission (*P. R.* 528 *g.*). The next witness produced in Court by defendant 1 was Mohamed Sultan Khan. He stated that a son had been born to him from Rani Nasim Sahri about one year after his marriage with her, that his name was Jafar Sultan and that he was then about 17 or 18 years of age, being still alive (*P. R.* 485). Muzaffar Ali Khan was not asked a single question in cross-examination about Jafar Sultan but Mohamed Sultan Khan was cross-examined on this point (*P. R.* 498). He was asked whether he had any doubts about Jafar Sultan being his son from Rani Nasim Sahri. The witness replied in the negative. He was also asked how long after his marriage with Rani Nasim Sahri the son was born. The witness gave the same answer which he had given in the examination-in-chief, viz., that he was born after a year of his marriage with her. A few other questions were also put to the witness regarding the boy's education and maintenance.

The examination of Nawab Muzaffar Ali Khan was finished on the 12th January 1927 (*P. R.* 455). The next day, i. e., on 13th January, defendant 1 put in an application to the effect that he wanted to examine Jafar Sultan and that he should be summoned for 17th January 1927, since Mohammad Sultan Khan's examination had commenced that day and was likely to be finished by the 17th. The examination of Mohammad Sultan Khan was, however, finished on the 19th, and as soon as his examination was over Jafar Sultan was produced as a witness in the case on behalf of defendant 1. He was examined as D. W. 3 (*P. R.* 501).

Jafar Sultan clearly stated in his evidence that Rani Nasim Sahri was his mother and Mohammad Sultan Khan was his father. He also stated that as long as his mother was alive, he used to remain with her though he used to go to his father occasionally. After her death the witness had been living permanently with his father. The cross-examination was directed to only two points: firstly regarding the parentage of the witness entered in the scholars' register of the Mission School, where he had been put in by Rani Nasim Sahri; secondly regarding the parentage given by him in theft cases started against him at Bahraich in which he had been convicted. Fortunately both these were matters regarding which documentary evidence was available. Defendant 1 filed Ex. A-67, a cor-

tified copy of the scholars' register, which showed the parentage of Jafar Sultan as Mohammad Sultan (*P. R.* 395 of *Part III*). There was, therefore, left no room for doubt regarding the parentage entered in the said register. Regarding the second objection the plaintiff summoned records of four criminal cases from the record room of the Deputy Commissioner, Bahraich. The criminal cases were No. 58 of 1925 (summary trial No. 5 of 1926), No. 59 of 1926 (summary trial No. 6 of 1925), No. 60 of 1926 (summary trial No. 7 of 1926) and 61 of 1926 (summary trial No. 8 of 1926). The numbers of the cases were, however, incorrectly given in the application, dated 1st March 1927, but when the files were received in this Court, correct numbers were ascertained.

All these records of the criminal cases were marked as the *King-Emperor* v. *Jafar* al as *Jaffu*. They contained the statements of Jafar Sultan, which have been filed in this case as Ex. A-94 (*P. R.* 473 *of Part III*), Ex. A-104 (*P. R.* 489 of *Part III*), Ex. A-113 (*P. R.* 508 of *Part III*) and Ex A-123 (*P. R* 524 of *Part III*). (The judgment then proceeded to discuss the information reports.) Regarding the information reports, the first thing which I should like to state is that these reports cannot, in my opinion, be considered to be admissible in evidence in proof of the parentage (waldiat) of the accused. It does not appear who was responsible for the entry of the parentage of the accused, whether as Nawab Ghafur or as Nawab Ali If it was entered by some police official on the information supplied by somebody who is alive it is clear that the entry would amount to a statement of a living person, and unless the person giving the information, i. e., making the statement, is produced and examined in regard to his source of information, it cannot be admitted in evidence at all. If the information was given by some person, who is dead, even then the statement cannot be admitted in evidence under S. 32, Cl. 5, Evidence Act (1 of 1872), until it is proved that the person making the statement had special means of knowledge. Nothing was done on behalf of the plaintiff to satisfy these requirements of law. I am, therefore, of opinion that all these documents are inadmissible in evidence to prove the parentage of the accused. The second thing which I would like to point out is that on going through the records of the criminal cases I found that the actual written complaints, which had been filed in the police station by the various complainants, contained no name of the accused at all. It does not appear how the names of the accused and his parentage came to be entered in the information reports, which were written in the police station on the basis of these complaints. If they were orally ascertained from the various complainants then the objections stated above would clearly apply. (Here a list of the information reports and the corresponding complaints was given). Regarding Ex. 96/2 (*P. R.* 812 *of Part III*) I may state that it consists of two portions. The first portion is to be found on one side of the page and the second portion on the other side. The first portion consists of an official letter from the Sub-Divisional Magistrate, Bahraich, to the Superintendent, District Jail, Bahraich, requesting him to examine the accused Jafar alias Jaffu, son of Nawab Ghafur of Bahraich, Moholla Qazipura, and to report as to his probable age. The letter is signed by Khan Bahadur Aulad Husain for the Sub-Divisional Magistrate. It was proved by the Khan Bahadur, who is an Honorary Magistrate of Bahraich, and who has been examined as P. W 11 (*P. R.* 9 1.) The Khan Bahadur stated in his evidence that the memo was prepared in the English office where such papers are usually prepared. According to the witness' statement they are sometimes prepared in the Court Inspector's office also. He, however, stated clearly that he did not know the boy previously, nor did he know about his parentage (*P. R.* 992), and had not, therefore, any personal knowledge of the accuracy or otherwise of the parentage recorded in the memo. He stated that he had signed the paper in his official capacity because the Sub-Divisional Magistrate was probably away on tour (*P. R.* 991). Although the memo is proved to be genuine yet it has not been established who was responsible for entering the parentage of the accused therein The second portion consists of the report of the Civil Surgeon (who happened to be the Superintendent of the District Jail) after he had examined the accused. According to his opinion the age of the accused was found on examination to be about 16 years. No

evidence was produced on behalf of the plaintiff to prove this report. It purports to bear his signatures, but no evidence was given in proof thereof. I called upon Mr. Jackson, the learned counsel for the plaintiff, to show how this report could be considered as admissible in evidence without its having been proved. His contention was that the report was a public document, it being the act of a public officer under S. 74, Cl. (1), sub-Cl. (iii), Evidence Act (1 of 1872), and did not require proof. His contention was that under S. 77, Evidence Act, the document proved itself.

Mr. Jinnah, the learned counsel on behalf of defendant 1, however, contended that the document was not admissible without proof, it being merely an opinion of the Civil Surgeon as an expert and not an act of a public officer within the meaning of S. 74. In my opinion this contention is correct and the memo cannot be considered to be a public document. There is no doubt that a Civil Surgeon, who happens to be the Superintendent of a District Jail, is a public officer, but I do not think that a memo written by him can be considered to be an act or a record of his act as a public officer. I think it merely embodies his opinion as an expert. Under. S. 74, Evidence Act (I of 1872), only such documents are considered to be public documents as form the act or record of the act of a public officer. Mr. Woodroffe and Ameer Ali, in their learned work on the Law of Evidence, define such acts as follows:

> The acts of public functionaries, in the Executive, Legislative and Judicial Departments of Government including the transactions, which official persons are required to enter in books of registers in the course of their public duties and which occur within the circle of their own personal knowledge and observation: vide, Woodroffe and Ameer Ali's Law of Evidence (8th edn. p. 542).

In *Queen Empress* v. *Arumugam* (16) the Full Bench of the Madras High Court held that reports made by a police officer, in compliance with the provisions of the Criminal Procedure Code, were not public documents within the meaning of S. 74, Indian Evidence Act.

Shephard, J., remarked on p. 197 that the word "acts" used at two places in the phrase "documents forming the acts or records of the acts" in S. 74 is used in one and the same sense, and the act of which the record made is a public document, must be similar in kind to the act, which takes shape and form in a public document. In short, the kind of acts which S. 74 has in view is indicated by S. 78 of the same Act.

Benson, J., remarked on p. 204 that it may well be doubted whether the word "acts" in S. 74 is used in its ordinary and popular sense, and not rather in the restricted and technical sense in which it is used in S. 78 of the Act.

It, therefore, appears to me that when a Civil Surgeon reports to a Magistrate he is merely giving his expert opinion and is not making a record of his "act" in official capacity for the use of the public. It is only his act of making a record in such a capacity that would be considered to be an "act" within the meaning of S. 74. I am, therefore, of opinion that the memo referred to in this case cannot be held to be proved without any proof to that effect. I may go further and state that, even if it be held to be proved, it does not take us very far in the case. Raghubir Saran, P. W. 9, who was examined by the plaintiff, was clearly asked by the Court as to who had told the doctor regarding the parentage of the accused (*P. R.* 983) and his reply was that the doctor had copied it from the memo. He was also asked whether the Civil Surgeon asked the accused his parentage, and if so, what parentage he gave. The witness stated in reply that the Civil Surgeon usually enquired from the accused his parentage and he must have done so in this case also. He, however, stated that he did not remember what parentage the accused gave. He was even reminded whether the accused gave his parentage as Ghafur Khan, but the witness stated that he did not remember. Under those circumstances it is clear that the parentage given in the Civil Surgeon's memo cannot, in any way, be brought home to the accused. In my opinion the doctor copied the parentage from the original memo and never enquired about it from the accused. If he had done so, the accused would have given the correct parentage as he gave it when his statement was recorded by the Court at the time of the trial.

Regarding the entry of the parentage of the accused in the warrant for intermediate custody on remand, Ex. 96-3

(16) [1896] 20 Mad. 189=7 M. L. J. 167 (F. B.).

(*P. R.* 813 *of Part* 3), I need only state that it stands on the same level as the memo issued from the Court of the Sub-Divisional Magistrate, Ex. 96-2. Though Khan Bahadur Aulad Husain has proved his signatures, yet we do not know who was responsible for the entry, without which evidence it is of very little value.

I should further like to point out that in my opinion the entries in all the documents mentioned above, where Jafar Sultan is described as the son of Nawab Ghafur Khan, can be explained away very satisfactorily by the fact that he was then living at Bahraich in the house of Ghafur Khan, who, according to the evidence in this case, had begun styling himself as Nawab Ghafur, ever since Rani Nasim Sahri had come to live with him in his house at Bahraich. His real father, Mohammad Sultan Khan, was living in Lucknow and had no house at Bahraich, and it appears that he was at the time neglecting to support him. Rani Nasim Sahri was dead and according to her will, Ghafur Khan was to be his guardian and was charged by her with the duty of looking after him, as long as he had not attained his majority : vide Ex. A-88, *P. R.* 424 *of Part* III. Jafar Sultan was then a minor aged about 16 years. If under these circumstances the public or the police came to look upon the boy as the son of Nawab Ghafur, there was nothing strange in it. To deduce from this that Ghafur Khan was the actual father of Jafar Sultan and that he was not the son of Mohammad Sultan Khan would, in my opinion, be an altogether unjustifiable conclusion. I am, therefore, of opinion that this documentary evidence upon which so much reliance has been placed by the other side does in no way rebut the fact that Jafar Sultan was actually the son of Mohammad Sultan Khan born from Rani Nasim Sahri. (The judgment then discussed the evidence and holding that Jafar Sultan was the son of Mohammad Sultan Khan born from Rani Nasim Sahri, proceeded.) On a review of the whole of the oral and documentary evidence led by the parties on this issue, I have no hesitation in holding that the marriage of Rani Nasim Sahri with Mohammad Sultan Khan in May 1908 is fully established. I, therefore, find this issue in favour of defendant 1 and against the plaintiff.

Issue 7 (*Res judicata*). The plea of res judicata is contained in para. 18 of the written statement of defendant 1 (*P. R.* 279). It is stated in that para. that the suit is barred by res judicata in view of the decision relating to the defendant's adoption in the interpleader suit, No. 62/3 of 1908, decided on the 4th November 1911. In the replication the plaintiff denied that the suit was in any way affected by the rule of res judicata (*P. R.* 302). In the oral pleadings before me the matter was cleared up by the counsel for defendant 1. He stated that his case was that the trial of the question relating to the factum and the validity of the adoption of defendant 1 was res judicata between the parties, the plaintiff being estopped from claiming as an adopted son by virtue of the conduct of his adoptive mother, Rani Champa (*P. R.* 338). In arguments the matter was further explained by stating that the plea of res judicata was urged not in the sense that the decision in the previous case was binding on the plaintiff, because he was a party to that case, but in the sense that the decision obtained in the interpleader suit by defendant 1 against Rani Champa (adoptive mother of the plaintiff) in regard to the validity of his adoption was binding not only on her but also on the plaintiff, who had been subsequently adopted by her.

It was urged that Rani Champa, as a donee of power, could have contended in the interpleader suit in which the Court had to determine the validity of the adoption of defendant 1, that his adoption was bad on the ground that Rani Nasim Sahri had not remarried herself and that Rani Saltanat Begam had not exercised her power of adoption within the time limit enjoined upon her in the will of the late Raja Mohammad Siddiq Khan (*P. R.* 1298 and 1299). If she did not raise these pleas in the inter pleader suit in order to destroy the validity of defendant 1's adoption, S. 11, Civil P. C., which contains the rule of res judicata, would stand as a bar in her way. The argument was that the bar of S. 11 came in this way that the result of the decision in that case took away her power of appointment by declaring that the power having been already validly exercised had been exhausted, and that she was not, therefore, capable of exercising it any more. To put it in other words: if the

necessary implication of that decision was that, in view of the fact that defendant 1 had already been validly adopted by the second Rani (Rani Saltanat Begam) the power to adopt conferred by the late Raja upon his Ranis had become exhausted and no other Rani could thereafter avail herself of the power, the adoption of the plaintiff by Rani Champa would be deemed invalid. The decision, being binding upon Rani Champa, must be deemed to be binding upon the plaintiff, who had been subsequently adopted by her, because she fully represented the estate in the previous suit.

Section 11, Civil P. C. (Act 5 of 1908) runs as follows :— (S. 11, Civil P. C. quoted). We have now to see whether the contention raised by defendant 1 can be considered to have been made out. The first question which we have to determine is whether in the interpleader suit (Suit No. 62/3 of 1908) the question of the validity of the adoption of defendant 1 was raised and decided in his favour. The second question which has to be decided is whether that decision is binding on Rani Champa, in the sense that she actually contested the validity and the point was decided against her, or in the sense that although she never contested the validity at all, yet she must be deemed under Expl. 4 to have raised the point. The third question which we have to determine is that in case the decision be held to be binding on Rani Champa, whether it would also be binding on the plaintiff, who has, subsequent to that decision, been adopted by her ; in short we have to determine whether the plaintiff though not a party to the previous suit can be deemed to have been represented by Rani Champa within the meaning of Expl. 4 attached to the said section.

In order to come to a decision on these points the first thing we have to do is to determine the facts as they then existed. (The judgment then narrated the circumstances of the interpleader suit instituted on the 28th April 1908 and holding that the question of the validity of the adoption of defendant 1 was raised in that suit and decided in his favour, proceeded.) We have now to decide the second question whether that decision can be deemed to operate as res judicata against Rani Champa.

Now so far as defendant 4 (Rani Champa) was concerned, it is clear from the facts elicited from the record that she did not challenge either the factum of the adoption of defendant 1, then defendant 13 (Saadat Ali Khan) or its validity though she was given full opportunity to plead whatever she liked by the order of the Court, dated the 16th July 1909, passed in the presence of her pleader, Mr. Mohammad Agha. She did not avail herself of that opportunity. The interpleader suit was decided in favour of defendant 1, then defendant 13. These points must, therefore, be deemed to have been decided against Rani Champa under Expl. 4. An interpleader suit from its very nature, as described in S. 88, Civil P. C., is a suit in which several claimants are to be deemed to be claiming adversely to each other. Consequently though Rani Champa and Saadat Ali Khan were arrayed in that suit on the same side as defendants 4 and 13 respectively, yet they must be deemed to be claiming adversely to each other. Saadat Ali Khan was putting forward his adoption by Rani Saltanat Begam under the powers conferred upon her under the will of the late Raja Mohammad Siddiq Khan, and it was the duty of Rani Champa, if she liked to do so, to contest the said adoption, both in respect of the factum as well as its validity by filing a written statement to that effect, as ordered by the Court. If she did not do so in spite of the fact that she was represented by a pleader on the date, when the issue relating to the adoption was framed on the pleadings of other defendants, she must be deemed to have raised the point, and if the Conrt decided it adversely, the matter must be deemed, under Expl. 4, S. 11, Civil P. C., to be a matter directly and substantially in issue in that suit. The conclusion at which I, therefore, arrive is that the questions relating to the factum and the validity of the adoption of Raja Saadat Ali Khan, now defendant 1, must be deemed to have been directly raised by Rani Champa in that suit and decided against her.

In this connexion I must deal with another contention raised on behalf of the plaintiff. Rani Champa filed an appeal against the decree of the trial Judge, passed in the interpleader suit on the 4th November 1911, and urged that the adoption of defendant 13 (Saadat

Ali Khan) by defendant 2 (Rani Saltanat Begam) was void in law and could not confer upon him any rights in respect of the property of the the late Raja Mohamad Siddiq Khan. This was put forward in ground 10 of her memorandum of appeal which will be found incorporated in the decree passed in appeal: vide Ex. A-10, (*P. R.* 181 of *Part III*). The appeal came for hearing before the Bench of the late Court of the Judicial Commissioner of Oudh, and their judgment is Ex. A-6 (*P. R.* 19 to 160, *Part III*). Mr. L. Stuart (now Sir Louis Stuart), J. C., in his judgment dated 28th May 1924 (*P. R.* 123 of *Part III*) gave his decision on the said ground of appeal as follows :

The tenth ground of appeal is that the adoption made by defendant 2 is void in law, nor can any property legally vest in the person so adopted. The suggestion made is that Saadat Ali Khan could not have been legally adopted by Rani Saltanat Begam, as the provisions of the will direct that no person belonging to the family of Mehdi Quli Khan could be adopted. Saadat Ali Khan is the son of Rani of Muhamdi, and the Rani of Muhamdi is the daughter of Rani Sultan Shan Begam who was the daughter of Mehdi Quli Khan. I interpret the provisions of the will in question to mean that no descendant on the male side of Mehdi Quli Khan's family is to be adopted, and I find that Saadat Ali Khan is not a member of the family of Mehdi Quli Khan on the male side. In any circumstances the point raised by Rani Champa is not a point material to the decision of her appeal. It has been shown that none of the claims which she urged in the lower Court or which she apparently urges again in appeal, are other than claims against the administrators of the estate: Provided that she can bring claims against the administrators of the estate she is not concerned with the decision as to who those administrators are. They will be liable to her, howsoever they have been appointed. It is to be noted that Rani Champa has not in her appeal claimed the property under the will. It is also to be noted that she has claimed no share in the non-taluqdari property. For the above reasons the appeal of Rani Champa fails and is dismissed.

Pandit Kanhaiya Lal, A. J. C., delivered a separate judgment and observed : vide Ex. A-6 *P. R.* 158 of *Part III* as follows:

The claim of Rani Champa to her dower and the annuity fixed by the will cannot be entertained in this case, because the object of this claim is not to enforce the will, but to determine the person rightfully entitled to the corpus of the estate, which is in the hands of the Court of Wards. She claimed certain jewellery included in the list filed with the plaint as her private property, but she did not substantiate her right to the same by any evidence. The claim tc the jewellery was made after the written statement was filed, and no evidence was produced in support of it. She did not claim any other rights independently of the will : vide her application, dated 28th August 1911.

The adoption of Saadat Ali Khan is valid under the will and under S. 29, Oudh Estates Act. The circumstances under which an adoption can be made by Hindus or Mahomedans under that Act, are identical, but the restrictions imposed on adoption by the personal law of the Hindus are not applicable to the Mahomedans. The boy adopted does not belong to the family (khandan) of Mehdi Quli Khan any more than Raja Mohammad Siddiq Khan did so, for in India a boy is known by the family of his father or paternal grandfather, rather than by the family in which his father or paternal grandfather was married . . . .

The appeals of . . . . . Rani Champa . . . . . fail and are dismissed with costs.

Mr. Jackson, the learned counsel for the plaintiff, contended that in view of the judgment of Mr. L. Stuart (now Sir Louis Stuart) it must be held that any contention as to the validity of adoption, even if raised by Rani Champa, would have been deemed as irrelevant for the purposes of that case. In support of this position reference was made by him to that portion of the judgment which stated that the matter was one which did not concern her, it being a matter relating to the appointment of an administrator only. Under these circumstances, he argued that the judgment of the Court of appeal in that case ascribed to Rani Champa a position both in the trial Court as well as in the appellate Court, according to which she could not have been heard if she challenged the validity of the adoption of Saadat Ali Khan. If she could not be allowed to challenge the validity of the adoption, argued Mr. Jackson, it could not be contended that she ought to be deemed to have challenged the validity of the adoption and the point deemed as having been decided against her : vide *P. R.* 1354.

The reply of Mr. Jinnah, the learned counsel for defendant 1, was to the effect that Mr. Stuart did not intend to lay down that Rani Champa could not raise such a plea, if she liked, in the trial Court. He intended merely to lay down that it was unnecessary to decide the point, because it had not been raised by her in the trial Court and consequently the point was not a material one for the decision of her appeal. The position, according to Mr. Jinnah, taken up by the Court of appeal was that because none of these claims had been urged by Rani Champa in the lower Court, they could

not be urged by her in appeal. Indeed the attitude taken up by her in the trial Court was that she only put forward her claims regarding dower and maintenance, which were claims which one would ordinarily raise against the administrator of the estate. She had never challenged the validity of the appointment of the administrator of the estate, consequently it was not open to her to challenge it in appeal. He also relied upon the judgment of the other Judge, Pt. Kanhaiya Lal, A. J. C. where he expressly made this point clear and decided the question of the validity of the adoption in favour of defendant 13 (Saadat Ali Khan).

I am in full agreement with the reply given by Mr. Jinnah. It appears to me to be clear from Mr. Stuart's (now Sir Louis Stuart) judgment that the only reason why he considered the decision on the point unnecessary for the purpose of deciding Rani Champa's appeal was that Rani Champa herself had never taken up that position in the trial Court. The learned Judge did not mean to lay down that Rani Champa could not take up that position, if she liked, in the trial Court. According to him, if she had taken up that position in the trial Court and a finding had been given by that Court against her it would have been perfectly open to her in appeal to contest the finding on the point. Not having, however, raised the point in the trial Court, she could not be heard to raise that point in appeal and consequently the decision of that point was, for the purpose of decision of her appeal, quite unnecessary. Pt. Kanhaiya Lal, A. J. C., however, went further and clearly gave a finding in favour of the validity of the adoption of defendant Saadat Ali Khan.

It, therefore, appears to me to be clear from the position taken up by Rani Champa during the trial of the interpleader suit that, prior to the adoption of the defendant Raja, she had admitted that owing to the remarriage of Rani Nasim Sahri, Rani Saltanat Begam had become the sole legatee and heir entitled to the Nanpara estate and no other widow of the late Raja except her or the person, whom she adopted, could succeed to the estate or the property left by him. It further appears to be clear from the proceedings of that very suit that after Rani Saltanat Begam had exercised her power to adopt in favour of defendant 1, then defendant 13 (Saadat Ali Khan) and after he had been impleaded in the case, Rani Champa never challenged either the factum or the validity of his adoption. It was perfectly open to her to take up that position, if she liked, but as a matter of fact she never did. If, therefore, she did not contest the point and it was decided against her, it must be deemed to be a point directly and substantially in issue and decided against her under Expl. 4, Civil P. C. My finding, therefore, on the second question, is that, after the decision of the interpleader suit, it is no more open to Rani Champa to contest the factum or the validity of the adoption of defendant 1. In short the decision operates as res judicata against her.

I now proceed to decide the third question, namely, whether the decision in the interpleader suit, which I have held to be binding on Rani Champa, the adoptive mother of the plaintiff, binds the present plaintiff also, although he was no party to that suit, having been adopted subsequent to the decision thereof.

The contention on behalf of the plaintiff was that he had not been adopted till after the decision of the interpleader suit, the case having been decided by the trial Court on 4th November 1911, and by the Court of appeal on 28th May 1914, and his adoption having taken place on 27th July 1914. It was urged on his behalf that although he had been adopted by Rani Champa, yet he could not be considered to be claiming the estate through her. He was claiming the estate as the adopted son of the late Raja, having been adopted by one of his widows under the provisions of his will.

The position taken up on behalf of defendant 1 was that in order that the decision in the interpleader suit might be considered to be binding upon the plaintiff it was not necessary that he should have been a party to that suit, nor would it be necessary to show that he was claiming the estate through his adoptive mother. According to the contention of the said defendant, the decision in the interpleader suit, which was a decision against the adoptive mother, must be considered to be binding upon the adopted son also, because in that litigation she must be deemed to have represented the estate so far as the plaintiff was concerned. Reliance was placed on Expl. 6, S. 11, Civil P. C., and it was

urged that Rani Champa should be deemed as having litigated bona fide in that suit in respect of her right to adopt, which was a right claimed in common for her and the present plaintiff, and therefore he should be deemed, for the purposes of S. 11, to claim under the person so litigating, i. e., his adoptive mother.

I have now to examine how far the position taken up on behalf of defendant 1 can be considered to be sound.

The decision arrived at in the interpleader suit should, in my opinion, be construed to conclude on two points:

Firstly, that the second Rani, namely, Rani Saltanat Begam was competent to adopt owing to the remarriage of Rani Nasim Sahri: vide the findings of the trial Judge on issues 21, 37, 38 and 39 to be found in Ex. 37 at *P. R.* 230, 231 and 232 *of Part III.*

Secondly, that Saadat Ali Khan was a person fully qualified for adoption: vide the findings of the appellate Court as contained in Ex. A-6, *P. R.* 123 and 158 *of Part III.*

It must also, in my opinion, imply a decision on a third point, namely, that if Saadat Ali Khan (defendant 1) had been validly adopted by Rani Saltanat Begam, no other Rani could be left with any power to adopt. In that case the adoption of the plaintiff by Rani Champa, which admittedly took place after the adoption of defendant 1, must be deemed to be invalid. The power to adopt given by the late Raja to his Ranis having been exercised by one of them, who was competent to exercise it at the time, the power should be deemed to have been exhausted and none left for being subsequently exercised by any other Rani. If, therefore, the effect of the decision of the interpleader suit was to declare the adoption of defendant 1 to be valid, the necessary consequence of the declaration was that the power of appointment given under the will to Rani Champa must be deemed to have ceased after the decision of that suit and consequently the adoption of the plaintiff must be held invalid. The fact that the plaintiff was not a party to that suit becomes altogether immaterial.

As to the argument raised on behalf of the plaintiff, that he is not bound by the decision in the interpleader suit, because he does not claim through Rani Champa, I am of opinion that the reply given to that contention on behalf of defendant 1, that, if there was a decision of a competent Court against the adoptive mother the decision would be binding also upon the subsequently adopted son by virtue of Expl. 6, S. 11, Civil P. C., is correct.

For a long time controversy on this point had raged in Indian Courts, and it was considered doubtful whether an adopted son or a reversioner should be considered to be bound by a decision arrived at against the adoptive mother or the widow in possession. It was felt that the adopted son or the reversioner claimed in his own independent right and did not claim through the adoptive mother or the widow in possession of the property, and consequently the decision obtained against the adoptive mother or the widow in possession could not bind the adopted son or the reversioner. The controversy has, however, been now settled by several decisions of their Lordships of the Privy Council recently delivered.

In the case of *Venkatanarayana Pillai* v. *Subbammal* (17) a suit had been instituted during the lifetime of a widow by a presumptive reversioner to set aside an adoption made by her. The plaintiff died and the next reversioner applied for being substituted on the record in his place. The application was opposed and it was contended that a reversioner could not be considered to claim under another reversioner, and consequently the suit brought by one must be deemed to have been brought in his own personal capacity, and after his death another reversioner could not be considered as his representative and thus capable of being substituted on the record in his place. Their Lordships of the Privy Council did not accept this contention and held that the suit brought by a reversioner must be considered to be a suit brought in a representative capacity. Their Lordships further held that the governing principle applicable to a suit brought by a reversioner during the lifetime of a widow was that it was brought to get rid of a common apprehended danger to the interest of the general body of reversioners. Their Lordships remarked that apart from the question whether the next reversioner could be considered to be the legal representative of the deceased reversioner, there remained the outstanding fact of identity

(17) A.I.R. 1915 P.C. 124=38 Mad. 406=42 I. A. 125 (P.C.).

of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights. According to their Lordships, Expl. 6, S. 11, Civil P. C., was intended to cover exactly cases of this kind and to bar 'a fresh litigation on the same cause of action.

The principle enunciated in the above case was followed in two later cases, namely, *Janaki Ammal* v. *Narayanasami Aiyer* (18) and *Kesho Prasad Singh* v. *Sheo Pragash Ojha* (19). The same principle was again laid down by their Lordships in a very recent case that went up to the Privy Council from Oudh, it being reported in *Mata Prasad* v. *Nageshar Sahai* (9). Their Lordships observed in the last case as follows (at p. 411) :

> Reversioners possess individually what has been called spes successionis, • • • • But the result, favourable or otherwise, affects the reversioners as a body.

These cases have, therefore, settled the law so far as the reversioners are concerned. If a decision has been obtained by a reversioner against the widow in his own favour, other reversioners can take advantage of that decision. The subsequent reversioner should be considered to be claiming under the first reversioner within the meaning of Expl. 6, S. 11, Civil P. C. If the decision is similarly obtained by the widow in her favour against a reversioner, the subsequent reversioner would also be considered to be bound by it on the principle that the widow represents the entire estate and the reversioners cannot be allowed to litigate the same cause of action twice over.

The same principle has been followed by their Lordships of the Privy Council as to cases relating to adoption. If a widow makes an adoption purporting to act under an alleged authority conferred upon her by her husband, and if a suit is brought by a reversioner either against the adoptive mother or against the adopted son (if the adoption has already taken place), and the litigation results in favour of either the widow or the adopted son, and it is found that the adoption was valid, because the widow possessed such an authority, the decision would be binding not only on the particular reversioner who brought the suit but also on all the reversioners who might choose to sue subsequently. Similarly, if a reversioner gets a declaration to the effect that the widow possessed no such authority, and if, in spite of that decision, the widow chooses to make an adoption, the previous decision would be binding upon the adopted son.

I now proceed to deal with cases relating to the first head. The most important case is reported in *Chaudhri Risal Singh* v. *Balwant Singh* (20). The facts of that case are that one Rani Dharam Kunwar of Landhaura, district Saharanpur, had brought a suit to declare that the adoption of one Balwant Singh, whom she had herself adopted, was bad on the ground that she had no authority from her husband to adopt and that, in fact, she did not make the adoption. The suit was contested on several grounds, among them being a ground that the Rani in fact had made the adoption, and was, therefore, estopped from denying it. The trial Court found that Balwant Singh had, in fact, been adopted, but it was of opinion that Rani Dharam Kunwar was estopped from questioning the validity of adoption and accordingly dismissed the suit. On appeal the High Court affirmed the decree. The plaintiff then appealed to the Privy Council and their Lordships confirmed the decree passed by the two Courts in India, but, in doing so they also took up for decision the issue whether the Rani had an authority to make the adoption. The Rani did not object to the issue being taken up and their Lordships decided it in favour of the adopted son Balwant Singh. The decision of their Lordships of the Privy Council is reported in *Dharam Kunwar* v. *Balwant Singh* (21). Rani Dharam Kunwar died and after her death another suit was brought against the adopted son by one Chaudhri Risal Singh, who alleged to be the nearest reversioner, and another person, to whom he had assigned a portion of the estate. The plaintiffs alleged in their suit that Rani Dharam Kunwar had no authority to adopt, and the adoption was, therefore, invalid. Several defences were raised but the one defence, upon which the case was decided by the High

(18) A.I.R. 1916 P.C. 117=39 Mad. 634=43 I. A. 207 (P.C.).
(19) A I.R. 1924 P.C. 247=46 All. 831=51 I.A. 381 (P.C.).
(20) A.I.R. 1918 P.C. 87=40 All. 593=45 I.A. 168 (P.C.).
(21) [1912] 34 All. 398=15 I.C. 673=39 I.A. 142 (P.C.).

Court of Allahabad, was that the previous decision of their Lordships of the Privy Council in the suit of *Dharam Kunwar* v. *Balwant Singh* (21) operated as res judicata. The decision of the Allahabad High Court is reported in *Risal Singh* v. *Balwant Singh* (22). Banerji and Chamier, JJ., held that the widow represented the estate and the interest of the reversioners to her husband, and as the Privy Council had held in the previous suit that the widow had full authority to make the adoption, that decision was binding on the reversioners and the present suit was not maintainable. Richards, C. J., however, took a different view. The matter was carried further in appeal and their Lordships upheld the plea of res judicata and remarked as follows :

> There can be no doubt, in their Lordships' opinion, that Rani Dharam Kunwar in her suit against Balwant Singh did, notwithstanding the personal estoppel under which she laboured, represent the estate on the question of fact as to whether Balwant Singh had or had not been validly adopted, and that she represented the estate within the meaning of the rule in *Katama Natchiar* v. *Raja of Shivagunga* (23). * * * The principle is that reversioners must risk that so that there may be an end to litigation—vide *Risal Singh* v. *Balwant Singh* (24).

The next case to which I would like to refer is the case of *Mata Prasad*, v. *Nageshar Sahai* (9), which has already been quoted above. The facts in this case were that one Raja Durga Prasad claiming to be the nearest reversioner had brought a suit against one Mt. Jagrani Kunwar, the widow of one Narendra Bahadur, for a declaration that a will set up by her which purported to confer upon her an authority to adopt, was not genuine. The trial Court found in favour of the genuineness of the will but the decision was set aside on appeal by the late Court of the Judicial Commissioner of Oudh. The matter was further taken up in appeal to the Privy Council where their Lordships decreed the appeal and found the will to be genuine. The case is reported in *Jagrani Kunwar* v. *Durga Prasad* (25). Pursuant to this decision of the Privy Council the lady took one Nageshar Sahai in adoption. Durga Prasad died in the meanwhile. Mata Prasad, another reversioner, instituted a suit for possession of the entire property after the death of the widow against the adopted son ; and the main ground for the suit was that the adoption of the defendant was bad because the will under which Mt. Jagrani Kunwar got her authority to adopt, was not a genuine document but was a forgery. The adopted son contended that the previous decision of their Lordships of the Privy Council regarding the genuineness of the will, operated as res judicata and constituted a bar to the trial of this issue a second time. The trial Court overruled the plea of res judicata but on appeal the late Court of the Judicial Commissioner of Oudh reversed that decision and held that the previous decision of the Privy Council on the question of gennineness of the will operated as res judicata. The matter was further taken up in appeal to the Privy Council and the judgment of the Court of appeal was affirmed.

The two litigations referred to above distinctly show that where, in a suit brought by a reversioner, the widow succeeds in getting the authority to adopt established, the decision is binding upon all subsequent reversioners.

I now proceed to deal with cases under the second head. It would be enough if I took up only one well-known case, which went up to the Privy Council from this very province (Oudh). It relates to the Ajudhia estate. Maharaja Sir Man Singh was the owner of that estate. The Maharaja died on 11th October 1870, leaving no male issue. Prior to his death he had executed a will dated 22nd April 1864, under which he gave his widow Maharani Subhao Kuar power to adopt. The Maharaja had also a daughter from whom was born a son named Partab Narain Singh who was known in the family as "Dadwa Saheb." After the death of the Maharaja, the Maharani adopted one Triloki Nath who was nephew of her husband, on 16th August 1872, in accordance with the terms of the will. Partab Narain Singh, the grandson of the Maharaja, then instituted a suit for a declaration of his title to succeed to the whole of the estate of Maharaja Sir Man Singh, his maternal grandfather, alleging that the Maharaja had revoked the said will during his lifetime, and consequently the adoption by the Maharani was invalid. Partab Narain Singh's suit was dismissed by both

(22) [1915] 37 All. 496=30 I.C. 657=13 A.L.J. 594.
(23) [1862] 9 M.I.A. 539 (P.C.).
(24) A.I.R. 1918 P.C. 87=40 All. 593=45 I.A. 168 (P.C.).
(25) [1913] 36 All. 93=16 O.C. 386=22 I.C. 103 =41 I.A. 76 (P.C.).

Courts in India, and he carried the matter further in appeal to the Privy Council. Their Lordships, on a review of the entire evidence, decided in favour of Partab Narain Singh holding that the will of the Maharaja executed in 1864 had been revoked by him, and consequently the Maharani was left with no authority to adopt, and the adoption by her of Triloki Nath was invalid. Their Lordships, therefore, held that the Maharaja had died intestate, and that under Cl. 4, S. 22, Act I, 1869 (as it then stood) Partab Narain Singh was entitled to succeed to the taluqa, since he had been treated by the late Maharaja in all respects as his own son; and the declaratory decree as prayed for by Partab Narain Singh was granted to him. This case is reported in *Partab Narain Singh* v. *Subhao Kuar* (26). An application for review was filed by Triloki Nath before their Lordships of the Privy Council on the ground that he had not been properly represented in the case, and the decree of their Lordships was not binding on him. The petition of Triloki Nath was, however, rejected by their Lordships. The case is reported as in the petition of Triloki Nath in re. *Partab Narain Singh* v. *Subhao Kuar* (27).

Having thus been defeated, Triloki Nath tried his luck again and started a fresh suit in India on the allegation that he was not properly represented in the previous litigation, and that the will of the late Maharaja had not been revoked by him during his lifetime, and consequently his adoption by Maharani Subhao Kuar was valid. He thus claimed the entire estate denying that "Dadwa Sahib" had been treated by the late Maharaja Sir Man Singh in all respects as his son. The Courts in India held that Triloki Nath was not properly represented, and also decided other points in his favour and gave him a decree for the entire estate. The matter was taken up again to the Privy Council and their Lordships' judgment is reported in *Partab Narain Singh* v. *Tirloki Nath Singh* (28). The case is a most instructive one and fully applies to the present case. The arguments will be found reported on pp. 189 and 190 of the said Indian Law Reports. It was contended on behalf of the appellant (Partab Narain Singh) that the previous decision of their Lordships of the Privy Council was binding upon Triloki Nath Singh since he, claiming derivatively under the will of the late Maharaja Man Singh, by the appointment of the widow of the latter, was bound by the decree against the widow who represented her deceased husband's estate. she having been a party to the suit.

On behalf of the respondent it was argued that Triloki Nath Singh, having neither been actually a party to the former suit, nor having been properly represented therein, was not bound by the previous decision. As to the argument that the widow had sufficiently represented all future and contingent interests in the estate, and therefore, had represented Triloki Nath Singh in the suit, it was contended on behalf of the respondent that it must be considered that the latter claimed title not under the widow but under the late Maharaja's will. Their Lordships in delivering the judgment observed that the declaration given by the Courts in India was directly opposed to the declaration made by the Privy Council in the former suit brought by the appellant in which substantially the same issues relating to the succession to the taluqa, as those in the present suit, were raised and decided. Their Lordships observed that the first question to be considered in the appeal was whether the respondent was bound by the judgment in the former suit; for if so bound, the question on the merits need not be discussed. Their Lordships stated with regard to the first point raised before them, namely, whether the respondent was properly represented or not, that they did not propose to discuss it at length as their decision would not turn upon it. Their Lordships did not, therefore, decide the point whether the respondent was a party to the previous suit, and consequently to the final order passed by the Privy Council in that suit. It was, however, clear that the Maharani was a party to the previous litigation, and that the decision had been pronounced against her. Their Lordships, therefore, proceeded to consider the second question whether the Maharani fully represented the estate in the former suit, and whether the previous decision con-

(26) [1876] 3 Cal. 626=4 I. A. 228=3 Sar. 740 (P.C.).
(27) [1877] 4 Cal. 184=5 I. A. 171=3 Sar. 840 (P.C.).
(28) [1884] 11 Cal. 186=11 I. A. 197=4 Sar. 567 (P.C.).

stituted res judicata. Their Lordships held that the Maharani represented the estate fully in the former suit, and the decision pronounced against her operated as res judicata in the second litigation and was binding upon Triloki Nath Singh. Their Lordships, therefore, reversed the decision of the Courts in India and dismissed the suit, upholding the title of Partab Narain Singh, which had been declared by them in their judgment in the previous case.

It is clear from this case that their Lordships for purposes of the decision of the second case, treated that Triloki Nath Singh was not a party to the previous suit, and only took into consideration the fact that the previous decision had been pronounced in a suit to which Maharani Subhao Kuar, the adoptive mother of Triloki Nath Singh, was a party. It is also clear that the decision of their Lordships in the previous case was to the effect that the will of the late Maharaja had been revoked, and that the Maharani had no more any authority to adopt, and therefore, the adoption of Triloki Nath Singh by her was invalid. According to the view taken by their Lordships their decision in the previous suit as to want of authority on the part of Maharani Subhao Kuar to adopt, was held to be binding upon Triloki Nath Singh, the adopted son, who was deemed for the purposes of the subsequent decision to have been no party to the previous litigation at all.

This case, therefore, leads me to conclude that if in a litigation a decision, fair and square, is obtained against the adoptive mother to the effect that she possessed no authority to adopt, that decision must be considered to be binding upon the adopted son, though he may have been adopted by her, subsequent to the decision, and could have been a party to the previous litigation.

I, therefore, apply this principle to the facts of the present case. I have already held that the decision in the interpleader suit, to which both defendant 1 and Rani Champa, the adoptive mother of the plaintiff, were parties, with adverse interests against each other, is binding upon Rani Champa. She was admittedly a party to that suit, and it cannot be said that the trial of that case was not fair and square. It was decided in that case that defendant 1 had been validly adopted. This decision was arrived at because Rani Champa never chose to contest the validity of defendant 1's adoption. The necessary consequence of that decision was that Rani Champa's power to adopt must be deemed to have been held to have become exhausted. It is obvious that if the adoption made by one of the widows of the late Raja Mohamed Siddiq Khan had been declared valid, no second adoption could be validly made by any other widow of the Raja.

I am, therefore, forced to arrive at the conclusion that the previous decision operates as res judicata in the present suit, and that the plaintiff cannot be allowed to plead the invalidity of the adoption of defendant 1, and to contend that his own adoption is valid, when the effect of the previous decision was that the power to adopt possessed by his adoptive mother Rani Champa must be deemed to have become exhausted.

My finding, therefore, is that the decision in the interpleader suit operates as res judicata. I, therefore, decide this issue in favour of defendant 1 against the plaintiff.

Issue 9 (*Limitation*).—I now proceed to decide the issue regarding limitation. The position taken up on behalf of defendant 1, in this connexion has not been consistent. In his written statement, para. 19 (*P. R.* 279), the plea was taken in a few words that the suit was barred by limitation. When the pleadings in the case were, however, cleared up before me and the statements of the parties were recorded, Mr. Wasim, the learned counsel for defendant 1, amplified the said plea by stating that the suit was barred by limitation on the ground that defendant 1, the person entitled to the estate as the adopted son, came into possession thereof in 1909 when he was adopted, and has, therefore, been in adverse possession for more than 12 years (*P. R.* 338). At the time of arguments a curious position was taken up by Mr. Jinnah, the learned counsel for defendant 1. His position as stated on *P. R.* 1297 and 1298 was that the adverse possession against the plaintiff began from the date of the institution of the interpleader suit, viz., the 28th April 1908. He explained his position by stating that, after the death of the late Raja Mohammed Siddiq Khan, the possession of the Court of Wards was the possession of the

person who might ultimately be found to be the real owner; but when the interpleader suit was filed, the possession of the Court of Wards, which was that of a stake-holder, under S. 88, Civil P. C., must be deemed to be the possession of the Court. According to him, since the plaintiff was not impleaded in that suit the possession of the Court was adverse to him because the Court should be deemed to hold only for the claimants impleaded in that suit. His further argument was that after the decision of that suit, the Court must be deemed to have held on behalf of defendant 1, who was determined to be the ultimate owner of the estate. Since that time the possession of defendant 1 must be deemed to have been adverse against the whole world including the plaintiff, though he had not been till then adopted and in the eyes of law was not then in existence. His contention was that defendant 1 had perfected his title by adverse possession against the pro tanto holder of the estate who would for all purposes be considered in the eye of the law to represent the entire estate, since he had remained in possession for more than 12 years, whether the period be reckoned from the date of his adoption or at any rate, from the date of the decision of the interpleader suit, and that would be quite enough to destroy the title of the plaintiff (*P. R.* 1298). At first he cited no rulings to support his position, but subsequently cited the following three authorities in support of his plea, and stated that his contention, shortly put, was that there would be limitation running even against a non-existent person, unless his case fell under Ss. 6 and 7 or under Art. 141, Lim. Act (*P. R.* 1323):

Gobind Chandra Sarma v. *Anand Mohan Sarma* (29), *Ayyadoria Pillai* v. *Solai Ammal* (30), *Ranodip Singh* v. *Parmeshwar Pershad* (31).

To sum up the case as put forward on behalf of defendant 1 was:

(1) That the suit was bayred by limitation because it had been brought more than 12 years after the filing of the interpleader suit, which was on the 28th April 1908. The possession of the Court of Wards after the filing of that suit was that of a stake-holder and must be deemed to be the possession on behalf of the Court, and the Court should be deemed to be in possession on behalf of only those claimants, who were impleaded in that suit. The plaintiff being no such claimant the possession of the Court and hence that of the Court of Wards could at no moment be considered to be the possession of the plaintiff though he may be the person actually entitled to the estate;

(2) that the suit was barred by limitation because it had been brought after 12 years from the date of the adoption of defendant 1, which was the 9th March 1909; and

(3) that in any case, the suit was barred because it was brought after 12 years from the date of the decision of the interpleader suit which was the 4th November 1911, since which date the Court and hence the Court of Wards must be deemed to be holding for defendant 1, who was declared to be the ultimate owner of the estate.

The reply given on behalf of the plaintiff to this argument was that the possession of defendant 1, could not be deemed to be adverse prior to the date when he was held to be actually entitled to the possession of the estate, under the compromise arrived at on the 7th September 1910—vide Ex. 80, *P. R.* 767 *of Part III* and in accordance with the terms of which a decree had been passed in the interpleader suit: vide Ex. 37, *P. R.* 251 *of Part III*. That compromise declared that Rani Qamarzamani Begam was to be entitled to one-fourth share of the profits of the entire Nanpara estate for a period of 15 years, and that she was to be held as absolute owner of certain villages of the estate, and that the remaining portion of the profits was to be divided equally between Rani Kaniz Begam of Utraula and Rani Sarfaraz Begam of Muhamdi for their lifetime. In the event of the death of Rani Kaniz Begam, without leaving a male issue, her husband, Raja Mohammad Mumtaz Ali Khan, the Taluqdar of Utraula, was to take her share for his life, and after his death that share was to revert to Rani Sarafraz Begam of Muhamdi, if surviving, otherwise to defendant 1, Raja Saadat Ali Khan. The share of Rani Sarfaraz Begam, after her

(29) 2 Beng. L. R. 313.
(30) [1901] 24 Mad. 405.
(31) A. I. R. 1925 P. C. 33=47 All. 165=27 O. C. 343=52 I. A. 69 (P.C.).

death, was also to go to the said defendant Raja Saadat Ali Khan. It was, therefore, argued that the right to present possession with regard to half of the Nanpara estate was vested in defendant 2, because his wife, Rani Kaniz Begam, had died in August 1920 without leaving any male issue, and the defendant 1 was not entitled to the possession thereof during the lifetime of Raja Mohammad Mumtaz Ali Khan, defendant 2. In respect of that portion, therefore, the adverse possession of defendant 1 could not commence before the death of defendant 2. With regard to the other portion of the estate Rani Sarfaraz Begam should be deemed to have remained in possession till her death in 1921; and defendant 1 came into possession of that portion only after that date. Briefly put, Mr Hasan Imam's case was that defendant 1 was in possession of one-half of the estate to which defendant 2 was entitled, only since November 1925 when the Court of Wards wrongly gave over possession of the entire estate to defendant 1, and his possession could not be deemed to be adverse in respect of that half portion prior to 1925; and with regard to the other half, defendant 1 had come into possession only in 1921, when Rani Sarfaraz Begam died and his possession could not be adverse prior to that date. Defendant 1 has not, therefore, been in possession, much less in adverse possession, of any of these moieties for more than 12 years and cannot be considered to have perfected his title by having remained in adverse possession for more than 12 years (*P. R.* 1323 and 1324).

The rulings relied upon on behalf of defendant 1 were also criticized, and it was contended that either they were not applicable to the facts of the pressent case, or they were irrelevant (*P. R.* 1325 and 1326).

I have now to examine whether the plea of limitation, as put forward on behalf of defendant 1, can be sustained.

The first point, which I have to see, is which article of the Limitation Act applies in the present case. It has baen held by their Lordships of the Privy Council that Art. 144, Sch. 1, Lim. Act, applies only when other articles of the Limitation Act are not applicable: vide *Ranchordas Vandrawandas* v. *Parvatibai* (32). Referring to Sch.1, Lim. Act (IX of 1908), we find that neither Art. 140, nor Art. 141, nor Art. 142, nor Art. 143, applies to the present case. Art. 140 deals with a suit by a remainderman, a reversioner of a devisee for possession of an immovable property. The plaintiff does not come within this description. Art. 141 deals with a suit by a Hindu or a Mahomedan entitled to possession of immovable property on the death of a Hindu or a Mahomedan female. This article, too, does not apply to the case of the plaintiff. Art. 142 deals with a suit for possession of an immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession. It is clear that the plaintiff had not been in possession of the property even for a single day, and consequently this article also does not apply to his case. Art. 143 deals with a suit where the plaintiff has become entitled by reason of any forfeiture or breach of condition. It is unnecessary to state that this article too does not apply to the present case. The only article, therefore, that is applicable to the plaintiff's case is Art. 144, which runs as follows:

144—For possession of immovable property or any interest therein not hereby otherwise especially provided for.	12 years	When the possession of the defendant becomes adverse to the plaintiff.

Three points are, therefore, clear from the wording of the aforesaid article:

(1) That the article only applies to a suit for possession of an immovable property when no other article applies to it.

(2) That the defendant must be in possession; and

(3) That his possession must be adverse to the plaintiff.

The above points make it clear that if the defendant has not been actually in possession of any property he cannot plead adverse possession in his favour. In order to be able to do so, he must first show that he has been in possession, which he can show by proving that he himself has been in possession or that any other person has been in possession on his behalf. It is also clear that, in

(32) [1899] 23 Bom. 725=26 I. A. 71=1 Bom. L. R. 607=7 Sar. 513 (P.C.).

order to defeat the claim of the plaintiff, the defendant must show that his possession has been adverse to the plaintiff. Unless these essentials are established the defendant cannot defeat the plaintiff's case.

I now proceed to examine how far defendant 1 has been able to establish these points in order that he might be able to defeat the plaintiff's present claim.

It is clear to me that defendant 1, prior to the date of his adoption, cannot possibly say that the possession of the Court of Wards, which, after the filing of the interpleader suit in April 1908, must be treated as the possession on behalf of the Court, can be considered to be his possession. He himself was not legally in existence prior to his adoption, and it would be absurd to contend that anybody else was in possession on his behalf, when he himself did not, in the eye of the law, exist.

We have again to see whether he actually came into possession of the property when he was adopted in March 1909. It is clear to me that defendant 1, though adopted and impleaded in the interpleader suit, yet he did not come into the possession of the property at all. He was a party to the interpleader suit like every other claimant, but no claimant could, merely by virtue of being impleaded in that suit, be deemed to be in possession. It was the Court of Wards which was actually in possession on behalf of the Court in which the interpleader suit had been filed. The only person on whose behalf the Court of Wards might be considered to be holding possession, would be the person who was actually determined to be entitled to the estate. I am, therefore, of opinion that defendant 1 did not come into possession even on the date of his adoption.

I have now to see whether defendant 1 came into possession of the property after the decision of the interpleader suit in November 1911. We know that the interpleader suit was decided in accordance with the compromise arrived at on the 7th September 1910, to which defendant 1, was a party. In accordance with the terms of that compromise defendant 1 was held not to be entitled to the immediate possession of the Nanpara estate. One-half of the estate was to fall in his possession only on the death of defendant 2 (Raja Mohammad Mumtaz Ali Khan) and the other half on the death of his own natural mother, Rani Sarfaraz Begam. Raja Mumtaz Ali Khan, defendant 2, is still alive, and during his lifetime defendant 1 cannot, according to the terms of the said compromise, be considered as entitled to possession of that half portion of the estate. If the Court of Wards, while releasing the estate in 1925, has wrongly given possession of that half portion of the estate to defendant 1, he must be deemed to be in illegal possession thereof, and his adverse possession with respect to the share of defendant 2, would only commence from 1925. As to the other half it is clear that Rani Sarfaraz Begam, the natural mother of defendant 1, died in 1921 and since then he has become entitled, under the terms of the compromise, to the possession of that half. In 1921 the Court of Wards was in possession of the estate, and since that date its possession with respect to that half must be deemed to be the possession of defendant 1. It, therefore, follows that with regard to one-half of the estate defendant 1 has, under the terms of the compromise, rightfully come into possession in 1921 and with regard to the other half, he has come into possession in 1925, though wrongfully and against the terms of the compromise. Defendant 1 has not, therefore, been in possession, much less in adverse possession of the property for more than 12 years prior to the 23rd December 1925, the date of the institution of the present suit ; and he cannot, consequently, defeat the plaintiff's claim under Art. 144, Lim Act.

I now proceed to consider how far the possession of defendant 1, even if it be deemed to have commenced either from the date of his adoption in March 1909, or from the date of the decision of the interpleader suit in November 1911, can be adverse to the plaintiff.

As stated above, the contention of Mr. Jinnah, the learned counsel for defendant 1, was that limitation would run even against a non-existent person. I cannot accept this proposition. It seems to me an impossible one on the very face of it. One of the general principles governing the law of limitation is that a person can only be considered to be barred, if he has a right to enter and does not exercise that right within the

period fixed by the Limitation Act. The maxim of law is *contra non valentem agree nulla currit praescriptio* (prescription does not run against a party who is unable to act) : vide Broom's Legal Maxims, 9th edn., p. 576. Accordingly possession cannot become adverse against a person as long as he is not entitled to claim immediate possession. Ex facie it must follow that a person who is not in existence cannot be considered to be in a position to claim whether immediate or otherwise. It is evident that in the eyes of the law the plaintiff did not come into existence as long as he was not adopted. His adoption took place on 27th July 1914. He must be deemed to have come into existence only then. It was, therefore, obviously not possible for him to claim possession of the property before that date, and if he was not in a position to claim it at all, having not been then in existence, it would be absurd to say that another person was in possession adversely to him. One might fairly ask: "Adverse against whom ?" It certainly cannot be adverse against the plaintiff, who was not then in existence. It may have been adverse against any other person, but we are not concerned with such person unless the plaintiff can be shown to have derived his title from such person. To meet this position, it was contended on behalf of defendant 1, that his possession was adverse against Rani Champa, and if it was adverse against her, who was his adoptive mother, it must be deemed to be adverse against the plaintiff also. The argument was that if defendant 1 was in possession without any right, Rani Champa had a right to take possession from him, and a cause of action must be deemed to have accrued in her favour, and if the cause of action accrued to her against defendant 1, nothing could stop it, except the circumstances specified in Ss. 6 and 7, Lim. Act. In support of this proposition the following rulings, as stated above, were quoted on behalf of defendant 1 :

Gobind Chandra Sarma v. *Anand Mohan Sarma* (29), *Ayyadorai Pillai* v. *Solai Ammal* (30) and *Ranodip Singh* v. *Parmeshwar Prasad* (31).

In the first case reported in Bengal Law Reports which was decided in 1869, a Hindu had died after leaving directions to his widow to adopt a son. Upon a partition of the joint property among his brothers and his widow, a certain property was allotted to his widow as her share of the joint property. Afterwards his brothers dispossessed the widow. After her dispossession she adopted a son, who on attaining his majority instituted a suit for possession of the property of which his adoptive mother had been dispossessed. It was held by the Calcutta High Court that the suit was barred by lapse of time, and the case of *Gobind Koomar* v. *Huro Chunder* (33), decided in 1866 was relied upon in support of the decision. The same view had been taken by the Calcutta High Court in another case decided in 1868 and reported in *Nobin Chunder* v. *Issur Chunder* (34). Subsequently the Calcutta High Court again took the same view in a case reported in *Saroda Soondury* v. *Doyamoyee* (35).

I have now to examine how far the cases reported in the Bengal Law Reports and the Weekly Reporter can be considered to be good law.

Under the Limitation Act, 14 of 1859, S. 1, Cl. 12 ran as follows :

> To suits for the recovery of immovable property or of any interest in immovable property to which no other provision of this Act applies —the period of twelve years from the time the cause of action arose.

This article laid down a general rule of limitation applicable to all suits relating to the possession of the immovable property and a period of twelve years was provided for all suits relating to possession, the period being reckoned from the date that the cause of action arose. The two cases quoted above and several others that were decided by the Calcutta High Court at that time were decided under the aforesaid provision contained in the Limitation Act of 1859. The law was, however, subsequently changed and in the Limitation Act, 9 of 1871, Art. 142 was indroduced which ran as follows :

142.—Like suit (i. e., suit for possession of immovable property) by a Hindu entitled to the possession of the immovable property on the death of a Hindu widow.	Twelve years	When the widow dies.

When the subsequent Limitation Act

(33) [1866] 17 W. R. 134.
(34) [1868] 9 W. R. 505=B. L. R. Sup. Vol. 1008 (F. B.).
(35) [1878] 5 Cal. 938.

15 of 1877 was passed the following article was substituted in its place :

141.—Like suit (i. e., suit for possession of immovable property) by a Hindu or Mahomedan entitled to the possession of immovable property on the death of a Hindu or Mahomedan female.	Twelve years	When the female dies.

In the present Limitation Act 9 of 1908, the article has remained the same both in respect of the number as well as the language.

The position of law laid down in the earlier cases by the Calcutta High Court was considered by a Full Bench of the same High Court in the case of *Srinath Kuer* v. *Prosunno Kumar* (36). It was held in that case that the rule laid down in the earlier cases which were governed by the Limitation Act of 1859 was no longer the law after the passing of Acts 9 of 1871 and 15 of 1877. It was ruled in that case that the effect of enactment of Art. 142 in the Act of 1871 and also a similar Art. 141 in the Act of 1877 was to give a reversioner, entitled to a particular property on the death of a female, a fresh start on the date of her death, and that *her* cause of action could not be deemed to be *his*. Their Lordships of the Calcutta High Court observed—vide p. 937—as follows :

> We think that the rule which was laid down under the Limitation Act of 1859 is no longer the law under the Acts of 1871 and 1877.
>
> A reversioner who succeeds to immovable property has now twelve years to bring his suit from the time when his estate fall into possession. Under the Act of 1859 the language was very different. The suit under that Act must have been brought within twelve years from the time when the cause of action arose.

The substance of the decision was that after the passing of the Act of 1871, a female for the purposes of limitation could not be considered to represent the estate. Adverse possession of the estate against her could not be deemed to be adverse against the reversioner.

Mr. Upendra Nath Mitra, in his learned work on the Law of Limitation, and Prescription (edition of 1905) deals wiht this point, and the following remarks from that work (vide p. 1038) might aptly be quoted:

> Under the regulations, as well as under Act 14 of 1859 • • • • by the Full Bench ruling in *Sri Nath Kuar* v. *Prosunno Kumar* (36).

Mr. Rustomji in his work on the Law of Limitation (Edn. 4, 1927) remarks, vide p. 724, as follows:

> Adverse possession against female: Old Law: Before the Act of 1871 was passed • • • In either event the reversioner was affected by it.

After the Full Bench decision of the Calcutta High Court, mentioned above, other High Courts in India have also followed the same rule: vide *Cursandas Govindji* v. *Vundravandas Purshotam* (37), *Mukta* v. *Dada* (38), *Ram Kali* v. *Kedar Nath* (39). The matter was also taken into consideration by their Lordships of the Privy Council in *Hari Nath* v. *Mothurmohun* (40) and their Lordships observed as follows (pp. 16 and 17):

> It will be convenient here to notice the state of the law of Limitation when the suit was brought in 1887 • • • • on the death of a Hindu or Mahomedan female.

Their Lordships, however, observed that the law of limitation might have been changed, but the law relating to the binding character of decrees had nowhere been changed.

The rule of law laid down by the Calcutta High Court, in its Full Bench decision in *Srinath Kuar* v. *Prosunno Kumar* (36), was subsequently followed by the same High Court in the case of *Braja Lal* v. *Jiban Krishna* (41).

I must now deal with the second case relied upon by Mr. Jinnah during the course of his arguments. It is a case decided by the Madras High Court reported in *Ayyadorai Pillai* v. *Solai Ammal* (40). In that case the facts were that a certain Hindu died leaving a widow and two daughters. His widow took possession of the property after his death. After about eight years of his death the widow adopted a boy in pursuance of an authority alleged to have been given to her by her late husband. The adopted son, according to Hindu law, became entitled to the estate of the deceased husband of his adoptive mother. The two daughters were aware of the claim of the adopted son, but they did not institute any suit for a declaration that the adoption was invalid. After the

(36) [1882] 9 Cal. 934=13 C. L. R. 372 (F. B.).

(37) [1890] 14 Bom. 482.
(38) [1894] 18 Bom. 216.
(39) [1892] 14 All. 156=(1892) A. W. N. 22 (F. B.).
(40) [1894] 21 Cal. 8=20 I. A. 183=6 Sar. 334 (P. C.).
(41) [1899] 26 Cal. 285.

expiry of limitation a son was born to one of the daughters; and within six years of his birth, a suit was instituted on his behalf to set aside the adoption made by the widow. It was contended in defence on behalf of the adopted son that the suit was barred by limitation. On behalf of the daughter's son it was, however, urged that limitation could only run as against him from the date of his birth. Their Lordships of the Madras High Court held that the suit was barred. In their opinion the daughters represented the inheritance being immediate reversioners, and the daughter's son, though a remote reversioner, was a person claiming through or from the daughter (his mother), within the meaning of S. 3, Lim. Act. With all respect to the learned Judges of the Madras High Court I may be permitted to state that the accuracy of the proposition laid down by them is a very doubtful one. In my opinion it is now rather late in the day to lay down that a remote Hindu reversioner should be considered to be claiming through the immediate reversioner, within the meaning of S. 3, Lim. Act. It is now a settled rule of law having been laid down by several decisions of the Privy Council that a remote reversioner cannot be considered to claim through the immediate reversioner. Indeed no reversioner can be considered to claim through another; each reversioner must be deemed to claim on the basis of his own right: vide

Bahadur Singh v. *Mohar Singh* (42), *Soni Ram* v. *Kanahaiya Lal* (43), *Monokarini Debi* v. *Haripada* (44), *Rangaswami* v. *Nachiappa* (45). The matter was discussed by a Full Bench of the Allahabad High Court in *Bhagwanta* v. *Sukhi* (46). It was held in that case that where there were several reversioners entitled successively under the Hindu law to an estate held by a Hindu widow no one such reversioner could be held to claim through or derive his title from another, even if that other happens to be his father, but he must be deemed to derive his title from the last full owner. If, therefore, the right of the nearest reversioner for the time being to contest an alienation or an adoption by the widow be allowed to become barred by limitation as against him, this would not bar the similar rights of the subsequent reversioner. It was also held in that case that the period of limitation mentioned in S. 7, Lim. Act, meant the period of limitation for the suit, which the plaintiff or some one, through whom he claims, is entitled to institute. The case was decided by six Judges including Mr. Justice Banerji (now Sir Pramoda Charan Banerji.) It, therefore, appears to me to be an established proposition that, so far as a Hindu widow is concerned, she cannot for the purposes of limitation, be considered to represent the entire estate, so as to bar a suit of a reversioner when her own suit happens to be barred. This rule would be applicable not only in the case of a Hindu entitled to the possession of the estate after the death of a female, but also to the case of a Mahomedan occupying a similar position. The wordings of Art. 141, Act 15 of 1877, and of the present Act. 9 of 1908 make this amply clear.

The position, so far as a reversioner is concerned, was indeed conceded by Mr. Jinnah: vide *P. R.* 1323, where he admitted that an exception had to be made in the case of one falling under Art. 141, Sch. 1, Lim. Act (9 of 1908). The only thing which he contended was that a similar principle should not be applied in the case of an adopted son, whether it might be the case of an adoption under the Hindu law or the case of an adoption under S. 29, Oudh Estates Act (1 of 1869). I have, therefore, to examine this position and to see whether the same rule could be applied in the case of an adopted son.

The Bombay High Court has clearly applied the same rule to the case of an adopted son and so have the Calcutta and Madras High Courts also. In *Moro Narain Joshi* v. *Balaji Raghunath* (47), decided by Farran and Candy, JJ., the facts where that a childless widow of a separated Hindu being in possession of his property as heir, alienated it in the year 1868. 20 years afterwards, in May 1888, she adopted a son, who, in 1890, brought the present suit to recover the alienated

(42) [1902] 24 All. 94=29 I. A. 1=8 Sar. 152 (P. C.).
(43) [1913] 35 All. 227=19 I. C. 291=40 I. A. 74 (P. C.).
(44) A. I. R. 1914 P. C. 164.
(45) A. I. R. 1918 P. C. 196=42 Mad. 523=46 I. A. 72 (P. C.).
(46) [1899] 22 All. 33=(1899) A. W. N. 159 (F. B.).
(47) [1895] 19 Bom. 809.

property. It was held that the suit was not barred by limitation. Farran, J., observed as follows: (pp. 814—816). We have first to consider what article in the schedule is to be applied * * * *

* * * * If, as I think it does, it falls within Art. 144, it is also not barred, as the possession of the defendant did not become adverse to the plaintiff until the plaintiff became entitled to possession of the property upon his adoption.

Candy, J. observed as follows (pp. 818 and 819) :

I agree with Mr. Apte, who appeared for defendants, that the article of the Limitation Act to be applied is Art. 144, and according to that article the claim is not barred.* * * *

That plea cannot be raised in the present case by the sons of Raghunath. They deny any alienation by the widow at all.

The same view was taken by Sir Lawrence Jenkins and Mr. Justice Candy in a subsequent case reported in *Hari* v. *Waman* (48) and by Mr. Justice Chandavarkar and Mr. Justice Heaton in *Rama Krishna* v. *Tripurabai* (49) and also by Sir Lallubhai Shah and Mr. Justice Fawcett in *Hanamgowda* v. *Irgowda* (50), where their Lordships held that there was no essential difference between the position of the adopted son seeking to enforce his rights with reference to the property alienated by the widow before the adoption and that of the reversioner seeking to enforce his rights with regard to the property alienated by the widow before her death (p. 660).

In *Harek Chand* v. *Bejoy Chand* (51) decided by Harington and Mookerjee, JJ. one of the points, which had to be considered, was the point of time at which the right of an adopted son arises in the case of an adoption by a widow after her husband's death ; in other words, whether his right relates back to the death of his father, when he might be considered as having been born. It was held that the title of a son adopted by a widow, under an authority from her husband, does not relate back to the husband's death, and that, when the adoption has taken place, his fictitious birth in the new family cannot be antedated. Another point which was considered in the case, was whether the claim for recovery of possession would be considered to be barred by limitation by reason of the adverse possession of the defendant having extended over a longer period than twelve years. It was held by their Lordships of the Calcutta High Court that 'Art. 142 could not have application to such a case, neither the plaintiff nor his adoptive mother having been dispossessed or discontinued possession while in possession of the property in suit. It was observed by them that under the circumstances Art. 142 could have no application to the case and the only article which could apply was Art. 144, but the point to be seen was whether the word "plaintiff" in the said article could include the adoptive mother also, i. e., whether the adopted son could be considered to have derived his title from the adoptive mother.

Mookerjee, J., observed as follows (pp. 800—802):

Now, from what I have already pointed out, it is clear that the plaintiff as an adopted son does not derive his right to sue from or through his adoptive mother, consequently the plaintiff is entitled to bring this suit within twelve years from the date of his adoption in August 1887. * * * * It would be unreasonable to hold that it would be otherwise as against a son adopted by her when he claims under his adoptive father.

In *K. Venkataratnam* v. *Venkataramiah* (52), decided by Sir John Wallis, C. J., and Seshagiri Iyer, J., it was held that adverse possession against the widow could not be treated as adverse possession against the adopted son, and a suit brought by him for the recovery of the immovable property belonging to the estate within twelve years of his adoption was in time, and the cases decided by the Bombay High Court and Calcutta High Court quoted above were cited with approval.

Seshagiri Iyer, J., observed as follows :

A distinction was, however, made in the case of alienations by a widow. In such cases it was held that the act of the widow only affected her interest in the property.* * * *

The defendants have not, therefore, acquired any right by prescription against the plaintiff.

The same view has been taken by a Full Bench decision of the Madras High Court reported in *Vaidyanatha Sastri* v. *Savithri Ammal* (53) decided by Sir John Wallis, C. J., Oldfield, J., and Kumaraswami Sastri, J. It was a case where a Hindu widow had alienated certain properties for a purpose not binding on the inheritance and thereafter adopted a son.

(48) [1900] 2 Bom. L. R. 411.
(49) [1911] 33 Bom. 88=1 I. C. 647=10 Bom. L. R. 1029.
(50) A. I. R. 1925 Bom. 9=48 Bom. 654.
(51) [1905] 9 C. W. N. 795=2 C. L. J. 87.
(52) [1914] 27 M. L. J. 569=25 I. C. 692=16 M. L. T. 435.
(53) [1917] 41 Mad. 75=33 M.L.J. 387=6 M. L.W. 542=42 I.C. 245 =(1917) M.W.N. 653 (F.B.).

The adopted son brought a suit. It was held by the Full Bench that the alienation was not binding on the adopted son and that he could sue, during the lifetime of the widow, to set aside the alienation and recover the properties so alienated, his cause of action arising from the time of his adoption.

The same view has been taken by their Lordships of the Privy Council in *Rai Bonamali Roy* v. *Jogat Chandra* (54). It has been held in that case by their Lordships of the Privy Council that where a Hindu widow alienated a particular property and subsequently made the adoption, the right of the adopted son to set aside the alienation accrued on the date of the adoption.

In another case reported in *Ranchordas* v. *Parvatibai* (32) their Lordships extended analogy of the principle contained in Art. 141 to the case of a plaintiff who on the death of a widow sued for moveables left by that widow, and held that although Art. 141 applied only to the case of immovable property, and although there was nothing corresponding to Art. 141, applicable to the case of movable property, yet the cause of action of a reversioner who sought to recover the moveable property of the last male owner after the death of the widow, should be held to accrue on general principles on the death of the widow.

In my opinion, therefore, the same rule should a fortiori govern the case of an adopted son.

I must also, before concluding this part of the case, refer to a third case relied upon by Mr. Jinnah, the learned counsel for defendant 1, during the course of his arguments. It is a case decided by their Lordships of the Privy Council and reported in *Ranodip Singh* v. *Parmeshwar Pershad* (31). This was a case in which four sons of a Hindu, who formed with him a joint Hindu family governed by the Mitakshara, sued to recover possession of the ancestral property, which had been sold by their father. The property had been sold in 1893, and the suit had been brought in 1920, 27 years after the sale. Out of the four sons it was found that if the three eldest of them had brought the suit, it would have been barred under the Limitation Act. It was, however, contended that the fourth plaintiff not having been born until 1900, the suit brought by him before the attainment of his majority was within limitation. It was held by their Lordships that the cause of action for the fourth son was no fresh cause of action, but only the cause of action which had accrued to the family in 1893 at the time when the alienation had taken place, and consequently his suit was held to be barred by limitation, unless he could show his case to come within Ss. 6 and 7, Limitation Act. This case is clearly distinguishable from the case of an adopted son, where according to the decision of their Lordships of the Privy Council themselves, reported in *Rai Banamali Roy* v. *Jagat Chandra* (54), it has been held that the cause of action of an adopted son accrues on the date of the adoption and not earlier : vide p. 679.

In *Runchordas Vandrawandas* v. *Parvatibai* (32), already referred to, their Lordships of the Privy Council observed (on p. 736) that

> it was not necessary to consider what might be the case if the widows or survivors of them were suing, as the plaintiff did not derive his right from or through them, and the extinguishment of their right would not extinguish his.

It is, therefore, clear that in the case of an adopted son their Lordships have distinctly held that his cause of action is different from that of his mother and must be deemed to accrue from the date of his adoption and not earlier.

On a review of these authorities I am of opinion that the cause of action in the case of an adopted son accrues only from the date of his adoption. If then the cause of action accrued to the plaintiff on 27th July 1914, when he was adopted, it seems to me to be clear that there could be no adverse possession against him before the accrual of the cause of action in his favour. The present suit was brought on 23rd December 1925, within 12 years of the date of the accrual of the cause of action in his favour, and cannot, therefore, be considered to be barred by limitation.

My finding, therefore, on this issue is that the suit of the plaintiff is amply within limitation, and is not, in any way, barred. I, therefore, decide this issue against the defendants and in favour of the plaintiff.

CONCLUSION.

Issue No. 10—After having given my findings I must consider the effect of those

(54) [1905] 32 Cal. 669=32 I.A. 80=8 Sar. 784 (P.C.).

findings. I have held that the factum of the plaintiff's adoption is proved, but I have also held that it was a bogus and sham transaction resorted to by Rani Champa with the object of putting pressure on the Court of Wards to get her claim as to maintenance settled. I have also held that Rani Champa, the adoptive mother, remarried herself with Sher Mohammad Khan in March 1910, before taking the plaintiff in adoption in July 1914, when she was, under the terms of the will, left with no power to adopt, and the adoption is, therefore, invalid. I have also held that the effect of the decision of the interpleader suit was that she was left with no right to adopt after that decision, and that the decision operated as res judicata in the present suit. Under these circumstances his suit is liable to be dismissed apart from my findings on the question of adoption of defendant 1.

Regarding defendant 1's adoption: I have held that the factum of his adoption is proved and its validity has also been established. I have held that the charge of corruption and bribery against Rani Saltanat Begam, the adoptive mother of defendant 1, has not been established. I have also held that his adoption was not premature under the terms of the will, Rani Nasim Sahri, the first Rani having remarried herself with Mohammad Sultan Khan in May 1908, prior to the adoption of defendant 1, which took place in March 1909. I have also held that defendant 1 does not belong to the Quli family. The result of these findings is that defendant 1's adoption is, in my opinion, valid.

Regarding the plea of estoppel: I have decided that in view of the fact that the factum of adoption of both the plaintiff and defendant 1 has been held to be established on the agreement of the parties, the question does not arise for decision. Regarding the plea of limitation: I have held that the plaintiff's suit is within limitation. The result of all these findings is that the plaintiff is not entitled to any relief, and his suit must be dismissed with costs. I, therefore, dismiss it with costs under O. 20, R. 1, Civil P. C. In the end I must express my sense of obligation to Mr. Mohammad Nasim, advocate for defendant 1 and Mr. H. C. Dutt, counsel for the plaintiff, for their having very ably cross-examined the witnesses of each side, which brought out every point that was important for the decision of the case. I must also express my sense of great indebtedness to Mr. Hasan Imam of Patna and to Mr. M. A. Jinnah of Bombay for their extremely able arguments which were of great assistance to me in the decision of several difficult points both of fact and of law involved in the case.

N.K. *Suit dismissed.*

** A. I. R. 1928 Oudh 195

Full Bench

STUART, C. J., AND WAZIR HASAN AND GOKARAN NATH MISRA, JJ.

Fatimunnisa and *another*—Appellants.

v.

Asghar Husain—Respondent.

Execution of Decree Appeal No. 28 of 1927, Decided on 14th December 1927, from order of Dist. Judge, Lucknow, D/- 3rd March 1927.

** *Civil P. C., O. 21, R. 2—Adjustment not certified—Court executing that decree cannot try the question.*

A Court executing a particular decree is barred by the provisions of sub-R. (3), R. 2, O. 21, from trying the question of the satisfaction or adjustment of the decree when such satisfaction has not been certified to the Court under sub-R. (1) or sub-R. (2) of the same rule : *A.I.R.* 1925 *Bom.* 309 (*F.B.*) *Foll.*; *A. I. R.* 1925 *Oudh* 225 and *Heaton, J. in* 34 *Bom.* 575, *Diss.* [P 199 C 1]

Pirthi Nath Chaudhari — for Appellants.

Hyder Husein and *K. P. Misra*— for Respondent.

Order of Reference

Gakaran Nath Misra, J.— These connected appeals arise out of an order passed by an Assistant Collector on four applications for execution. The appellants in each case are the decree-holders who obtained a decree for profits from the revenue Court and applied for execution of their decree. The respondent is the same in all the four cases, and the decrees of the revenue Court were passed against him. He objected to the execution of the decree on the ground that by virtue of two agreements dated 11th March 1924, and 9th August 1925, the decree-holders had discharged him from all liabilities under the said decree and no proceedings for execution were, therefore, maintainable. The decree-holders admitted the execution of the agreements

referred to above but alleged that they had been executed by them under coercion and undue influence. They, however, did not produce any evidence to support the allegation, and consequently the said plea was rejected by the execution Court as well as by the lower appellate Court in appeal. There was a further objection raised by the decree-holders that the adjustment relied upon by the judgment-debtor respondent could not be recognized by the Court executing the decree since such adjustment had not been certified by the Court by whom the decrees were passed. This plea has been overruled by the Courts below on the strength of a ruling of the late Court of the Judicial Commissioner of Oudh reported in the case of *Suraj Narain Misra* v. *Uland Singh* (1).

On behalf of the decree-holders appellants it is contended that the view of law taken in *Suraj Narain Misra* v. *Uland Singh* (1), is erroneous and that it has been dissented from by a Judge of this Court in *Jhalri* v. *Ram Bharose Pandey* (2). Reference is also made to a decision of a Bench of the late Court of the Judicial Commissioner of Oudh in *Harihar Prasad* v. *Shankar Dyal* (3).

In this state of conflict of authorities, it appears to me to be expedient that the matter should be settled by a decision of a Full Bench of this Court. I, therefore, refer for decision of a Full Bench of this Court the question of law as stated below:

Is a Court executing a particular decree barred by the provision of sub-R. (3), R. 2, O. 21, Civil P. C., from trying the question of the satisfaction or adjustment of the decree when such satisfaction or adjustment has not been certified to the Court under sub-R. (1) or (2) of the same rule?

Opinion

Stuart, C. J.—The following question has been referred to a Full Bench of this Court under the provisions of S. 14 (1) of Oudh Courts Act, Local Act 4 of 1925 :

Is a Court executing a particular decree barred by the provisions of sub-R. (3), R 2, of O. 21, Civil P. C. from trying the question of the satisfaction or adjustment of the decree when such satisfaction or adjustment has not been certified to the Court under sub-R. (1) or sub-R. (2) of the same rule?

Order 21, R. 2 reproduces S. 258 of the old Code with certain modifications. The modification in sub-R. (3) is as follows ;

The old section ran :

Unless such payment or adjustment has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree.

The present sub-rule reads :

A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree.

The question for our decision is not affected by the alteration in the wording. We have .to give meaning to the word "recognized."

The procedure to which our attention is directed is the procedure which the legislature has laid down for the use of a Court executing a decree when either side sets up a payment or adjustment made out of Court. The primary duty of a person liable to pay money or to take action as a result of the passing of a decree of a Court is to pay that money or to take that action. A party will be well advised, where he is under an obligation under a decree to pay money or to take certain action, to make the payment or to take the action through the Court. If an adjustment has been made, the parties will also be well advised to have the adjustment made in a Court. When a decree is partly or wholly satisfied or adjusted in favour of the decree-holder, the decree-holder should ordinarily certify that fact to the Court. If the decree-holder is an honest man, he will acknowledge at the time that he applies for execution a part satisfaction or adjustment made out of Court, even though he has not certified such payment or adjustment. If the decree has been wholly satisfied by such payment or adjustment, an honest decree-holder would not ask for execution, and no difficulty would arise. The law has to make provision for the record and proof of payments and adjustments made out of Court ; and in doing so the legislature is faced with certain difficulties. The majority of decrees are decrees for the payment of money. If at the time of execution the judgment-debtor asserts that he has made payments out of Court which have not been certified through the Court, and if he is permitted to prove such payments by evidence, the work of a Court in execution would be enormously augmented in any country. In India permission to produce evidence to prove payments made out of Court would result

(1) A. I. R. 1925 Oudh. 225=27 O. C. 277.
(2) A. I. R. 1926 Oudh. 482.
(3) A. I. R. 1924 Oudh. 208.

undoubtedly in the production of much false oral evidence. On the other hand, a judgment-debtor, who has made payments out of Court which he has inadvertently failed to have recorded in the Court within the period prescribed by law, must be granted a remedy against his decree-holder's fraudulent refusal to admit the payments. But it does not follow that that remedy should take the form of being permitted to prove at the time of the execution such a payment when the payment has not been certified under the law. I have thought it necessary to state the circumstances in which these rules of procedure have come into being before I proceed to examine the rules themselves. The rules are briefly these : the decree-holder is required to certify payments or adjustments made out of Court. But the Court performs no judicial act, according to my view, in recording such payments or adjustments.

The first portion of the rule lays down distinctly that when the decree-holder certifies a payment or adjustment the Court is to record his certification without issuing notice to the judgment-debtor. The Court here performs a purely ministerial act. If the judgment-debtor wishes a payment or adjustment to be certified the procedure is very different. The judgment-debtor has under Art. 174, Sch. 1, Lim. Act (Act 9 of 1908), to apply to the Court within ninety days of the making of the payment or adjustment for a notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified. If the decree-holder fails to show cause the payment or adjustment is recorded as certified. Here the Court performs a judicial act and decides the question judicially. The distinction as to the treatment of the decree-holder and the judgment-debtor is marked. In the case of a decree-holder's certification the Court performs no judicial act and takes his word as to the certification. In the case of a judgment-debtor the Court decides judicially whether the payment or adjustment has or has not been made.

It does not follow that a decree-holder is dishonest because he does not certify a payment or adjustment. There are many instances in which decrees are satisfied completely out of Court where the decree-holder is an honest man, and yet does not certify the payment or adjustment. Such a man does not apply to execute the decree. Even where the decree has been partly satisfied by payment or adjustment out of Court, and the decree-holder does not certify at the time, and where he proceeds to execute the decree for the remainder of the relief he can still act honestly by certifying at the time of execution, for, under the law, there is no limitation as to the time when the decree-holder can certify. This carries me to the point for decision. The present rule stands that a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be "recognized" by any Court executing the decree. Does the rule mean that the Court is to refuse to receive proof of such payment or adjustment or does it mean that the Court is to find that such payment or adjustment, which has not been certified, is not to be accepted as a good payment or adjustment until it is proved ? The whole question turns on the meaning to be given to the word "recognized."

It has been urged by the learned counsel for the respondents, who supports the latter view, that the question being a question between the decree-holder and the judgment-debtor and a question to which S. 47, applies, the Courts cannot be debarred from going into the merits. But S. 47 must be read in conjunction with O. 21, R. 2. Under S. 121 this rule has the same effect as if enacted in the body of the Code, until it is annulled or altered. It has not been annulled or altered. The rule as to recognition is a rule providing for the method of proof. It can, I think, only be read as laying down that a payment or adjustment which is not certified or recorded cannot be proved in proceedings under S. 47. The old view in respect of the former S. 258 undoubtedly was that where an uncertified payment had been made out of Court and where the decree-holder had not certified such payment at the time of the execution, the duty of the executing Court was to refuse to enter into the question as to whether such a payment had or had not been made, and that the remedy of the judgment-debtor was by a separate suit. This view was laid down in many cases one of which was *Shadi* v. *Ganga Sahae* (4). In 1910 a Bench of the Bombay High Court decided in

(4) [1881] 3 All. 538.

Trimbak Ram Krishna v. *Hari Laxman* (5) that, where a judgment-debtor pleaded an uncertified adjustment as a bar to execution, and where the decree-holder contended that the adjustment not having been certified to the Court, the Court was precluded from inquiring into the fact of the adjustment, and where the trial Judge had held that the decree-holder was estopped from taking that plea and proceeded to inquire into the merits, there was no case of estoppel, and the trial Judge was ordered to proceed with the execution. In the course of opposition Heaton, J, expressed an opinion which admittedly did not affect the decision. This opinion was as follows at pp. 581 to 583 :

> It is, however, supposed that the Court is debarred from recognizing in any way payment or adjustment unless it is certified by the decree-holder or proved by the judgment-debtor in accordance with the special procedure provided by S. 258, ... for to read the law. as it often is read is, it seems to me, to reverse the principle of justice, and to convert the instruments of justice into instruments of fraud.

In 1924 the then Judicial Commissioner in *Suraj Narain Misra* v. *Uland Singh* (1), while expressing a view dissenting from the view taken by the trial Judge whose appeal he was hearing to the effect that an omission to certify on the part of a decree-holder amounted to a fraud, and that in those circumstances it was open to judgment-debtor to prove an uncertified payment, referred to a portion of the judgment of Heaton, J., which has already been quoted, with approval. He did not directly decide the point. It is to be noted that this decision of the Judicial Commissioner is dated 12th March 1924, and that on 19th December 1924, a Full Bench of the Bombay High Court in *Mehbunissa Begam* v. *Mehmedunnisa Begam* (6) decided the point. Macleod, C, J., referred as follows to the decision of Heaton, J. :

> The appellants have relied on the decision in *Hansa Godhaji* v. *Bhawa Jogaji* (7), where it was held that a Court executing a decree could deal with the question whether uncertified payments had, as a matter of fact, been made or not. Judgment was given in accordance with the opinion expressed by Heaton, J., in *Trimbak Ramkrishna* v. *Hari Laxman* (5), which was obiter for the purposes of the decision in that case, as the executing Court had held that the party executing the decree was estopped from disputing that payments had been made, and the High Court in appeal held that the decision was wrong.

I am of opinion that the decision in *Hansa Godhaji* v. *Bhawa Jogaji* (7), cannot be supported. The words of O. 21, R. 2 (3), are too plain to admit of any other construction than that the Court executing a decree is barred in limine from considering any allegation that a payment not certified has been made. The party alleging such a payment may have a remedy, but not before the Court executing the decree.

I do not consider that I am asked here to balance the opinions expressed in the late Judicial Commissioner's Court in the decisions which the learned Judge who has referred the case has noted. As I understand, I am asked to interpret the meaning of the word "recognized" in sub-R. (3). The meaning which I attach to the word is the meaning which Macleod, C. J., and other Judges composing the Full Bench of the Bombay High Court attached to it in the decision which I have noted. As I understand it, a Court executing the decree is not permitted to go into the question as to whether a payment or adjustment, which has not been recorded according to the provisions of this rule, has been made or not. The rule does not debar the Court from exercising its judicial functions under S. 47. But it lays down that payments or adjustments made out of Court can only be proved, if they have been certified in a particular manner. The rule is a rule of proof. If the meaning which Heaton, J., gives to the word "recognised" be accepted sub-R. (3) would be surplusage. It would not have been necessary to make a rule to state that when a party desires to prove a payment which had not been already certified or recorded by the Court itself the Court should not decide that such a payment or adjustment had been made, until it had been proved to have been made. The provisions of the ordinary law of evidence would sufficiently cover the case. In respect to the hardship, which according to the view of Heaton, J., would result, if his view were not accepted, it is sufficient to say that, while a judgment-debtor is not permitted in execution to prove a payment or adjustment made out of Court which has not been certified, he is given other remedies. I, therefore, answer the question as follows :

(5) [1910] 34 Bom. 575=7 I. C. 940=12 Bom. L. R. 686.
(6) A. I. R. 1925 Bom. 309=49 Bom. 548 (F. B.).
(7) [1916] 40 Bom. 333=33 I. C. 232=18 Bom. L. R. 22.

A Court executing a particular decree is barred by the provisions of sub-R. (3), R. 2, O. 21, Civil P. C., from trying the question of the satisfaction or adjustment of the decree when such satisfaction or adjustment has not been certified to the Court under sub-Rr. (1) or (2) of the same rule.

Wazir Hasan, J.—I concur and have nothing to add.

Gokaran Nath Misra, J.—I am in entire agreement with the view taken by the Honourable Chief Justice.

R.K. *Reference answered.*

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* * A. I. R. 1928 Oudh 199
Full Bench

STUART, C.J., AND WAZIR HASAN AND GOKARAN NATH MISRA, JJ.

Gaya Bakhsh Singh and *another*—Appellants.

v.

Kuar Rajendra Bahadur Singh—Respondent.

Execution of Decree Appeal No. 23 of 1927, Decided on 17th December 1927, from order of 1st Addl. Dist. Judge, Lucknow, D/- 28th February 1927.

* * (*a*) *Civil P. C., S. 47—Decree-holder auction-purchaser—Order under O. 21, R. 95—Such order is not appealable—Civil P. C., O. 21, R. 95;*

An order passed on an application made under the provisions of R. 95, O. 21 against a judgment-debtor in favour of the auction-purchaser, who was also a decree-holder, is not an order under S. 47 of the Code and is not appealable: 31 *All.* 82 (*F.B.*), 1 *P. L. J.* 232 (*F.B.*), *A. I. R.* 1924 *Bom.* 429 (*F.B.*), *A. I. R.* 1926 *Cal.* 798 (*F.B.*), 7 *Mad.* 255, *Cons.*

[P 203 C 1]

* (*b*) *Civil P. C., S. 47—Decree-holder though auction-purchaser is a party to suit in subsequent proceedings.*

A decree-holder who purchases, under the sale held in execution of his decree, property of the judgment-debtor is still, in subsequent proceedings between him and the judgment-debtor, a party to the suit in which the decree was passed. [P 202 C 1]

Radha Krishna—for Appellants.

Bhagwati Nath and *Bishambhar Nath*—for Respondent.

Order of Reference

Wazir Hasan, J.—This is an appeal by the judgment-debtors in a decree obtained by the predecessor-in-interest of the respondent. The decree-holder in execution of his decree purchased certain property of the judgment-debtors and with a view to obtain possession thereof he made an application under R. 95, O. 21, Civil P. C. The judgment-debtors preferred objections which were disallowed. They then preferred an appeal to the lower appellate Court. That Court has held that the appeal did not lie as it was not a case which was covered by S. 47, Civil P. C. The decision of the lower appellate Court is challenged in appeal now.

The question involved would have appeared to me to be a simple one and I should have had no difficulty in deciding it but the divergence of views on that question amongst the High Courts in India is so great that I feel simply borne down by that divergence. I would only here refer to some of the Full Bench decisions of the High Courts which illustrate the conflict of views on the question for decision in this appeal.

On the appellants' side reliance is placed on *Kailash Chandra* v. *Gopal Chandra* (1). On the respondent's side the following cases were cited *Bhagwati* v. *Banwari Lal* (2), *Hargovind Fulchand* v. *Bhudar Raoji* (3), and *Abdul Gani* v. *Raja Ram* (4).

In the circumstances it seems to me highly proper and advisable that the question of law raised in this appeal should be decided by a Full Bench of this Court. Accordingly under S. 14, sub-S. (1), Oudh Courts Act, 1925, I refer the following question for decision of a Full Bench.

Whether an order passed on an application made under the provisions of R. 95 O. 21, Civil P. C., against a judgment-debtor in favour of the auction-purchaser who was also the decree-holder is an order under S. 47 of the Code and appealable as such.

Opinion

Stuart, C. J.—The following question has been referred for the decision of a Full Bench under the provisions of S. 14, sub-S. (1), Oudh Courts Act, Local Act 4 of 1925.

Whether an order passed on an application made under the provisions of R. 95, O. 21, Civil P. C., against a judgment-debtor in favour of the auction purchaser, who was also the decree-holder, is an order under S. 47 of the Code and appealable as such.

The learned Judge who made the reference considered that the question

(1) A.I.R. 1926 Cal. 798=53 Cal. 781 (F.B.).
(2) [1909] 31 All. 82=1 I. C. 416=6 A. L. J. 71 (F. B.).
(3) A.I.R. 1924 Bom. 429=48 Bom. 550 (F.B.)
(4) [1916] 1 Pat. L. J. 232=20 C. W. N. 829=35 I. C. 468=3 Pat. L. W. 62 (F.B.).

was a question which should be decided by a Full Bench in view of the difference of opinion between High Courts in India upon the subject. O. 21, R. 95, reproduces S. 318 of the old Act. S. 47 of the present Code reproduces S. 244 of the old Act.

Before the passing of the present Act there had been considerable difference of opinion in High Courts upon the question now before us. When the new Act was passed, the differences in opinion were not decided by an amendment of the Act and the question remains much as it was before the present Act was passed. These differences of opinion had been in existence prior to 1908. In that year a Full Bench of the Allahabad High Court decided in *Bhagwati* v. *Banwari Lal* (2) by a majority of three to two that a decree-holder, who purchased at a sale held in execution of his decree property belonging to his judgment-debtor was not to be considered a party to the suit in which the decree was passed, and that an application by him for delivery of immovable property in occupancy of the judgment-debtor made under the provisions of old S. 318 was not to be considered an application involving the decision of a question relating to the execution, discharge or satisfaction of the decree. The three learned Judges in favour of the view were Banerji, Aikman and Griffin, JJ. Stanley C. J. and Knox, J. dissented. The question did not arise again, as far as I can ascertain, before a Full Bench of any High Court until the new Act had come into force. In 1916 it was decided by a Full Bench of the Patna High Court consisting of Chamier C. J., Sharfuddin and Atkinson, JJ., in *Abdul Gani* v. *Raja Ram* (4), where it was decided that no appeal lay from an order under R. 95, O. 21. That decision laid down in effect that Allahabad was in favour of the view taken, that the majority of the decisions in Calcutta were in favour of the view taken, but that the Madras and Bombay High Courts were not in favour of the view taken. The learned Chief Justice, who delivered the main, decision stated that in his opinion the right course for the Patna High Court to adopt was to follow the general trend of opinion in the Calcutta High Court. It is to be noted that in this decision it was stated that the Bombay view was in favour of an order being appealable. In 1924, however, a Full Bench of the Bombay High Court, consisting of Macleod, C. J., Shah and Crump JJ. decided in *Hargovind Fulchand* v. *Bhudar Raoji* (3), that the previous decision of the Bombay High Court to the opposite effect was not a correct statement of the law. This Full Bench accepted as correct the view taken by the majority of the Allahabad High Court Judges in *Bhagwati* v. *Banwari Lal* (2). Two years later in 1926, the question came up for consideration before a Full Bench of the Calcutta High Court consisting of Chatterjea, Ag. C. J., Walmsley, Cuming, Page and Chakravarti, JJ., in *Kailas Chandra* v. *Gokul Chandra* (1). This Full Bench decided by a majority of four to one that an order passed on an application under O. 21, R. 95 by an auction purchaser who was also the decree-holder was an order under S. 47, Civil P. C., and appealable as such. There has been no Full Bench decision of the Madras High Court bearing directly upon the subject. The Madras High Court has, however, in many decisions held that such an order is an order falling within the purview of S. 47, and as such appealable.

I do not propose to discuss more than a few decisions of the learned Judges who have arrived at divergent opinions upon the questions involved. In this conflict of authority I have endeavoured to form a conclusion independently, based upon the actual words of the section and the rule having application, keeping in mind any authority that may exist which emanates from their Lordships of the Judicial Committee. I have examined all the decisions upon the subject, but shall not refer in great detail to more than a few of them.

The question referred involves decision of two separate matters. The first is whether a decree-holder, who under a sale held in execution of a decree himself becomes a purchaser at auction of the property of his judgment-debtor, is to be considered in a subsequent dispute arising between himself and the judgment-debtor in respect of that property no longer the decree-holder, and as such a party to the suit in which the decree was passed within the meaning of S. 47, because he occupies the character of purchaser at an auction sale. The second is whether an application under O. 21, R. 95 in which such decree-holder as purchaser of the

property applies for possession of the property in occupancy of the judgment-debtor is to be considered an application to obtain a decision on a question relating to the execution, discharge or satisfaction of the decree in execution of which the property has been sold.

In answer to the first part of the question, I am of opinion that such a person must be considered in such proceedings as a party to the suit in which the decree was passed. In *Prosunno Kumar* v. *Kali Das Sanyal* (5), their Lordships of the Judicial Committee decided that where certain persons, who were judgment-debtors under a decree, alleged that they satisfied their liability by a money payment to the decree-holders and that the decree-holders had agreed that, in these circumstances, properties to which the judgment-debtors were entitled should be exempted from sale in execution, and where the properties were exempted from sale in a prior execution, but in a subsequent execution attached and brought to sale and where these persons had instituted a suit for a declaration that the properties were not liable to sale, such a suit did not lie, as it was contrary to the provisions of S. 244, and that their remedy was by proceedings under S. 244. When it was pressed before their Lordships in argument, that this was not a question between the parties to the suit in which the decree was passed, because its determination affected the right of the auction purchasers who had subsequently purchased the property, their Lordships, in determining the point as to whether this circumstance should take the case out of the purview of S. 244, "thought it desirable, before giving judgment, to examine the reported cases which had arisen under S. 244, Civil P. C." They continued at pp. 168-9 :

> An examination of these cases, of which it is only necessary to mention *Sakharam Govind Kale* v. *Damodar Akharam Gujar* (6) and *Kuriyali* v. *Mayan* (7), has satisfied their Lordships that the decision appealed from is in accordance with the construction which the Courts in India have uniformly placed on the section in question.

And they proceeded further :

> It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of S. 244.

I consider that the words of their Lordships can only be construed as meaning that they decided that the Bench of the Madras High Court which decided *Kuriyali* v. *Mayan* (7) had arrived at a correct interpretation of the law. What was the decision in the Madras case? It was to the effect that, where a certain person had mortgaged four parcels of land, and the mortgagee instituted a suit for satisfaction of the mortgage by sale of the parcels in question, and where, during the course of the proceedings the mortgagor died, and where the mortgagee subsequently obtained a decree in execution of which it was sought to sell the parcels in question, and where the mortgagor's representatives in interest, who had become judgment-debtors under the decree objected to the sale of three of the parcels on the grounds that one was their own separate property and the other two were the property of a joint family to which the mortgagor and they belonged, and that, this being the case, the mortgagor was not entitled to transfer, the objection should be decided under the provisions of S. 244 of the old Civil P. C. and not by a separate suit.

This was clearly a decision that the mortgagor's representative must be considered as a representative of the party to the suit in which the decree was passed within the meaning of the present S. 47, even although he was setting up a title contrary to the title set up by the judgment-debtor whose representative he was. This decision of the Madras High Court, which was approved by their Lordships of the Judicial Committee, was with reference to the position of the representative of a judgment-debtor, but the principle laid down is to the effect that, where a persen is a party to the suit in which the decree is passed, he or his representative is still to be considered a party to the suit even although in subsequent proceedings the representative is setting up a title inconsistent with his predecessor's title, and thus appearing in a character other than character of party. A Bench, of which I was a member, previously considered this decision in *Shah Naim Ata* v. *Lala Girdhari Lal* (8) and arrived at a similar view. My answer

(5) [1891] 19 Cal. 683=19 I. A. 166=6 Sar. 209 (P. C.).
(6) [1885] 9 Bom. 468.
(7) [1884] 7 Mad. 255.
(8) A. I. R. 1927 Oudh 120=2 Luck. 145.

to the first part of the question is, therefore, that a decree-holder who purchases under the sale held in execution of his decree property of the judgment-debtor is still in subsequent proceedings between him and the judgment-debtor a party to the suit in which the decree was passed. But in order to decide that an order passed on an application under O. 21, R. 95 is to be considered an order under S. 47 of the Code, it is necessary further to decide that the question is a question relating to the execution, discharge or satisfaction of the decree. If it is not a question relating to the execution, discharge or satisfaction of the decree, the fact that it is a question arising between the parties to the suit in which the decree was passed will not bring it under S. 47.

Order 21, R. 95 provides a summary remedy, whereby a purchaser of immovable property sold in execution of a decree which at the time of the sale is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of the property, who has obtained a certificate in respect thereof, can obtain possession against the occupant. Certain purchasers have clearly also a remedy by a regular suit, as is clear from Art 138, Sch. 1, Act 9, 1908, which declares the period of limitation within which such a suit must be brought. Such a suit is described in that article as a suit by a purchaser at a sale in execution of a decree when the judgment-debtor was in possession at the date of the sale.

I do not support the position that a decree-holder who has purchased such property at auction must be considered to have a right to institute such a suit because he is not excluded expressly in this article, as, according to my view, his right to bring a regular suit would depend upon the decision as to whether the obtaining of possession is a question relating to the execution, discharge or satisfaction of the decree. If it is a question relating to the execution, discharge or satisfaction of the decree he is in my view expressly debarred from bringing such a suit by the provisions of S. 47. No such suit would be maintainable. If such suit is not maintainable no question of limitation can arise and no inference can be drawn from the omission to exclude him expressly. But the question remains as to whether the obtaining of possession by a summary order under O. 21, R. 95 involves the decision of a question relating to the execution, discharge or satisfaction of the decree. Upon this point the opinion of Banerji, J., in *Bhagwati* v. *Banwari Lal* (2), was as follows (at pp. 100-102) :

> I am further of opinion that a question between the auction purchaser or his representative and the judgment-debtor or his representative relating to delivery of possession is not a question "relating to the execution, discharge or satisfaction of the decree" within the meaning of S. 244, Cl. (c). * * * * * * * * * *
> I am, therefore, of opinion, that a decree-holder auction purchaser, like any other auction purchaser, is entitled to obtain possession, not only by an application under S. 318 or S. 319, but also by suit, that he has alternative remedies, one of the remedies being a summary application for possession and that S. 244 is not a bar to such a suit and does not apply to such an application.

The contrary view was stated by Stanley, C. J., in the same decision at pp. 92 to 93 in the following words :

> According to my view when a Court has passed a decree for sale in a mortgage suit the proceedings are not at an end when the sale to the decree-holder who has obtained liberty to bid has been confirmed and a certificate of sale granted. * * * * * I may point out that when a decree in a mortgage suit is not wholly satisfied by proceeds of a sale, proceedings in the suit must be continued if the decree is to be wholly satisfied.

Chatterjea, Ag. C. J., in *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar* (1), has added other reasons in support of the view of Stanley, C. J. I quote one passage of his judgment at p. 795 :

> It appears therefore that the Court in delivering possession of the property sold does so under the provisions relating to execution of decree, and it is difficult to see how else it can deliver such possession. It is said that such delivery is made under the summary powers given by the Code, that it is merely incidental to the sale and the contest arises as the result of the sale. Even if it is so, it relates to execution of the decree. Such proceedings may not affect the decree, nor impeach the sale, but when the question arises as to the kind of possession to be delivered it is a question relating to the execution of the decree.

At p. 806, Page J., in supporting the view of Chatterjea, Ag. C. J., has said :

> That such questions do relate to the execution of the decree appears to me to be free from doubt * * * * * I have no hesitation in holding that questions arising in an application under R. 95 for the delivery of possession are questions relating to the execution, discharge or satisfaction of the decree.

There is force in the arguments direc-

ted against the view of Banerji, J., but I find greater force in the arguments in favour of the opinion that the act of placing the purchaser in pos-ession of the property which he has purchased at an auction sale does not involve the decision of a question relating to the execution, discharge or satisfaction of the decree.

I consider such an order only partly of a judicial character, and cannot see how the passing of such an order can involve decision of an objection to an execution sale.

As this is my opinion I answer the question raised in the reference as follows: An order passed on an application made under the provisions of R. 95, O. 21, Civil P. C., against a judgment-debtor in favour of the auction purchaser, who was also a decree-holder, is not an order under S. 47 of the Code and is not appealable.

Wazir Hasan, J.—I concur and have nothing to add.

Gokaran Nath Misra, J.—I agree and have nothing to add.

R.K. *Reference answered.*

A. I. R. 1928 Oudh 203

STUART, C. J., AND RAZA, J.

Jagmohan Singh and *another*—Plaintiffs—Appellants.

v.

Sri Nath and *others*—Defendants—Respondents.

First Appeal No. 58 of 1927, Decided on 13th December 1927, against decree of Sub-Judge, Fyzabad, D/- 29th January 1927.

(*a*) *Hindu Law—Mitakshara—Gift by husband to wife by a deed of gift—Her power to transfer must be determined by construction placed upon it.*

When a husband governed by the Mitakshara law makes a gift in favour of his wife the property transferred by gift becomes her stridhan and she would ordinarily have the power to transfer it. Such stridhan would descend by intestate succession to her heirs and not to her husband's heirs. But there are peculiar restrictions to the widow's right to transfer landed property if the gift has been made in a particular fashion. Therefore, in order to ascertain whether the widow has not the right to transfer the property, one must look at the deed of gift and find whether full proprietory estate is conferred or not : 12 *M. I. A.* 448, 30 *All.* 84 (*P. C.*), *A. I. R.* 1916 *P. C.* 20, *A. I. R.* 1922 *P. C.* 193, and *A. I. R.* 1922 *P. C.* 63, *Rel. on.* [P 205 C 1]

(*b*) *Deed—Construction—Gift of full proprietary rights by husband to his wife—Wife to hold property generation after generation—No connexion of any one with the property—Deed transfers full proprietary rights.*

When, on a deed of gift, the husband transfers the property to his wife as a special gift describing it as the property in his exclusive proprietary right, and says that he transfers all the rights held by him to her, that she is to hold it generation after generation, that neither himself nor his own heir is ever to make a claim against her, and that no one except her is to have any connexion with the property, the only construction to be placed upon the deed is that it transferred full proprietary rights. [P 206 C 2]

Niamat Ullah, J. N. Misra and *Balbhaddar Sahai*—for Appellants.

A. P. Sen, Ali Zaheer and *A. P. Sen*—for Respondents.

Judgment.—Subedar Gaind Singh obtained in 1859 a grant, which, it is agreed, consisted of ten and a half villages in the Fyzabad District as a reward for his loyal services in the disturbance of 1857. This grant received the name of Bhiti Risalpur, and the name of Subedar Gaind Singh is entered as the ninety-second name in List VI prepared under the provisions of Act 1 of 1869 as the name of the grantee of the Bhiti Risalpur estate. As his name was entered in List VI the succession to his property, in event of his dying intestate, was regulated by the ordinary Hindu law under the provisions of S. 23, Act 1, 1869. Subedar Gaind Singh did die intestate, but it is an admitted fact that at the time of his death he was not in possession of any portion of the Bhiti Risalpur estate, as he had parted with the whole of it during his lifetime. He died in October 1880. We find that in 1876 he had disposed of the major part of the estate to outsiders, and had retained only a portion of the village of Mareman in which he resided, the whole of the village of Bhiti, and the whole of the village of Fathepur, and half of the village of Nau Sanda. His family then consisted of his wife Agand Kuar, his daughter Phuljhari who was a married woman, and his daughter Sughar Kuar who was married to Sheoambar Singh. He had no sons. On 25th November 1876, Gaind Singh executed a registered deed in favour of his daughter Phuljhari, by which he transferred to her by gift with immediate possession the whole of his interests in Mareman, with the ex-

ception of certain *sir* and khudkasht land, the whole of one patti and the half of the other patti, which he retained in his possession for life. The deed gave Phuljhari title to this property also upon the death of her father. The deed in question transfers full proprietary rights.

There can be no doubt as to that fact for in addition to the words, which, in our opinion, convey an absolute proprietary right, the words are added that Phuljhari is to have the power of mortgage, sale, etc. This deed was executed on 25th November 1876, as a deed of gift, and on 2nd December 1876, he executed another deed by which he transferred by gift to Sheoambar Singh, his son-in-law, Sughar Kuar's husband, for the specific purposes of the maintenance and support of his family and children the whole of the village Bhiti. The donee was to obtain immediate possession. He was to have no power of alienation during Gaind Singh's lifetime, but was given full powers of alienation after the death of Gaind Singh. This was the second deed. On 7th May 1877, Gaind Singh executed a third deed by which he disposed of the whole of the remainder of the property then in his ownership. This is the deed with the construction of the terms of which we are concerned in the present appeal. It is not questioned on either side that the two prior deeds gave full proprietary title to the persons in whose favour they were executed. There is considerable dispute as to the meaning of the third deed. Under the third deed Gaind Singh transferred to his wife Agand Kuar the whole of the village of Fatehpur and half of the village of Nau Sanda, that is to say, the whole of the property which still remained undisposed of.

We shall deal with the construction to be placed on the terms of the deed later. Here it is only necessary to say that possession over the property was clearly transferred to Mt. Agand Kuar from the date of the execution of the deed. Subedar Gaind Singh died in October 1880. Mt. Agand Kuar transferred by sale the village of Fatehpur to Chhedi Ram Misir on 8th September 1881 by a registered deed of sale in consideration of Rs. 6,000. Mt. Agand Kuar died in 1886. Directly after her death a certain Badri Prosad, who alleged that he was the purchaser of the rights of a certain Bahadur Singh in the said village and that Bahadur Singh was the reversioner to Gaind Singh, instituted a suit against Sri Nath and Sripat, the sons of Chhedi Ram, for possession of the village of Fatehpur. This suit was instituted in the Court of the Subordinate Judge, Fyzabad. It sought to set aside the deed of sale in favour of Chhedi Ram Misir on the ground that Agand Kuar had no right to execute it. That suit was dismissed. An appeal was filed in the Court of the District Judge of Fyzabad. That appeal was dismissed. A further appeal was taken to the Court of the Judicial Commissioner. That appeal was also dismissed. In 1904 another suit was filed, by Jagmohan Singh the present plaintiff-appellant and his younger brother Jag Prasad Singh, now deceased, against Sri Nath, the son of Chhedi Ram Misir in respect of the same property.

This suit was filed in the Court of the Subordinate Judge of Fyzabad. Jagmohan Singh and Jag Prasad Singh were the sons of Sheoambar Singh. Their case was that, as Mt. Phuljhari had no children and has passed the age when she was likely to have children, and as they were sons of Sughar Kuar, the daughter of Agand Kuar, they were entitled to the possession of Fatehpur on the ground that Agand Kuar had no right to transfer the property except for her lifetime. They claimed in the alternative a declaration that they would be entitled to possession on the deaths of Phuljhari and their own mother. The learned Subordinate Judge of Fyzabad dismissed their claim for possession, but gave them a declaration that they were entitled to the possession of the village of Fatehpur on the deaths of Phuljhari and Sughar Kuar. Sri Nath appealed against this decree to the Court of the Judicial Commissioner. A Bench of that Court decided on 4th March 1907, that no relief could be granted to the plaintiffs, as their suit was premature. They decided nothing upon the merits.

Previous to the decision of this appeal Mt. Phuljhari had died. She died in 1906. Sughar Kuar died in 1921. In 1925 Jagmohan Singh joining Jang Bahadur Singh, the son of Jag Prasad Singh—Jag Prasad Singh had died—instituted the suit out of which the present appeal arises against Sri Nath and other descendants of Chhedi Ram Misir.

They asked for possession of Fatehpur setting up the following case. Their case was that the transfer of 1877 made by Gaind Singh to Agand Kuar had given her the village of Fatehpur as stridhan, without power to alienate beyond her own life, that on the death of Agand Kuar a daughter's estate had come into existence in favour of Phuljhari and Sughar Kuar, that on Phuljhari's death Sughar Kuar had obtained this estate by survivorship, and that on Sughar Kuar's death in 1921 the estate devolved on them as daughter's sons. The learned Subordinate Judge has dismissed this suit holding that under the deed of gift of 1877 (Ex. 9) a complete proprietary estate has passed to Mt. Agand Kuar. He gave further reasons for this view. He dismissed the suit on this preliminary point without going into other matters. The plaintiffs appeal against this decision.

The first question which we have to decide is in respect of the limitations attaching to certain transfers made by gift by a husband in favour of his wife when the husband is governed by the Mitakshara law. When a husband who is governed by the Mitakshara law makes a gift in favour of his wife the property transferred by gift becomes her stridhan, and we have no doubt as to the fact that if the stridhan is considered to be her self-acquired property she would ordinarily have the power to transfer it. Further such stridhan would descend by intestate succession to her heirs and not to her husband's heirs. But as the learned counsel for the appellants has rightly pointed out, there are peculiar restrictions, according to legal authority on the Mitakshara law, to the widow's right to transfer landed property if the gift has been made in a particular fashion. We go direct to the authority in question. It is the authority of the Viramitrodaya. As to the weight to be attached to this authority it is only necessary to say that in *Girdhari Lal Roy* v. *The Bengal Government* (1), their Lordships of the Judicial Committee said:

> Adhering to the principles which this Board lately laid down in the case of *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (2) their Lordships have no doubt that the Viramitrodaya, which by Mr. Colebrooke and others is stated to be a treatise of high authority at Benares, is properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and declaratory of the law of the Benares school.

The Mitakshara does not contain the qualification which we find in the Viramitrodaya but under this rule it is clear that we must consider the Viramitrodaya authoritative upon the point. In Ch. V of the Viramitrodaya, para. 5, p. 441, of Setlur's Complete Collection of Hindu Law Books on Inheritance of 1911, the author says:

> In the disposal of women's property, however, females have not independence without the permission of their huband. This is declared by Manu thus:
>
> Women shall not make any disbursement out of family property which is common to many, or even out of their own property without the permission of their husbands. Disbursement (nirhara) means expenditure (Manu IX 199).
>
> But in the disposal of some kinds of women's property females have independence; this, Katyayana having described a kind of gift, declares thus: 'The independence of women who have received a kind gift, is admitted (in respect of it) for it was given to them out of kindness, for their maintenance. With respect to a kind gift, the independence, at all times, of women is proclaimed in making sale or gift according to pleasure, even when it consists of immovable property' (II Cole. Dig. 594, ccccIxxv).
>
> But as regards property given by the husband they have independence in dealing only with property other than immovables. This is declared by Narada thus: 'What has been given by an affectionate husband to his wife, she may even when he is dead, consume it or give it away as she pleases, excepting immovable property' (Narada, 1. 28). The meaning is, that the wife can only enjoy the immovable property given by the husband by dwelling on it etc., but cannot make a gift, sale or the like. Some are of opinion that the text of Katyayana also, viz: 'Let the sonless wife, preserving unsullied the bed of her husband, etc.,'—refers only to immovable property given by the husband, since (if interpreted in this way) it embodies the same precept as the text of Narada. But what it refers to, has been discussed by us while explaining the text—'The wife and the daughters also etc.'

Sir Gooroodass Benerjee in his Hindu Law of Marriage and Stridhan (Tagore Law Lectures for 1878) has at p. 370 of the 5th edition given the name of the property so gifted by the husband. The name is Saudayika. He translates the word Saudayika as a gift from affectionate kindred. This translation appears to us the correct one. But our decision as to the Hindu law on the subject does not conclude the matter. For the decision of this case we have to deter-

(1) [1867] 12 M. I. A. 448=1 B. L. R. 44=2 Suther. 160=2 Sar. 382 (P. C.).
(2) [1867] 12 M. I. A. 397=1 B. L. R. 1=10 W.R. 17=2 Suther 135=2 Sar. 361 (P.C.)

mine on the construction of Ex. 9 itself, whether Gaind Singh transferred the village of Fatehpur to his wife as Saudyika, or as a full proprietary estate. We can undoubtedly accept as a conclusion that Gaind Singh was an affectionate husband, but it does not follow that because he was an affectionate husband it must be determined that Fatehpur came to Mt. Agand Kuar as Saudayika, and that she had no power to transfer it. If it were taken that all gifts or bequests from a husband were Saudayika it would not be possible in any circumstances for a widow to have the power of transfer over immovable property so received from her husband. There is an abundance of authority to show that in certain circumstances a widow has the power to transfer immovable property so acquired.

We need only refer in this connexion to decisions of their Lordships of the Judicial Committee. In *Mt. Surajmani* v. *Rabi Nath Ojha* (3) their Lordships found that wives had obtained a full proprietary estate in property transferred to them by gift by their husband. In *Fateh Chand* v. *Rup Chand* (4) their Lordships found that a widow had obtained a full proprietary estate in property devised to to her by her husband. In *Bhai Das Shiv Das* v. *Bai Gulab* (5) their Lordships arrived at a similar decision. In *Sasiman Chowdharain* v. *Shib Narayan* (6) they arrived again at the same conclusion. Thus it appears clear that in order to ascertain whether Mt. Agand Kuar had or had not the right to transfer Fatehpur to Chhedi Ram Misir we must look at Ex. 9 and place a construction upon it. If on the face of it Ex. 9 shows that a full proprietary estate was conferred on Agand Kuar there is an end of the matter. If it does not show that a full estate was conferred upon Agand Kuar, the gift must be considered as Saudayika, and it must be held that she had no power of transfer beyond her life time.

We must in the first place remember the circumstances in which this deed was executed. Before 1876 Subedar Gaind Singh had transferred some two-thirds of his whole estate to outsiders. In 1876 he transferred all that he had left in Mareman to one daughter and he transferred the whole of Bhiti to his other daughter's husband. He gives both the transferees full proprietary rights. All that he had then left out of the original estate was his interest in Fatehpur and half Nau Sanda, and these he proceeds in 1877, three years before his death, to transfer to his wife. He commences with a somewhat remarkable statement that he is afraid that the estate may be destroyed after his death, as he has no male issue. As by this time he had already disposed of more than five-sixths of it, it seems that this phrase was the work of the writer, and that it meant nothing in particular. He had described himself as the full proprietor of this property and he then proceeds to transfer the zamindari with all rights appurtenant to his wife as by special gift (hiba khas). He transfers the estate to her and her heirs naslan bad naslan (generation by generation). He transfers his rights to her and he lays down that after the execution of the deed neither he nor any one of his own heirs and co-sharers is to bring any sort of claim against the lady. His heirs were distant collaterals. The operative part of the deed concludes with the words that with the exception of Mt. Agand Kuar no one else is to have the power to interfere or intervene in respect of the property transferred. This can only mean that Mt. Agand Kuar is the only person who has the authority to interfere or intervene in respect of the property. She is to have *ikhtiyar dastandazi wa madakhlat*.

It is true that although in the prior deeds an express power of alienation is given to the donees, no express power of alienation is given to the donee here. The form of a deed, however, depends to a certain extent upon the draftsman. We do not know who drafted the deed in favour of Phuljhari, but the deed in favour of Sheoambar Singh was drafted by a man called Sita Ram, while the deed Ex. 9 was drafted by a man called Bans Gopal. One question which arises for our consideration in considering the intention of Gaind Singh is what would have happened if he had not executed Ex. 9 in favour of his wife. If he had died intestate without executing this

(3) [1908] 30 All. 84=35 I. A. 17=5 A. L. J. 67 (P. C.).
(4) A. I. R. 1916 P. C. 20=38 All. 446=43 I.A. 183 (P. C.).
(5) A. I. R. 1922 P. C. 193=46 Bom. 153=49 I. A. 1 (P. C.).
(6) A. I. R. 1922 P. C. 63=1 Pat. 305=49 I.A. 25 (P. C.).

deed, Fatehpur and half of Nau Sanda, which she obtained under this deed, would have been obtained by her as a Hindu widow under the Mitakshara law. In respect of her position she would have been exactly in the same position if the view of the appellants be accepted, whether this deed had or had not been executed. In respect of the inheritance to the estate, taking the view which we do, had Ex. 9 not been executed, the inheritance would have passed to her daughters and her daughter's sons. It is true that it is suggested by the learned counsel for the appellants that there was a custom excluding daughters and daughter's sons from inheritance, but there is nothing upon the record to support the existence of any such custom, and in absence of such custom under the Mitakshara law the daughters and daughter's sons would have succeeded.

Thus if the view of the learned counsel for the appellants be accepted, Gaind Singh by executing Ex. 9, left the situation exactly as it was if he had not executed that deed. We think it is a reasonsable presumption that he executed the deed for some specific purpose. The learned counsel for the appellants argues that it is most unnatural that he should wish to exclude his own daughters and their children from inheritance and that it is only natural to suppose that he would have wished to keep the property intact. He can hardly be said to have excluded his daughters from inheritance in view of the fact that he had given valuable property absolutely to one daughter, and valuable property absolutely to the other daughter's husband and thereby had considerably diminished the interest which his widow would otherwise have obtained in the estate. As to keeping the property intact, in spite of the assertion that he wished to do this, the facts show that he had reduced his estate to practically nothing.

Having made permanent provision for both his daughters there was nothing surprising in a wish to make an absolute provision for his wife with a full right of transfer; and when we find in these circumstances that he transfers this property to her as a special gift describing it as the property in his exclusive proprietary right, and says that he transfers all the rights held by him to her, that she is to hold it generation after generation, that neither himself nor his own heir is ever to make a claim against her, and that no one except her is to have any connexion with the property, we consider that the only construction to be placed upon the deed is that it transferred full proprietary rights.

We should not have been of opinion that if the deed had not transferred full proprietary rights the provisions of Act 1 of 1869 would have operated to transfer the property with full proprietary rights. But upon our construction of the deed we are in agreement with the decision of the learned Subordinate Judge and dismiss this appeal with costs

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 207

STUART, C. J.

Mani Ram—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 664 of 1927, Decided on 20th December 1927, from order of Addl. Sess. Judge, Fyzabad, D/- 23rd September 1927.

Criminal P. C., S. 297—Charge to the jury—Judge explaining evidence of approver and evidence of corroboration together—Charge is open to no objection.

A conviction based upon an uncorroborated evidence of an approver should ordinarily not be sustainable unless the Judge had explained carefully to the jury that they were taking a grave risk in convicting upon such uncorroborated evidence. Where the Judge, in his charge, explains the nature of the corroboration and directs the jury to arrive at their verdict after considering the evidence of the approver and the evidence of corroboration together, the charge is open to no objection.

[P 208 C 1]

R. D. Sinha—for Appellant.
H. K. Ghose—for the Crown.

Judgment.—Only two points have been argued in appeal. The first is that the conviction is vitiated by the failure of the Judge to explain to the jury the law as to the necessity of corroboration of an approver's statement. The second is that the sentence is too severe. In regard to the first point it is sufficient to say that I find that the learned Judge did explain sufficiently to the jury the law on the subject. A conviction based

upon an uncorroborated evidence of an approver should ordinarily not be sustainable unless the Judge had explained carefully to the jury that they were taking a grave risk in convicting upon such uncorroborated evidence. Here the case is perfectly different. The evidence of the approver was corroborated and strongly corroborated. It was corroborated against the present appellant. The Judge in his charge explained the nature of the corroboration and directed the jury to arrive at their verdict after considering the evidence of the approver and the evidence of corroboration together. This portion of the charge is open to no objection. On the second point I find that the sentence passed upon the appellant was a sentence of two years' rigorous imprisonment only. He was convicted for having participated in the commission of a serious dacoity. He is, it is true, only a young man. The learned Sessions Judge has taken his youth into consideration and has passed on him a sentence which I consider a light sentence. In view of the nature of the offence, I do not interfere on the question ot sentence and dismiss the appeal.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 208

WAZIR HASAN, J.

Mt. Chandra Kunwar—Appellant.

v.

Rani Radha Kunwar and *another*—Respondents.

Execution of Decree Appeal No. 63 of 1927, Decided on 18th January 1928, from decree of Sub-Judge, Sitapur, D/- 13th September 1927.

Civil P. C., S. 115—Decree-holder getting possession in execution of decree before decision of appeal—Order of restitution by High Court—Appellant can not claim to hold it under a right acruing during suit proceedings except by separate suit.

After the passing of the decree of the Court of first instance and before the decision of the appeal by the appellate Court the appellant executed his decree and obtained possession of property, but the appellate Court ordered restitution in favour of respondent. Later, when respondent sought to recover possession of the property under S. 144, the appellant persisted to continue in possession, alleging that the right to retain possession arose during the pendency of the previous litigation.

Held : that the decree of first instance under which the appellant obained possession, having been reversed by the Chief Court, restitution in favour of the respondent must ensue and any rights which the appellant has might be enforced by him in a separate suit. [P 208 C 2]

Harish Chandra—for Appellant.

Judgment.—This is an appeal in execution of decree proceedings. The appellant, Mt. Chandra Kunwar, obtained a decree from the Court of the Subordinate Judge of Sitapur for recovery of possession of village Khamaria in the district of Sitapur against the respondent, Rani Radha Kunwar. On appeal to this Court the decree was reversed and the appellant's suit dismissed. After the passing of the decree of the Court of first instance and before the decision of the appeal by this Court, the appellant executed her decree and obtained possession of the village Khamaria. Rani Radha Kunwar now seeks to recover possession of the property of which she was dispossessed by way of restitution under the provisions of S. 144, Civil P. C. The appellant says that, in spite of the reversal of the decree of the Court of first instance, she is entitled to continue in possession in virtue of certain rights existing in her favour.

The right to retain possession arose, according to her during the pendency of the previous litigation. I agree with the Court below that this is not a defence which can be entertained in proceedings under S. 144, Civil P. C. The decree of of the Court of first instance under which the appellant obtained possession having been reversed by this Court, restitution in favour of the respondent must ensue and any rights which the appellant has may be ehforced by her in a separate suit.

The appeal is dismissed under O. 41, R. 11, Civil P. C.

N K. *Appeal dismissed.*

A. I. R. 1928 Oudh 209 (1)

PULLAN, J.

Sheo Nath — Debtor — Objector — Appellant.

v.

Mt. Ganesha and *another*—Decree-holders—Respondents.

Execution of Decree Appeal No. 38 of 1927, Decided on 2nd September 1927, against order passed by Sub-Judge, Hardoi, D/- 8th February 1927, in Misc. Civil Suit No. 2 of 1927.

Decree—Instalment decree—Deposit of money—Tender made on specified day but delay in payment—Deposit is not valid.

A judgment-debtor under a decree had to pay certain sum annually to the opposite party on 14th September and in default he was liable to ejectment from certain property. On 14th September he brought a tender for the sum to the Court. The Sub-Judge, was on leave but he signed the tender on the following day directing the judgment-debtor, to deposit the money. He, however, did not withdraw the tender till 17th September on which date he deposited the money in the Treasury.

Held: that the deposit was made beyond time and though the money was tendered on the 14th the judgment-debtor delayed to take the tender from the Court: *A. I. R.* 1927 *Oudh* 263; *A. I. R.* 1926 *All.* 602, *Dist.* [P 209 C 1]

Harish Chandra—for Appellant.

Murlidhar, Govt. Advocate—for Respondents.

Judgment.—This is an appeal from an order of the Subordinate Judge of Hardoi dismissing an objection made by a judgment-debtor whose deposit was held to have been made beyond time. The appellant, under a decree of the Court of the Judicial Commissioner of Oudh, had to pay a sum of Rs. 30 annually to the opposite party on 14th September, and in default he was liable to ejectment from certain property. On 14th September 1926, the appellant brought a tender for Rs. 30 to the Court of the Subordinate Judge. The Subordinate Judge was on leave, but he signed the tender on the following day, 15th September 1926, directing the appellant to deposit the money. The appellant, however, did not withdraw the tender till 17th September, on which date he deposited the money in the Treasury. The lower Court has found that the deposit was made beyond time and that the appellant cannot be allowed an extension of the period of limitation till 17th September, because it is owing to his own carelessness that he did not appear either on 15th or 16th to take the tender which was ready for him on the former date.

The lower Court considered certain rulings and I have been referred to my own decision in a recent case reported as *Mendi Lal* v. *Udmi Chand* (1). That was a case under the Small Cause Courts Act in which I followed a decision of the Allahabad High Court reported as *Ganga Dhar-Baij Nath* v. *B. B. & C. I. Ry.* (2). In each case the basis of the finding was that the presentation of the tender was substantial compliance with S. 17, Sm. C. Cs. Act, provided that the applicant did everything possible to deposit the money at the time of presenting the application. In the present case the applicant would have been saved, in accordance with the view taken by this Court, had he taken back the tender on 15th September, when it was ready, and deposited the money as soon as possible, but he chose to delay till 17th September and he cannot explain that delay. The munsarim of the Court was examined as a witness, and he shows clearly that the applicant did not come till the 17th and that the tender was lying ready for him from the 15th. This being so I must hold that the appellant did not take all possible means to make the deposit and must be penalized for his own carelessness. I agree with the view taken by the Court below and dismiss this appeal, but as the opposite party is not represented I make no order as to costs.

N.K. *Appeal dismissed.*

(1) A. I. R. 1927 Oudh 263.
(2) A. I. R. 1926 All. 602=48 All. 342.

A. I. R. 1928 Oudh 209 (2)

STUART, C. J., AND RAZA, J.

Sitaran Bibi and *others*—Plaintiffs—Appellants.

v.

Ganesh Prasad and *others*—Defendants—Respondents.

Second Appeal No. 213 of 1926, Decided on 15th March 1927, against decree of Addl. Dist, Judge, Sitapur, D/- 17th March 1926.

Mahomedan Law—Widow in possession of husband's estate in lieu of dower cannot alienate the property.

A Mahomedan widow who holds possession of her husband's property until she has been paid her dower has not estate or interest in the property as has a mortgagee under an ordinary

mortgage. There is no real or true analogy between the widow's right of retention and a mortgage usufructuary or other. In the case of a mortgage, the mortgagee takes and retains possession under an agreement or arrangement made between him and the mortgagor. The widow's right of retention is conferred upon her not by the agreement or bounty of her husband but by the Mahomedan law. The right of the widow to retain possession of her husband's property until satisfaction of the dower debt does not carry with it the right of selling, mortgaging or otherwise transferring the property. If she alienates the property itself, and delivers possession thereof to the alienee her husband's other heirs are entitled to recover possession of the property from the alienee without payment to him of the dower debt. This may not affect her right to recover the dower debt from the other heirs of her husband out of his estate. It is doubtful whether a widow could transfer her dower debt or her right to retain possession until the debt was discharged, but an alienation by her of the property itself is void. A transfer by a widow of the property itself cannot be treated as a transfer of her dower debt and the right to hold possession thereof until the debt was paid off: *A. I. R.* 1925 *P. C.* 63 and 41 *All.* 538, *Foll.*

[P 211 C 2]

Akhlaq Husain—for Appellants.

Hyder Husein and *Rama Shankar Srivastava*—for Respondents 1 to 3.

Judgment.—This is an appeal from a decree of the District Judge, Sitapur, dated 17th March 1926, setting aside a decree of the Subordinate Judge, Sitapur, dated 18th September 1925.

The facts of the case, so far as it is necesssary to state them for the purpose of disposing of this appeal are as follows:

One Iltifat Ahmad, a Hanafi Mahomedan, died on 6th November 1918, leaving the property specified in list A attached to the plaint. He died leaving a widow (Mt. Hafiz-un-nissa), a daughter (Mt. Akbari), mother (Mt. Sitaran), four brothers and three sisters, as his heirs under the Mahomedan law. It is admitted that his widow had a one-eighth share, his daughter a half-share and his mother, his brothers and his sisters, the remaining three-eighths-share in the property left by him. However, his widow, Mt. Hafiz-un-nissa, obtained possession of the entire property peacefully in lieu of her dower. She sold 10 bighas 3 biswas out of 42 bighas 19 biswas 16 biswansis possessed by her in lieu of her dower to certain persons on 7th February 1919. Hasad Ahmad, one of the brothers of Iltifat Ahmad, brought a pre-emption suit in respect of that property and his claim was decreed on 16th March 1920. He died subsequently, and was succeeded by his widow, his mother, his brothers and sisters, who are the plaintiffs in this case. It appears that the said 10 bighas 3 biswas land is still possessed by the plaintiffs. That property is not in dispute in the present suit. The dispute relates to the property specified in the second part of list A mentioned above. This property consists of three items. One of these (comprising 30 bighas 13 biswas 16 biswansis) was purchased by defendants 4 to 6. The remaining two items were purchased by other persons (defendant 3, and defendants 7 to 11). Thus defendants 3 to 11 hold the property in dispute as transferees from the widow (Mt. Hafiz-un-nissa defendant 1), and the daughter (Mt. Akbari, defendant 2) of Iltifat Ahmad deceased.

The plaintiffs brought the present suit against the widow and the daughter of Iltifat Ahmad (defendants 1 and 2) and their transferees (defendants 3 to 11) claiming a half-share in the property specified in the second part of list A as heirs of Iltifat Ahmad deceased. They admitted in their plaint that Mt. Akbari, daughter of Iltifat Ahmad, was entitled to a half-share in the property in dispute, but they alleged that Mt. Hafiz-un-nissa had no share left in the said property, as she had accepted only the property specified in the first part of list A (i. e.. 10 bighas 3 biswas mentioned above) in lieu of her legal share and dower. It was by virtue of the alleged private arrangement that the widow was said to have had no right left to the items of the second part of list A and the plaintiff's share in the property in dispute was alleged to have increased by one-eighth.

The suit was not contested by the widow and the daughter of Iltifat Ahmad. The claim was, however, resisted by their transferees on various grounds.

Though the learned Subordinate Judge found that the widow Mt. Hafiz-un-nissa (defendant 1) had not accepted the said 10 bighas 3 biswas land specified in the first part of list A, in lieu of her dower and legal share, as alleged by the plaintiffs, yet he gave the plaintiffs a decree for a half-share in the property in dispute, holding that the price realized by the widow by sale of the said 10 bighas 3 biswas land covered the amount of her dower and also the value of her legal share in her husband's property. It

should be noted that the plaintiffs themselves had not alleged in their plaint that the price realized by the widow by sale of the said 10 bighas 3 biswas land covered the amount of her dower and also the value of her legal share in her husband's property. They had set up a private arrangement or agreement which they failed to prove.

Defendants 4 to 6 (Ganesh Prasad, Baijnath, and Ram Ratan) alone appealed from the decree of the learned Subordinate Judge, and thereupon the learned District Judge reversed the whole decree and dismissed the suit with costs. He accepted the appellants' contention that the transferees were entitled to hold the property during the widow's lifetime till her dower was paid off.

The plaintiffs have now come to this Court in second appeal.

We find that the ground on which the plaintiffs' claim was rejected by the learned District Judge was not one of the grounds on which the claim was resisted by the contesting defendants. The specific plea, that the transferees were in any case entitled to hold the property during the widow's lifetime till her dower was paid off, was never raised before the trial Court. If the learned Subordinate Judge was wrong in making a new case for the plaintiffs by finding that the dower debt was satisfied and the value of widow's legal share was also realized by sale of 10 bighas 3 biswas land mentioned above, the learned District Judge was also wrong in allowing the contesting defendants to raise the plea that the transferees were entitled to hold the property during the widow's lifetime till her dower was paid off. No plea as to the amount of dower or the satisfaction or non-satisfaction of dower was raised before the trial Court. A plea involving questions of fact and not raised before the trial Court cannot be raised in appeal. Even granting that the contesting defendants could raise the plea in question before the lower appellate Court, we find that there is no substance in the plea. It is true that the widow Mt. Hafiz-un-nissa had obtained possession of the entire property left by her husband peacefully, under a claim of dower, but she had no right to alienate the property of which she was thus in possession. As pointed out by their Lordships of the Privy Council in the case of *Maina Bibi* v. *Chaudhri Vakil Ahmad* (1) the widow who holds possession of her husband's property until she has been paid her dower has not estate or interest in the property as has a mortgagee under an ordinary mortgage. There is no real or true analogy between the widow's right of retention and a mortgage usufructuary or other. In the case of a mortgage, the mortgagee takes and retains possession under an agreement or arrangement made between him and the mortgagor. The widow's right of retention is conferred upon her not by the agreement or bounty of her husband, but by the Mahomedan law. The right of the widow to retain possession of her husband's property until satisfaction of the dower debt does not carry with it the right of selling, mortgaging or otherwise transferring the property. If she alienates the property itself and delivers possession thereof to the alienee, her husband's other heirs are entitled to recover possession of the property from the alienee without payment to him of the dower debt.

This may not affect her right to recover the dower debt from the other heirs of her husband out of his estate. It is doubtful whether a widow could transfer her dower debt or her right to retain possession until the debt was discharged, but an alienation by her of the property itself is void. A transfer by a widow of the property itself cannot be treated as a transfer of her dower debt and the right to hold possession thereof until the debt was paid off: see also *Mina Bibi* v. *Chaudhri Vakil Ahmad* (2). In the present case the transfers made by Mt. Hafiz-un-nissa were not transfers of her dower debt or of her right to retain possession until the debt was discharged. On the contrary, in the deeds in question she describes herself as the absolute owner of the property and purports to convey that absolute ownership to her transferees. She had no right to sell the property as she did and the transfers made by her are void. The plaintiffs who are admittedly the heirs of her husband and who have a six-annas share in the property under the Mahomedan law are entitled to recover possession of the same from the transferees without payment to them of the dower debt.

(1) A.I.R. 1925 P.C. 63=47 All. 250=52 I.A. 145 (P.C.).
(2) [1919] 41 All. 533=51 I.C. 242=17 A.L.J. 629.

We have to see now what relief or reliefs are the plaintiffs entitled to against the defendants in the present suit. Defendants 4 to 6 (respondents) hold 30 bighas 13 biswas 16 biswansis under the sale-deed dated 25th March 1922 (Ex. 2) executed by Mt. Hafiz-un-nissa and Mt. Akbari jointly. Defendants 7 to 11 hold 1 bigha 12 biswas under the sale-deed dated 17th January 1921 (Ex. 3) executed by Mt. Hafiz-un-nissa alone. Defendant 3 holds 11 biswas land under the sale-deed dated 25th May 1922 (Ex. 4) executed by Mt. Hafiz-un-nissa alone. The learned Subordinate Judge has given the plaintiffs a decree for possession of half of the properties comprised in the three sale-deeds mentioned above and also for Rs. 150 mesne profits, against all the defendants jointly. Defendant 3 and defendants 7 to 11 have preferred no appeal from the decree passed by the learned Subordinate Judge. The decree has become final, so far as the said defendants are concerned. They are not parties to the appeal before the learned District Judge. The plaintiffs are thus entitled to get possession of half of the properties comprised in the sale-deeds dated 17th January 1921 and 25th May 1922 (Exs. 3 and 4). They are also entitled to a decree for mesne profits to that extent against defendants 7 to 11 and defendant 3.

Mt. Akbari, who has admittedly a half-share in the property left by her father, Iltifat Ahmad, could validly transfer 21 bighas 9 biswas 18 biswansis (i. e., half of 42 biswas 19 biswas 16 biswansis) to defendants 4 to 6. The plaintiffs cannot therefore question the validity of the sale-deed dated 25th May 1922 (Ex. 2) to the extent of that share. Mt. Hafiz-un-nissa can claim no share in the property comprised in this sale-deed, as the property already transferred by her by the sale-deed dated 7th February 1919 (Ex. 1) exceeds her legal share. The plaintiffs are, therefore, entitled to a decree for possession of (30 bighas 13 biswas 16 biswansis minus 21 bighas 9 biswas 18 biswansis)=9 bighas 3 biswas 18 biswansis only out of the property comprised in the sale-deed dated 25th May 1922 (Ex. 2), against defendants 4 to 6. They are also entitled to a decree for mesne profits to that extent.

The result is that we allow the appeal; and, setting aside the decree of the learned District Judge, modify the decree of the learned Subordinate Judge. The plaintiffs will now get a decree for possession of the property comprised in the sale-deed dated 25th May 1922 (Ex. 2) to the extent of 9 bighas 3 biswas 18 biswansis out of 30 bighas 13 biswas 16 biswansis against defendants 4 to 6. They will also get a decree for possession of half of the properties comprised in the sale-deeds dated 17th January 1921 and 25th May 1922 (Exs. 3 and 4) against defendants 7 to 11 and defendant 3. They will also get a decree for mesne profits to the extent of the shares decreed in their favour against the three sets of the defendants mentioned above. There are not sufficient materials on record to enable us to determine the mesne profits in respect of the properties severally decreed in favour of the plaintiffs. We pass a decree for possession of the properties directing an inquiry as to mesne profits from the institution of the suit until the delivery of possession, under O. 20, R. 12, Sch. 1, Civil P. C. The first Court will pass a final decree in respect of the mesne profits in accordance with the result of such inquiry. The decree for mesne profits should not be passed against all the defendants jointly. The liabilities of the three sets of defendants mentioned above should be severed with due regard to the properties held by them separately under the three sale-deeds mentioned above. The plaintiffs will get one-third of their costs of the suit from defendants 4 to 6, the principal contesting defendants in the case, in all three Courts. The said defendants will get ¾ths of their costs from the plaintiffs in all the Courts.

D.D. *Appeal allowed.*

A. I. R. 1928 Oudh 212

STUART, C. J.

Suraj Bali—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 45 of 1927 Decided on 1st December 1927, made by 2nd Addl. Sess. Judge, Unao, D/- 1st October 1927, in Criminal Revn. No 11 of 1927.

Criminal P. C., S. 350-A — Only one out of three Magistrates constituting Bench present throughout the hearing—Trial is bad.

Where out of three Magistrates constituting the Bench only one is present on all hearings throughout the trial, sitting sometimes with

one, sometimes with the other and sometimes with both, the trial is bad as it contravenes the provisions of S. 350-A, even though the quorum consisted of two : *A. I. R.* 1926 *Lah.* 304, *Foll.*
[P 213 C 1, 2]

Ram Krishna—for Applicant.
Government Pleader—for the Crown.

Report.—This is an application for revision against the order of the learned District Magistrate of Unao dismissing the applicant's appeal against the order of the Bench Magistrates convicting him under S. 456, I. P. C., and sentencing him to six months' rigorous imprisonment.

The ground pressed in revision is that the procedure adopted by the Bench Magistrates contravened the provisions of S. 350-A, Criminal P. C., and therefore the trial was bad in law. The facts about which there is no dispute are these: The case was sent for decision to the Bench Magistrates sitting at Unao. The Bench Magistrates sitting at Unao is composed of Khan Bahadur Quazi Nasir Ahmad, Major Kamta Singh and Pt. Shiam Sundarnath Kaul. On receiving the case, K. B. Quazi Nazir Ahmad and Major Kamta Singh began the trial on 6th June and recorded a portion of the prosecution evidence which was taken down by Major Kamta Singh. On the next date of hearing, i.e., 18th June 1927, K. B. Quazi Nazir Ahmad was absent whose place was taken by Pt. Shiam Sundarnath Kaul who sitting with Major Kamta Singh heard the case in part and adjourned it for the rest of the hearing to 25th June 1927. On 25th June 1927 also the same two members formed the Bench and heard the case in part and adjourned it to 2nd July 1927. From 2nd July down to the 23rd, all the three sat and the judgment was also signed by all of them. All the writing work, that is, of recording the evidence was done by Major Kamta Singh who, as has been seen, attended on all the dates and sat on the Bench.

In my opinion the proceedings should be quashed. The case of *Banwari Lal* v. *Emperor* (1), after the amended Criminal Procedure Code came into force, is on all fours with the present case. It was held in that case that where out of three Magistrates constituting the Bench only one is present on all hearings throughout the trial sitting sometimes with one, sometimes with the other and sometimes with both, the trial is bad as it contravenes the provisions of S. 350-A, Criminal P. C., even though the quorum consisted of two. The same view appears to have been taken by the late Court of the Judicial Commissioner of Oudh in *Brij Bhukhan* v. *Ram Kirat* (2). In this case the trial was commenced before the Bench of two Honorary Magistrates. They heard the evidence for the prosecution and examined one of the witnesses for the defence. On a subsequent date one of the Magistrates was not present, and his place was taken by another who recorded the remaining evidence for the defence and heard the arguments and the case was eventually decided by all the three acting together and ended in the conviction of the accused. It was held that the trial was bad and was rightly set aside by the District Magistrate although the District Magistrate was not justified in passing an order of acquittal of the accused but what he ought to have done was to have set aside the conviction and direct a retrial if the case was a fit one for the taking of that step.

The learned pleader for the opposite party relied on the case of *Emperor* v. *Mathura* (3). This case was decided before the passing of the amended Criminal Procedure Code. The rules which were framed by the Government for the conduct of business by Benches of Honorary Magistrates before the amended Act are to be found in the Manual of Government. O. 6, Judicial (Criminal) Department, Chap. 33, para. 814. The amendment in the law necessitated the substitution of the words " provided that the provisions of S. 350-A, Criminal P. C., are carefully observed," for the proviso to R. 3 under para. 814, referred to above (correction slip 528). S. 350-A requires that the Bench should be duly constituted under S. 15 and that the Magistrates constituting the same have been present on the Bench throughout the proceedings. Reading the above with S. 15 it would appear that at least two Magistrates ought to have been present on the Bench throughout the proceedings. In the present case only one Magistrate was present on the Bench throughout the proceedings, namely, Major Kamta Singh. I find therefore that in this case S. 350-A was not carefully observed. The next argu-

(1) A.I.R. 1926 Lah. 301=7 Lah. 122.

(2) A.I.R. 1923 Oudh. 163.
(3) [1920] 41 All. 116=48 I.C. 344=16 A.L.J. 884.

ment was that the Court should not interfere because no party has been prejudiced. I think this argument cannot prevail. When the law prescribed at least two Magistrates for a proper constitution of the tribunal, it did so intentionally and for a certain object. That object has been explained by the late Court of the Judicial Commissioners of Oudh in *Sultan* v. *Shamsher* (4) :

the object of constituting a Bench is that the Magistrates concerned should individually and collectively give their attentfon and apply their minds to the hearing of the evidence and the determination of the points at issue and arrive at an independent judgment in regard to the merits of the charge.

(On this report of the Additional Sessions Judge, the following order was passed.)

Order.—I direct that trial including the judgment and order of the learned District Magistrate in appeal be set aside. As the accused has already been imprisoned for a considerable time I direct that he stand acquitted and be not tried again.

R.D. *Order set aside.*

(4) A.I.R. 1922 Oudh 21=25 O.C. 182.

A. I. R. 1928 Oudh 214

STUART, C. J., AND PULLAN, J.

Narayan and *another* — Defendants— Applicants.

v.

Baldeo Singh — Plaintiff — Opposite Party.

Civil Revision No. 34 of 1927, Decided on 2nd December 1927, from decree of 3rd Addl., Dist. Judge, Lucknow, D/- 19th May 1927.

Oudh Rent Act (22 *of* 1886), *Ss.* 116 *and* 119—*Decree by Asst. Collector, 2nd Class—Appeal lies to the Collector and second appeal to the District Judge—Chief Court to which above Courts cannot be said to be subordinate in respect of rent suits has no jurisdiction.*

Where the decree is the decree of an Assistant Collector of the 2nd class an appeal lies to the Collector or to a specially empowered Assistant Collector. The next appeal where the value of the original suit does not exceed Rs. 5,000 lies to the District Judge and where the value of the suit exceeds Rs. 5,000, lies direct to the Chief Court. In the former case, the Courts of Assistant Commissioner and District Judge are not subordinate to the Chief Court : *A. I. R.* 1924 *Oudh* 16, *Foll.*; *A. I. R.* 1924 *Oudh* 349, *Diss.*; *A. I. R.* 1923 *Oudh* 18, *Expl.* [P 215 C 1]

S. N. Roy—for Applicants.

Hyder Hussain—for Opposite Party.

Judgment.—This is an application in which we are asked to interefere in revision under S. 115, Civil P. C. with an order of the Additional District Judge of Lucknow reversing a decree passed by an Honorary Assistant Collector, 2nd Class, which was upheld on appeal by the Collector. A preliminary objection has been taken to the effect that, as the Courts in question, in exercise of the jurisdiction which they exercised, are not subordinate to this Court, this Court has no jurisdiction to interfere in revision.

In order to understand the nature of this objection, it is necessary to examine the provisions of Local Act 22 of 1886 as amended by Act 4 of 1901 and Act 1 of 1923 in respect of jurisdiction. The chapter in question is Ch. 8. Under the provisions of S. 108, Courts, other than Courts of revenue, are prohibited from taking cognizance of a certain description of suits. The five grades of Courts of revenue are given in S. 109. They are the Courts of the Board of Revenue, the Commissioner, the Collector, the Assistant Collector of the 1st Class, and the Assistant Collector of the 2nd class. Assistant Collectors of the 2nd Class have jurisdiction to try only certain specified suits the value of which does not exceed Rs. 100. Assistant Collectors of the 1st Class can try and determine suits of every description which are cognizable only by a revenue Court. A Collector has, in addition to the powers of a Collector, the powers of an Assistant Collector of the 1st Class. We thus have it that all original suits, which are cognizable only by revenue Courts, are heard by the Courts of Collectors and Assistant Collectors and by no other Courts. So far this is simple. We now come to appeals. S. 119 classifies for appeal purposes certain specified classes of suits. It is not necessary to enumerate these suits. It is sufficient to say that the main suits so classified are suits for arrears of rent and suits for profits. After those suits are excluded, an appeal lies in all the remaining suits from the original Court to the Collector (or to the Commissioner, if the Collector was the Court of original trial), Assistant Collectors of the 1st Class being permitted to hear, when specially empowered, appeals from Assistant Collectors of the 2nd Class. From the appellate Court of a Collector or of a specially empowered Assistant Collec-

tor of the 1st Class, appeals lie to the Commissioner and from the Commissioner appeals lie to the Board. The law here has not been materially altered. When we come, however, to appeals in the class of cases which we have noted as specially classified we find that there has been a very considerable change effected by the recent law. Formerly, when the final Court of appeal was not the Board of Revenue, the final Court of appeal was the Court of the Judicial Commissioner, but now a third final Court of appeal has been added in certain cases. In these classified suits of which suits for arrears of rent and profits may be taken as the outstanding class, where the decree is the decree of an Assistant Collector of the 2nd Class, an appeal lies to the Collector or to a specially empowered Assistant Collector. The next appeal, however, does not lie to the Commissioner, but where the value of the original suit does not exceed Rs. 5,000 it lies to the District Judge and, where the value of the suit exceeds Rs. 5,000, it lies direct to the Chief Court. S. 119 B lays down particularly that there shall not be an appeal from the decision in appeal of a District Judge except in decrees passed in appeal from the appellate decrees or orders of Collectors or Assistant Collectors of the 1st Class.

We thus have it that in a suit, such as the suit we are now considering, the Chief Court has no jurisdiction whatever in appeal. The first decree was passed by an Assistant Collector of the 2nd class. The appeal lay to the Court of the District Judge and there the matter ended. Can it then be said that these Courts are in any way subordinate to the Chief Court in respect of this particular matter? We are of opinion that it cannot so be said. This decision of ours is in agreement with the decision arrived at by Pandit Kanhaiya Lal, Judicial Commissioner in *Kali Bakhsh Singh* v. *Bhagwan Das* (1). This decision was passed on 12th March 1923. It is true that in a subseqtent decision passed by Mr. Dalal, who was then Judicial Commissioner, on 30th August 1923—*Jagannath Prasad* v. *Beehu* (2)—in which he does not refer to Pandit Kanhaiya Lal's decision, the contrary view is taken. But with due respect to Mr Dalal we are unable to accept his view. He based his view upon a decision of a Bench of the Judicial Commissioner's Court dated 14th September 1922 in *Chauharaja Bakhsh* v. *Kalka Pande* (3). He omitted, however, to notice that this decision referred to the law as it was before the alterations which had taken place at the time that Pandit Kanhaiya Lal gave his decision. In 1922 there were only two final Courts of appeal; the Court of the Board of Revenue in certain cases and the Court of the Judicial Commissioner in other cases. All that the decision in *Chauharja Baksh* v. *Kalka Pande* (3) lays down is that, where a Court is the Court of final appeal the Court whose decisions are subject to final appeal are Courts subordinate to the Court of final appeal, and that such Court of final appeal has revisional powers. That is a perfectly correct statement of the law as it then was with with which we agree, but does not follow that where, as here, this Court is not the Court of final appeal, the Courts concerned are subordinate to it and that this Court has revisional powers. The whole situation has been altered by the change in the law which has made the Court of the District Judge the Court of final appeal in such cases. The view taken by Pandit Kanhaiya Lal was that, where the original decree was a decree of an Assistant Collector of the 2nd Class, this Court had no powers in revision. We accept that view. According to that view the preliminary objection must succeed. We, therefore, dismiss this application with costs.

S.J. *Application dismissed.*

(1) A. I. R. 1924 Oudh 16.
(2) A. I. R. 1924 Oudh 319=27 O. C. 89.
(3) A. I. R. 1923 Oudh 18.

A. I. R. 1928 Oudh 215

STUART, C. J.

Rahim Bakhsh—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No 128 of 1927, Decideded on 23rd December 1927, from the order of 1st Addl. Sub-Judge, Bara Banki, D/- 8th December 1927.

(a) *Evidence Act, S. 54—Guilt of joint possession of cocaine—Evidence of previous conviction of trafficking in cocaine and history sheet opened by the police are inadmissible.*

In order to establish the guilt of the accused of joint possession of cocaine, evidence to the effect that he had been previously convicted of

trafficking in cocaine, and that he was suspected by the police with the result that a history sheet had been opened against him, was inadmissible in evidence. [P 216 C 2]

(*b*) *U. P. Excise Act* (4 *of* 1910), *S.* 69—*Previous conviction can be used after the determination of the accused's guilt.*

The evidence of a previous conviction can be used under the provisions of S. 69 to afford reason for enhancement of sentence after the accused's guilt has been determined. [P 216 C 2]

Jagat Narain Mulla—for Applicant.

H. K. Ghosh—for the Crown.

Judgment.—Rahim Bakhsh and Nanhu were convicted by a Magistrate of the 1st Class of Bara Banki under the provisions of S. 60, Act 4, 1910, of being jointly in possession of twenty-five and a quarter tolas of cocaine. They appealed to the Additional Sessions Judge of Bara Banki, who dismissed their appeals. Their applications in revision have been admitted by this Court. The following facts are clearly established. On 13th September 1927, at 8 A. M. certain premises in Bara Banki town were searched by police officers of the Bara Banki District. The premises in question consisted of three adjoining apartments standing side by side and connected with a varandah in front, situated in a sarai in Bara Banki. The premises were used as a tobacco shop. The doors of each apartment were secured with a locked padlock. The padlocks were unlocked and search was made in every apartment. In the largest apartment, which was used as a godown, was a large stock of tobacco. In the other two apartments there were miscellaneous articles. There was no indication that either apartment was used for residential purposes. In one of the two other apartments was found a large wooden box secured by two padlocks. Those two padlocks were unlocked, and inside the box were found three locked receptacles. They were unlocked. In one receptacle was found in separate phials cocaine amounting to twenty-five and a quarter tolas. These are the facts. There cannot be to my mind the slightest reasonable doubt as to these facts. The suggestion that the cocaine was planted by the police or anybody else is untenable; but the question remains: In whose possession were those articles?

It is established beyond the possibility of reasonable doubt that Nanhu, who is the brother of the husband of Rahim Bakhsh's sister, is the occupier of the premises. I find it established on the evidence that the keys of the padlocks fastening the outer doors of the three apapartments were produced by Nanhu and that the doors were opened with those keys. It is further established (again beyond the possibility of reasonable doubt to my mind) that the large box in which the cocaine was found contained a variety of other articles, most of which admittedly belonged to Nanhu. Thus we have it that the cocaine was found in a locked box, which was inside a locked apartment of which Nanhu was the occupant, and that Nanhu had the key which opened the doors of that apartment.

In order to establish the guilt of Rahim Bakhsh, which the prosecution has suggested, was the guilt of joint possession, the prosecution produced certain evidence against him, The lower Courts should not have admitted a considerable portion of this evidence. I find that they permitted evidence to be produced to the effect that Rahim Bakhsh had been previously convicted of trafficking in cocaine and that Rahim Bakhsh was suspected by the police with the result that a history sheet had been opened against him. This evidence was inadmissible under the provisions of S. 54, Act, 1872, evidence on the original charge. The evidence of a previous conviction could be used under the provisions of S. 69, Act 4, 1910 to afford reason for enhancement of sentence after Rahim Bakhsh's guilt had been determined but I find it clear that this evidence was admitted as evidence against him on the charge. It should not have been so admitted, and I exclude it completely from consideration. The next evidence against him, to which I wish to refer, was the evidence that when the box was opened it was discovered to contain notes to the value of Rs. 510. The Magistrate permitted the witnesses to give evidence to the effect, that Rahim Bakhsh had made a statement to the police officers admitting the ownership not only of some of these notes but of the cocaine These statements can only be considered as confessions made to a police officer, and should not have been admitted under the provisions of S. 25, Act I, 1872. After excluding this evidence, as it should have been excluded originally there remains against Rahim Bakhsh the following evidence only. It is this:

There is evidence that, after the doors of these apartments had been opened, Circle Inspector Ram Prasad told Nanhu to produce the keys of the padlocks securing the big box, and that Nanhu said to the Circle Inspector, that the keys were with Rahim Bakhsh, that Rahim Bakhsh then produced the keys and that the box was opened. The circumstances have to be looked at closely. The premises were not Rahim Bakhsh's premises. He had no connexion with the tobacco shop. It is true that witnesses for Nanhu have deposed that Rahim Bakhsh occupied one or more of these apartments for residential purposes but that evidence has not been believed by the Courts below, and I do not believe it. The case then stands, that Rahim Bakhsh has no known connexion with these premises. It is further proved on the prosecution evidence, that Rahim Bakhsh was at the time of the search, in a house some distance away from his shop. He was thence brought to the search. It is not suggested, that he produced these keys (if he did produce them) from his person. The Circle Inspector says that Rahim Bakhsh went out of the room in which the box was into one of the other rooms, and brought keys from there. Now, if these facts stood alone, would they be sufficient to show that Rahim Bakhsh was in joint possession of the cocaine? I consider that they would not be sufficient. The keys were not on his person. That is clear. It was incorrect to say that he had them. At the most the evidence shows that he knew that there was a bunch of keys in the next room and that evidence is not sufficient to justify the finding. But, apart from that, there are some peculiar circumstances in connexion with this evidence as to the keys. The evidence would appear to show that there were five padlocks.

It would not necessarily follow that there were five keys because one key might open more than one padlock. The police search list, which was prepared on 13th September 1927, on the spot, and which has been proved in evidence, mentions only four padlocks. The five padlocks should have been three padlocks (one each on the outer doors of the three apartments), and the two padlocks on the box. The reason why only four padlocks were produced would appear to be that the police did not produce the padlock or key of the godown in which the main stock of the tobacco was kept, and produced only the padlocks and keys of the two apartments, and the padlocks and keys of the box. There should have been on this reckoning, if each padlock had a separate key, four keys for the padlocks, and one key for the receptacles. That is five keys in all. Now the search list states distinctly that there were five keys, one for each padlock and one for the receptacles, and adds that the five keys were all on one bunch. The Circle Inspector has in his evidence referred explicitly to a bunch of keys containing five keys. There is not the slightest doubt as to the fact that Nanhu produced the keys which unlocked the two apartments other than the godown. But if those keys were on the bunch, as they apparently were, the keys of the padlocks on the box and the keys of the receptacles were on the same bunch, and Nanhu was the man who produced them all. If, after he produced them and had unlocked the doors, the keys were left in one of the apartments other than the apartment in which the box was, and Rahim Bakhsh had been sent to fetch them, this would not show that Rahim Bakhsh was in joint possession of the cocaine. It would almost seem that something of this kind had happened. It is further noticeable that, in the first report made, Rahim Bakhsh is stated to have done a great deal more than what the evidence states that he did, and in the search list he is also stated as having done more than what the evidence discloses. No attempt was made to clear up this circumstance.

I have given the case careful consideration. I am unable to interfere in the case of Nanhu. On my finding the cocaine was found on his premises inside a locked receptacle in a locked room and he had the key which opened the door of that room. That much is clear. These facts justify his conviction. In the case of Rahim Bakhsh I do not consider that on the evidence it is established that he was in possession of this cocaine. It is not for me to discuss the amount of suspicion against him. That is immaterial to the case. But there is not sufficient admissible evidence which can justify a conclusion that he is guilty. I therefore reject the revision of Nanhu and allow

the revision of Rahim Bakhsh. I see no reason to interfere with the sentence passed on Nanhu. The conviction and sentences passed on Rahim Bakhsh will be set aside and he will be set at liberty if he is not required upon any other charge. The fine, if paid by him, will be refunded. The order as to securities will of course be set aside.

N.K. *Revision allowed.*

A. I. R. 1928 Oudh 218 (1)

PULLAN, J.

Mrs. Nan Greenwood—Petitioner.

v.

L. V. Greenwood—Respondent.

Divorce Case No. 7 of 1927, Decided on 24th October 1927.

Divorce Act (4 *of* 1869), *S.* 10—*Indian Courts have jurisdiction to grant divorce which will be valid in British India to parties not domiciled here.*

Where neither of the parties are proved to be domiciled in India and therefore for purposes of international law no divorce can be granted to the party but the Indian Courts are authorized under the Indian Divorce Act to grant a petition which will be valid for all purposes throughout British India where the parties are resident within the jurisdiction of the Court and the adultery complained of has been committed in India. [P 218 C 2]

Moti Lal Saksena—for Applicant.

Judgment.—Mrs. Nan Greenwood has applied in this Court under S. 10, Divorce Act for dissolution of her marriage with Sergeant-Major L. V. Greenwood of the Gloucestershire Regiment. The petition is not contested and a letter has been filed by the petitioner written, as she states on oath, by her husband which gives ample ground for divorce. It appears from this letter that he left his wife more than two years ago in order to live with another woman, a certain Mrs. Pearl Cottrell, who is mentioned in the petition. In this letter the respondent definitely refuses to make any provision for the petitioner or to leave the woman with whom he is living. There is, therefore, prima facie a case entitling the petitioner to a decree for divorce on the ground of adultery and desertion.

The petitioner states and there is no reason to doubt her statement that there is no collusion between herself and her husband, and and it is not necessary for her to prove cruelty on his part in view of his admission of adultery and desertion.

The only question which gives rise to any difficulty is that of jurisdiction. Neither of the parties is proved to be domiciled in India. The petitioner is an Irish woman and the respondent is an Englishman. They were married in a Roman Catholic Church in Cork in South Ireland in the year 1915. They have been living in India since the year 1921. They are still resident in India and the petitioner states that she has no intention of leaving the country and that her husband before deserting her also expressed his intention of remaining in India when he obtains a discharge from the Army. But at present he is a Sergeant-Major in a British regiment and cannot as such acquire Indian domicile. Thus for purposes of international law no divorce can be granted to the petitioner, but the Indian Courts are authorized under the Divorce Act to grant a petition, which will be valid for all purposes throughout British India, in any case where the parties are resident within the jurisdiction of the Court and the adultery complained of has been committed in India. I opine that the recent English enactment, the Indian and Colonial Divorce Act, 1926, has no application to a marriage celebrated in what is now the Irish Free State. Both the required conditions are present in this case and I, therefore, decree this petition ex parte and grant the petitioner a divorce from her husband Surgeant-Major L. V. Greenwood. She will be at liberty to apply to this Court after expiry of six months from to-day to have her decree made absolute. At present no application is made for alimony, but the petitioner claims her costs. I allow the costs of the petitioner which amount to : Rs. 20 for the stamp, Re. 1 for process fee, Rs. 2 vakalatnama and Rs. 100, pleader's fees according to the certificate filed.

N.K. *Petition decreed.*

A. I. R. 1928 Oudh 218 (2)

PULLAN, J.

Ram Sukh Dube and *another*—Defendants—Appellants.

v.

Rampat Tewari and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 278 of 1927, Decided on 22nd December 1927, against decree of Addl. Sub-Judge, Fyzabad, D/- 16th May 1927.

(a) *Oudh Laws Act* (18 *of* 1876), *S.* 9—*Suit for pre-emption—Plaintiff and vendee having equal right of pre-emption in respect of the same property—Deciding the suit by lot is valid.*

Where in a suit for pre-emption plaintiff and the vendee had an equal right of pre-emption in respect of a certain property the trial Court, acting on this finding drew lots under S. 9. The plaintiff being successful in the lots the losing party appealed.

Held : that S. 9, Oudh Laws Act, was correctly interpreted and that a Court in a case of this kind was bound to have recourse to lots : 3 *O. C.* 330, *Foll.* [P219 C 1,2]

(b) *Oudh Laws Act* (18 *of* 1876), *S.* 10—*Vendor should issue notice to all who have under the law of pre-emption a right to buy.*

The meaning of the section is not that after the vendor has agreed to sell the property to some person he should issue a notice to those persons who have a right of pre-emption as against the vendee, but that a person who intends to sell property, which is subject to the right of pre-emption, shall issue a notice to all persons who have under the law of pre-emption a right to buy : 3 *O. C.* 330, *Foll.* [P 219 C 2]

R. D. Sinha and *G. C. Sinha* for Appellant.

Raj Bahadur for *Rajeshri Prasad*—for Respondent No. 1.

Judgment.—This is an appeal from the order of the Additional Subordinate Judge of Fyzabad in an appeal arising from a suit for pre-emption. The findings which are not challenged are that the plaintiff and the vendee have an equal right of pre-emption in respect of this property. The Court below, acting on this finding, drew lots under S. 9 Act 18, 1876, the Oudh Laws Act, and the plaintiff, being successful in the lots, the appeal was dismissed. The decision is now challenged on the ground that the lower Court erred in law by deciding the case by drawing of lots and this is the only ground of appeal which has been argued. The appellant's contention is that where the vendee and the pre-emptor stand in the same position with regard to their right of "pre-emption," S. 9, Oudh Laws Act, does not apply, because neither of them can be said to have a right of pre-emption against the other, but, under S. 9, the word " pre-emption " is not used and the rule that where two or more persons are equally entitled to such right " the person to exercise the same shall be determined by lot " applies to the right to buy or redeem such property and not to the right to pre-empt such property. It is also argued that pre-emption can only be sought by a person who is entitled by law to receive notice from the vendor of the property proposed for sale, and as the vendee in this case had the same right as the pre-emptor no such notice was due to the pre-emptor under S. 10. But here again the learned counsel for the appellant would have me add certain words to the section. The section rules that any person proposing to sell any property in respect of which any person has right to pre-empt shall give notice to the person concerned of the price at which he is willing to sell such property. The section does not say " where any person has entered into a contract to sell any property," but only " where any person proposes to sell any property," and the meaning of the section is not that after the vendor has agreed to sell the property to some person he should issue a notice to those persons who have a right of pre-emption as against the vendee, but that a person who intends to sell property which is subject to the right of pre-emption, shall issue a notice to all persons who have under the law of pre-emption a right to buy. This question was decided by the authority of the late Court of the Judicial Commissioner of Oudh and I have to cover the same ground as the Judicial Commissioners in their decision reported in *Wali-ul-Hak* v. *Ghani-ul-Huk* (1), which has formed the basis of the decisions in numerous subsequent cases. I have no doubt that S. 9, Oudh Laws Act, was correctly interpreted by the Judicial Commissioners and that a Court in a case of this kind is bound to have recourse to lots. I dismiss the appeal with costs.

N.K. *Appeal dismissed.*

(1) [1900] 3. O. C. 330.

A. I. R. 1928 Oudh 219

PULLAN, J.

Baij Nath Upadhiya—Plaintiff—Appellant.

v.

Ghazi Khan and *another*—Defendants—Respondents.

Second Appeal No. 38 of 1927, Decided on 13th December 1927, against judgment of Dist. Judge, Fyzabad, D/- 10th August 1927.

Oudh Rent Act, Ss. 127 and 108 (2)—Suit by landlord—He must prove that defendant is trespasser and he has option to eject him as such.

In order to bring a suit under this section the landlord must show first that the defendant is

retaining possession of the land without being entitled to such possession, and secondly that he himself has the option of ejecting him as a trespasser. [P 220 C 1]

R. D Sinha and *G. C. Sinha*— for Appellant.

Naim Ullah—for Respondents.

Judgment.—This is a second appeal from an order of the learned District Judge of Fyzabad. The plaintiff sued under S. 127, Oudh Rent Act, read with S. 108, Cl. (2) of the same Act, to recover a reasonable rent in respect of a certain plot. S. 127 provides that a person taking or retaining possession of land without being entitled to such possession may, at the option of the person entitled to eject him as a trespasser, be treated as a tenant. In order to bring a suit under this section the landlord must show first that the defendant is retaining possession of the land without being entitled to such possession, and secondly that he himself has the option of ejecting him as a trespasser. There have been conflicting decisions both of this Court and of the revenue Courts as to the circumstances under which a suit under S. 127 can be brought but there is no decision to which I have been referred which meets the present case. In this case there are two decisions of the year 1883, one by an Assistant Collector and one by a civil Court between these parties as to this land. In both cases it was held that the present defendants had a title in the land. It is not necessary to state here what their title is, but it was then stated to be that of mortgagees. From that time till this they have continued in possession and only once, that is in 1895, has any dispute arisen. At that time there were settlement proceedings and this land was entered as being in the tenancy of the defendants *bila tasfia*. An application was made to amend this entry, but apparently was not pressed, and no order was passed. The entry, therefore, remains. But that is not sufficient cause for the plaintiff to plead that the title acknowledged in the year 1883 has ceased to have effect, still less that these are persons whom he, as landlord, can eject as trespassers. In my opinion the suit was rightly dismissed by the Courts below and I dismiss this appeal with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 220

PULLAN, J.

Ansar Ahmad—Appellant.

v.

Samidan—Respondent.

Misc. Appeal No. 54 of 1927, Decided on 12th December 1927, against order of Dist. Judge, Fyzabad, D/- 15th July 1927.

(a) Mahomedan law—Guardian—Mother cannot be guardian of her minor married daughter.

Under Mahomedan law the mother is disqualified from the guardianship even of her minor daughter if she is married to a man who is not related to the minor within the prohibited degrees. [P 220 C 2]

(b) Guardian and Wards Act, S. 17 — Appointment of guardian.

Where the law definitely lays down that an appointment of a certain guardian cannot be made, it is not proper for the Court to disregard the law even in the interests of the minor. [P 220 C 1]

Ghulam Husain—for Appellant.

Ali Zaheer—for Respondent.

Judgment.—This is an appeal from an order of the learned District Judge of Fyzabad appointing Mt. Samidan to be the guardian of her minor daughter in preference to the appellant Ansar Ahmad who is the father's brother of the minor. The learned District Judge has appointed the mother although he appears to be aware that her appointment is contrary to Mahomedan law, because he considers that the child should not be given over to the care of her uncle who is understood by the Judge to have denied her right to her paternal inheritance. It is not altogether clear what the appellant has done in this matter, but I understand from counsel that in an application for mutation of names in the revenue Courts, he has supported an entry in the wajib-ul-arz which excludes females in this family from inheritance to landed property. There is nothing to show that he himself has any adverse interest to the minor. But it is not so much the disability of the appellant which must be considered in this case as the disability of the mother, and to that there seems to be no answer. All the authorities on Mahomedan law are agreed that the mother is disqualified from the guardianship even of her minor daughter if she is married to a man who is not related to the minor within the prohibited degrees. In this case Mt. Samidan has married a man who is a stranger and, under S. 17,

Guardians and Wards Act, a Court in appointing a guardian must make an appointment "consistently with the law to which the minor is subject." Where the law definitely lays down that an appointment cannot be made, it is not proper for the Court to disregard the law even in the interests of the minor. In this case it may be that it is not in the interests of the minor that the uncle should be the guardian, but it is nowhere suggested that these are the only persons who under the Mahomedan law could become the guardian of the minor. As a matter of fact I am told that in the mutation proceedings the maternal grandmother is actually acting as the guardian of the child and, under the Mahomedan law, the mother's mother comes next to the mother in the order of priority among females who are entitled to be appointed guardians—see S. 107, Wilson's Anglo-Mahomedan Law, 5th Edn., p. 182. Under the circumstances I think it would be better if the lower Court should reconsider this question in view of the fact that the guardian appointed by the lower Court is one who is disqualified under the Mahomedan law, and I, therefore, set aside the order of the District Judge and return the case to him in order that he may reconsider the claim of the appellant along with those of any other persons who may be found willing to accept the guardianship. The appellant will get his costs in this Court.

N.K. *Case returned.*

A. I. R. 1928 Oudh 221

STUART, C. J. AND RAZA, J.

Madaru—Accused—Appellant.

v.

Emperor—Opposite party.

Criminal Appeal No. 606 of 1927, Decided on 16th December 1927, against order of Second Addl. Sess. Judge, Lucknow, D/- 19th November 1927.

(a) *Penal Code S. 300 Exception 4—Assailants using sticks—Member of one party striking by hatchet over the head of a member of another party who is empty handed—Death ensues—Murder is committed—Accused gets no benefit of Exception 4.*

When a brawl is taking place in which the assailants on both sides are using sticks a member of one side, who intervenes with a hatchet and striks over the head of a member of the other side, who is empty-handed and is taking no active part in the fight and kills him in consequence commits murder and nothing less. Excep. 4, S. 300, I. P. C. has no application. [P 222 C 2, P 223 C 1]

(b) *Criminal P. C., S. 374—Accused rushing into brawl with heavy hatchet — Striking neighbour who is undefended — Sentnce of death passed — The case does not justify clemency.*

When a man rushes into a brawl with a heavy hatchet and strikes with all his force one of his neighbours who is unable to defend himself upon the head with the hatchet and kills him then it is not a case for the exercise of clemency and capital sentence should not be reduced. [P 223 C 1]

J. Jackson and *Hyder Husein*—for Appellant.

H. K. Ghose, Govt. Pleader—for the Crown.

Judgment.—Madaru, a Behna aged 25 of Sahrawan, a village in the Unao district, has been convicted by the learned Additional Sessions Judge of Unao of the offence of murder under S, 302, I.P.C. and sentenced to death subject to confirmation by this Court. He appeals and the reference in confirmation is also before us.

These are the facts: In this village the family of which Madaru is a member occupies a house which adjoins the house occupied by certain Pasis. Adjacent to the two houses is a rain water drain. The occurrence took place on the 16th July 1927. The rains having set in, the drain in question was overflowing. Unless it was cleared the water flowed into the appellant's house. When cleared it spilled over into the Pasis' house. It was over a dispute in relation to this trifling matter that Sadhu Pasi lost his life. What happened was this. Early in the day the Behnas had been diverting the water in such a manner that it spilled into the Pasis' house. There had been a quarrel. Later Abdul, the appellant's father, was again, in order to save his own premises, taking such action that the water according to the Pasis would flow into their house. This took place in the evening, and another quarrel then began. It is not very clear what was the exact sequence of incidents in this quarrel, but it is quite clear that five male members of the Pasis' family and four male members of the Behnas' family appeared on the scene. On the Pasis' side were Bhawani the uncle, Puran and Sadhu deceased who were own brothers and two men called Hembraj and Mihi, who were cousins. On the Behnas' side were Nabi, and

Abdul who were brothers and Sardar and Madaru who were the sons of Abdul. Both sides indulged in the abuse and remonstrance usual to the members of their castes on such occasions and from words they rapidly came to blows. Bhawani and Puran on the one side received injuries and Nabi, Abdul and Sardar upon the other side received injuries, the weapons used being lathis. They did not receive serious injuries, but Sadhu received injuries which caused his death.

The evidence is that Madaru who at the time when the fight arose had been shaping a piece of wood into an agricultural implement came on the scene with a hatchet and struck Sadhu over the head with this hatchet a blow which penetrated into the bone of the skull and fractured the left parietal and the right frontal bones, injured the brain, and caused death within a very short period. Apart from the evidence of Puran and Bhawani there is the evidence of certain neighbours who witnessed the incident. Those neighbours are Bhawan Din, a Thakur, Ishur Din, a Brahman, and Ajudhia Prasad a Brahman. These three persons who were cross-examined at length and whose evidence has in no way been shaken in our opinion in cross-examination have deposed with certainty that the deceased man Sadhu was taking no active part in the fight and that at no time had he used violence to any one. There is evidence which we accept that he had joined in abusing the Behnas, but the attack upon him was not justified in any way as he was stated by these witnesses to have been empty-handed. Great stress was laid down by the learned counsel for the appellant upon a statement made by Sub-Inspector Suraj Narain that Puran had stated to him on the following morning that Sadhu had brought a shovel in order to clean out the drain. We do not consider that the statement was admissible in evidence as the provisions of S. 162, Criminal P. C., had not been complied with. But putting this statement at its highest, it would mean very little. Sadhu might have brought a spade with which to clean out the drain and yet at the same time been empty-handed when he was attacked. He could have brought the spade and put it down. We have the evidence of three witness who are not showu to be biased in any manner that Sadhu was empty-handed at the time that Madaru the appellant came and struck him a violent blow on the head with the hatchet. We have the hatchet before us. The blade is a heavy blade ending in a sharp edge. The blade is 5″ long and 1½″ wide. The handle is 2 ft. long.

Madaru refused to make any reply in the Committing Magistrate's Court, and in the Sessions Court he made a simple denial. In his appeal from the jail for the first time he has suggested that he was not present on the spot. He clearly was present on the spot. He has not been able to meet in any way the evidence of the witnesses against him. It was open to him to have called as witnesses in his defence his father, Abdul and his uncle Nabi. He could not call his brother Sardar for Sardar was charged with the murder. Sardar has been acquitted of murder and sentenced to six months' rigorous imprisonment for simple hurt. He has not so far appealed. But apart from his father Abdul and his uncle Nabi, he has not attempted to call any of the neighbours who might have been in a position to see the occurrence. All the neighbours who have been called as witnesses have deposed against him. It has been suggested in defence that the feelings of the Hindus and Mohammadans in this village are so strained that no Hindu would give truthful evidence on behalf of a Mahomedan. We are unable to attach any value to that suggestion as we find that there is nothing to support it. We find the case to be clearly a case of murder.

The learned counsel for the appellant put forward as his main defence that the culpable homicide had been committed in a sudden fight in the heat of passion upon a sudden quarrel. He did not contest the finding that his client had struck the fatal blow, but he suggested that the offence committed was at the worst culpable homicide not amounting to murder, and in any circumstances he pleaded for a remission of the capital sentence. We do not consider that Excep. 4, of S. 300, I. P. C. has any application, because Madaru distinctly took undue advantage over the deceased man. When a brawl is taking place in which the assailants on both sides are using sticks, a member of one side, who intervenes with a hatchet and strikes over the head a member of the other side, who is empty-

handed and taking no active part in the fight and kills him in consequence, in our opinion commits murder and nothing less. We find that the appellant has been rightly convicted of murder. We believe the evidence of Puran and Bhawani in the main and we find that Bhagwan Din, Ishur Din and Ajodhia Prasad have told the truth.

The question of sentence presents some difficulty. The murder was undoubtedly not premeditated. The victim had been using bad language, and the hatchet was being employed shortly before the quarrel by the appellant for a perfectly innocent purpose. We have given full weight to all the above facts, but at the same time we are obliged to take the view that these savage homicides are too prevalent in Oudh to justify the exercise of clemency. When, as here, a man rushes into a brawl with a heavy hatchet and strikes with all his force, as Madaru clearly did, one of his neighbours who is unable to defend himself upon the head with the hatchet and kills him we are unable to reduce the capital sentence. We therefore dismiss the appeal, uphold the conviction and confirm the sentence and direct that Madaru be hanged by the neck till he be dead.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 223

WAZIR HASAN AND PULLAN, JJ.

Pahlad Singh—Defendant—Appellant.

v.

Suraj Bakhsh Singh and *others*—Plaintiff and Defendants—Respondents.

Second Rent Appeal No. 32 of 1927, Decided on 16th January 1928, from decree of Dist. Judge, Sitapur, D/- 9th April 1927.

Oudh Rent Act (1886), *Ss. 7 (a) and* 108—*Usufructuary mortgage of a share of a village—Mortgagor transferring proportionate share of his* sir *lands—Mortgagor in possession—Mortgagee claiming for a share of profits on the footing of being cosharer—Relationship of cosharer is not created and no profits can be claimed—Mortgagor is the tenant of the mortgagee and so liable only to pay rent—Oudh Laws Act* (1876), *S.* 25.

Out of the eight annas share in a village owned by *A* four annas were transferred by way of a usufructuary mortgage to the plaintiff. Within his proprietary share of eight annas *A* held certain *sir* lands and a proportionate share of the *sir* lands was transferred to the plaintiff when the mortgage of four annas was made in his favour. Plaintiff claimed for a share of profits under Cl. 15 of S. 108. *A* had all along been in possession of his *sir* lands on the ground that the relationship of cosharers existed between him and the plaintiff,

Held: that once the usufructuary mortgage in favour of the plaintiff was created in respect of the four annas share, *A* became a tenant with a right of occupancy in the proportionate area of the *sir* lands by virtue of S. 25, Oudh Laws Act, 1876, if the mortgage was made prior to the 1st January 1902, or an exproprietary tenant within the meaning of S. 7-A, Oudh Rent Act, 1886, if the mortgage was effected after the 1st January 1902, in either case he was a tenant and was not liable to account to the plaintiff on the footing of a cosharer. [P 223 C 2; P 224 C 1]

H. N. Das—for Appellant.

Tara Shankar—for Respondent 1.

Judgment.—This is an appeal by Pahlad Singh, defendant 1, from the decree of the District Judge of Sitapur, dated 4th April 1927, affirming the decree of an Assistant Collector of the First Class of the same place dated 23rd September 1926, in a claim for a share of profits under Cl. (15), S. 108, Oudh Rent Act, 1886. The facts as found by the Court below are as follows :

The appellant, Pahlad Singh, held an eight annas share in village Kohrawan, pargana Misrikh, in the district of Sitapur. The remaining eight annas are owned by the taluqdar of Ramkot, and with the last-mentioned share we are not concerned in this appeal. Out of the eight annas owned by the appellant four annas were transferred by way of a usufructuary mortgage to the plaintiff and the remaining four annas were subsequently transferred by a similar mortgage to one Aziz Ahmad, who was made a pro forma defendant to the suit, out of which this appeal has arisen. Within his proprietary share of eight annas Pahlad Singh held 110 bighas 5 biswas of *sir* lands. They were specifically excluded from the mortgage in favour of Aziz Ahmad, but it must be taken that a proportionate share of the *sir* lands was transferred to the plaintiff when the mortgage of four annas was made in his favour. It is admitted that the defendant-appellant, Pahlad Singh, has all along been in possession of his *sir* lands.

This suit was founded on the ground that the relationship of cosharers existed between the plaintiff and the defendant, Pahlad Singh, and the Courts below have decreed the suit on the same footing. This was obviously wrong. Once the usufructuary mortgage in favour of the plaintiff was created in respect of the four

annas share the defendant, Pahlad Singh, became a tenant with a right of occupancy in the proportionate area of the *sir* lands by virtue of S. 25, Oudh Laws Act, 1876, if the mortgage was made prior to the 1st January 1902, or an exproprietary tenant within the meaning of S. 7-A, Oudh Rent Act, 1886, if the mortgage was effected after 1st January 1902. The result is that in either case he is a tenant and is not liable to account to the plaintiff on the footing of a cosharer. In the character of a tenant under S. 25, Oudh Laws Act, he is liable to pay so much rent only as may be determined by the Deputy Commissioner under the provisions of the Oudh Rent Act, 1886. Admittedly there has been no such determination. As an exproprietary tenant under S. 7-A, Oudh Rent Act, he is liable to pay rent which shall be four annas in the rupee less than the fair and equitable rate payable by statutory tenants for land of the same class or classes of soil. In the present case, however, the parties agree that the profits which the Courts below have assessed in respect of the *sir* lands fairly and equitably represent the amount of rent which this land would be liable to yield in the ordinary circumstances and the defendant is entitled to the reduction of four annas in the rupee in the same amount.

We accordingly allow this appeal and modify the decree of the Court below by giving to the plaintiff a decree against Pahlad Singh for three-fourths of Rs. 426-12-7 for the rent and three-fourths of Rs. 80 for interest previous to the institution of the suit. We also grant the plaintiff a decree for interest from the date of the suit to the date of realization on the total amount of the two figures just now mentioned at the rate of 1 per cent. per mensem As neither party has placed the true facts of the case in the pleadings we think that the proper order as to costs would be that they shall bear their own costs all through.

N.K. *Appeal allowed.*

A. I. R. 1928 Oudh 224

STUART, C. J., AND WAZIR HASAN, J.

Bishun Narain—Plaintiff—Appellant.

v.

Mazharul Haq — Defendant—Respondent.

Second Appeal No. 248 of 1927, Decided on 20th December 1927.

(a) *Civil P. C., S. 35—Departure from practice of directing costs to follow event — Reasons must be in writing — Discretion exercied on judicial principles—Appellate Court should not interfere.*

It is in the absolute discretion of the Courts as to how costs are to be awarded but where they do not follow the event the Court must give its reasons for departure from the practice of directing costs to follow the event and those reasons must be in writing. It is well settled law that although the Court has full discretion in the matter of awarding costs, that discretion must be exercised on judicial principles. But if that discretion has been exercised upon judicial principles, an appellate Court is not justified in interfering with the order passed: *A. I. R.* 1925 *Oudh* 699 ; 40 *All.* 558, *Foll.*

[P 225 C 1]

(c) *Civil P. C., S. 100—Interference of lower appellate Court with a non-appealable order (of awarding costs)—Second appeal lies.*

If the lower appellate Court has no right to interfere with the order of the trial Court in the matter ol awarding costs the decision of the lower appellate Court is co ıtrary to law and is a proper subject for second appeal. But if the order of the trial Court is of such a nature as to be appealable to the lower appellate Court and the lower appellate Court's order is based upon a judicial discretion properly exercised, there can be no second appeal. The question as to whether a second appeal lies or does not lie is largely academic, for it is always necessary to examine the merits before the question is decided.

[P 225 C 1]

Harish Chandra—for Appellant.

Naimullah for *Hyder Husein*—for Respondent.

Judgment.—The facts of the suit out of which this second appeal arises are as follows :—

The plaintiff-appellant instituted a suit against Dilasa Ram vendor and Mazharul Haq vendee to enforce an alleged right of pre-emption. He stated that the property in suit had been sold by the vendor to the vendee for Rs. 1,500 but that the consideration had been falsely stated in the deed of sale to be Rs. 2,000. He had a right of pre-emption. This was admitted by the vendee. The vendee, however, asserted that the plaintiff had lost his right by refusing to purchase the property. Upon the facts there was a finding, which is accepted as correct by the parties, that the amount of consideration was actually Rs. 2,000 and that the plaintiff had not refused to purchase the property. A decree was given on payment of Rs. 2000. The plaintiff therefore failed on a very important point. The order as to costs gave now reasons of any kind. It merely said that if the plaintiff paid the amount due from him within

two months he would receive his costs from the vendee. The order as to costs was appealed against.

The lower appellate Court in a carefully reasoned judgment has decided that in the circumstances of the case neither the plaintiff nor the defendant was entitled to costs as each had failed in respect of a portion of his claim. He therefore directed that the parties should bear their own costs. An appeal has been filed against this appellate decree.

As there has been some doubt in the past as to the question whether a second appeal does or does not lie in such cases, the decision of this appeal was referred to a Bench. We state our findings upon it A second appeal can only lie under the provisions of S. 100, Civil P. C. The provisions of that section must be complied with absolutely. In this particular case a second appeal can only be justified if it be found that the decision of the lower appellate Court is contrary to law. We therefore have to decide what is the law on the subject.

The authority of the Court to award costs is regulated in the main by the provisions of S. 35, Civil P. C. It is in the absolute discretion of the Courts as to how costs are to be awarded, but where they do not follow the event the Court must give its reasons for departure from the practice of directing costs to follow the event and those reasons must be in writing. It is well-settled law that although the Court has full discretion in the matter of awarding costs, that discretion must be exercised on judicial principles. But if that discretion has been exercised upon judicial principles, an appellate Court is not justified in interfering with the order passed. This rule has been laid down in more than one decision. It was laid down by a Bench of the late Court of the Judicial Commissioner of Oudh in the case of *Ram Bhoros* v. *Rampal Singh* (1) and it was laid down in Allahabad in the case of *Radhe Shiam* v. *Behari Lal* (2). If the lower appellate Court had no right to interfere with the order of the trial Court in the matter of awarding costs the decisions of the lower appellate Court is contrary to law and is a proper subject for second appeal. But if the order of the trial Court was of such a nature as to be appealable to the lower appellate Court and the lower appellate Court's order is based upon a judicial discretion properly exercised, there can be no appeal to this Court.

We consider that the order of the trial Court was open to the objection that the Judge had not judicially exercised his discretion. In the circumstances the lower appellate Court had a right to modify it. In its order of modification the lower appellate Court judicially exercised its discretion, and therefore no second appeal lies. The question as to whether a second appeal lies or does not lie is largely academic, for it is always necessary to examine the merits before the question is decided. If the Court below has decided the matter correctly and legally, an appeal would obviously fail even if it lay. Thus the question as to whether an appeal lies is not in practice of importance. It is of interest to note that the view enunciated in the above decisions are views which were approved in a recent judgment of the House of Lords in the case of *Donald Campbell & Co.* v. *Pollok* (3). The procedure in the Courts in England differs in material particulars from the procedure in the Courts of India but the principle as laid down by their Lordships is the same as the principle in India. Where the discretion has been exercised judicially there should be no interference, but the discretion must be exercised judicially.

We, therefore, dismiss this appeal with costs.

N.K. *Appeal dismissed.*

(1) A.I.R. 1925 Oudh 699.
(2) [1918] 40 All. 558=48 I.C. 478=16 A.L.J. 592.
(3) [1927] A.C. 732.

1928 O/29 & 30

A. I. R. 1928 Oudh 225

PULLAN, J.

Mathura and *others* —Defendants—Appellants.

v.

Shambhoo Dayal and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 274 of 1927, Decided on 22nd December 1927, against decree of First Sub-Judge, Bahraich, D/- 14th May 1927.

Hindu Law—Debt incurred by father—Separated property of son cannot be proceeded against.

A Hindu son cannot be compelled to pay his father's debt out of his separated property either

in his father's life-time or after his father's death : *A. I. R.* 1924 *P. C.*, 50; 28 *Bom.* 383, *Dist.* [P 226 C 2]

Mohammad Ayub—for Appellant.

Moti Lal Saksena—for Respondent 1.

Judgment.—This is a second appeal from the order of the First Subordinate Judge of Bahraich confirming the decree of the Court of the Munsif allowing plaintiff to recover a sum of Rs. 139-3-0 as price of certain goods which were attached and sold in execution of a decree. The decree was for a simple money debt and it was passed against the father of the plaintiff. It is proved that the plaintiff separated from his father in the year 1318 Fasli, that is, A. D. 1911. It has been proved to the satisfaction of the Court below that the property sold consisted of certain articles of furniture which were the personal property of the plaintiff. I am asked in second appeal to find that the plaintiff was liable to pay his father's debt because under Hindu law it was his pious obligation to do so, that is, the proposition before me is that a Hindu son who has been separated from his father has the pious obligation to pay the personal debt of the father during the father's lifetime. I find that this proposition was not argued before the learned Hindu Judge who heard the appeal in the Court below and I have been asked to hold that this is the effect of the decision of their Lordships of the Privy Council reported in *Brij Narain* v. *Mangla Prasad* (1). It is true that in that judgment their Lordships have approved of the decision of the Bombay High Court in *Govind Krishna Gujar* v. *Sakharam Narayan* (2), in which it is laid down that the law is now well established that under the Hindu law the pious obligation of a son to pay his father's debt exists whether the father is dead or alive. I have referred to that ruling. I observe that it deals entirely with the case of a joint Hindu family where it is sought to execute a decree by selling the sons's interest in the family property. The ruling of their Lordships of the Privy Council is intended to lay down certain rules as to the powers, rights, and duties of members of a joint Hindu family property in the matter of alienating or burdening the estate. It has no application to the case of a separated Hindu. As far as I am aware, there is no authority for the proposition that a Hindu son can be required to pay his father's debt out of his separated property either in his fathers' lifetime or after his father's death. I would refer to a ruling of the Madras High Court reported in *Ramchandra Jagannath Rao* v. *Visvesam* (3), in which it was held that after partition the creditor could sue the son to recover the debt which was in existence before the partition from the joint family properties allotted to the son in partition. This proposition could only affect the present case if it were shown firstly that this debt was in existence before the partition and secondly that the property attached was part of the joint family property which came into the possession of the son. Neither of these pleas were raised at any time by the present appellant. It is too late for him to raise them now. I have no doubt that the suit has been decided correctly by the Courts below and I dismiss the appeal with costs.

N.K. *Appeal dismissed.*

(1) A. I. R. 1924 P. C. 50=46 All. 95=51 I. A. 129 (P. C.).

(2) [1904] 28 Bom. 383=6 Bom. L. R. 344.

(3) A. I. R. 1924 Mad. 682=47 Mad. 621.

A. I. R. 1928 Oudh 226

STUART, C. J., AND RAZA, J.

Ram Dulari and *another*—Applicants.

v.

Mushtaq Ahmad and *others*—Opposite Party.

Criminal Ref. No. 41 of 1927, Decided on 17th December 1927, made by Sess. Judge, Sitapur, on 26th September 1927.

Criminal P. C., S. 544—In private prosecution complainant must pay reasonable expenses of witnesses in advance, if not paid, Court has right to refuse to issue process—Criminal P.C., S. 208 (3).

In private prosecution the complainant must pay the reasonable expenses of the witnesses, although it is open to the Local Government to make rules which would permit, in certain cases, the liability to be transferred to the Crown. The payment in respect of diet money and travelling expenses fall under the head of "other fees payable" and the Court has a perfect right to insist upon those fees being paid in advance before the processes are issued, and to refuse to issue process for the attendance of witnesses unless the travelling expenses and diet money of such witnesses have been deposited by the complainant in advance. [P 227 C 1, 2]

H. N. Misra—for Applicants.

C. S. Zaman—for Opposite Party.

H. K. Ghose—for the Crown.

Judgment.—The question which has been referred to us for decision by the

learned Sessions Judge of Sitapur is whether a Magistrate has a right to refuse to issue process for the attendance of witnesses in a case instituted on the complaint of a private person, unless the travelling expenses and diet money of such witnesses have been deposited by the complainant in advance. We are here concerned only with a private prosecution. It is clear to us that the provisions of S. 208 (3), Criminal P.C., must be read subject to the provisions of S. 204 (3). If the complainant applies to the Magistrate to issue such process, unless he deems it unnecessary to do so for reasons to be recorded, an essential preliminary before the process is issued is the payment of the fees. Under S. 20, Court-fees Act (Act 7 of 1870) a High Court makes rules as to the fees chargeable for serving and executing processes issued by all Courts under its jurisdiction including criminal Courts. In Oudh, the Chief Court is the High Court for the purposes and the Chief Court has fixed the fees chargeable for the issue of such summonses, and has also regulated the travelling expenses and diet money of the witnesses.

There can be no doubt as to the fact that in a private prosecution the complainant is under the legal obligation to pay the process fees before such summonses are issued. The learned Sessions Judge would, however, distinguish the question of the payment in advance of travelling expenses and diet money. He has referred to the wording of S. 208 (3), Criminal P. C. His argument is that as that section does not say that the Magistrate is not to issue process until the diet money and travelling expenses have been paid in advance, it must be taken that he has no authority to order the diet money and the travelling expenses to be paid in advance. But this provision has got to be read with the other provisions of the Code. In our opinion the payment in respect of diet money and travelling expenses fall under the head of "other fees payable" and the Court has a perfect right to insist upon those fees being paid in advace before the processes are issued. S. 544, Criminal P. C., provides that, if the Local Government makes rules upon the subject a criminal Court may, if it thinks fit, order payment, on the part of Government, of all reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceedings before such Court under the Code. We take this to mean clearly that the general rule is that in private prosecution the complainant must pay the reasonable expenses of the witnesses, although it is open to the Local Government to make rules which would permit, in certain cases, the liability to be transferred to the Crown. We, therefore, are of opinion that the Magistrate's order was a correct order and we return the papers to the Sessions Judge so that they may be returned to the Magistrate.

N.K. *Reference answered*

A. I. R. 1928 Oudh 227

WAZIR HASAN, J.

Behari—Defendant—Appellant.

v.

Ramkaran—Plaintiff —Respondents.

Second Appeal No. 371 of 1927, Decided on 23rd January 1928, against order of District Judge, Fyzabad, D/- 17th August 1927.

Hindu Law—Entry of daughter's name in revenue registers—She cannot acquire more than limited estate by adverse possession.

Where a daughter's name is entered in the revenue registers in place of her mother distinctly on the ground that she is entitled to succeed under the Hindu law as the daughter of her father, she acquires no better title by adverse possession than the limited title of a Hindu female which comes to an end on her death. [P 228 C 1]

S. N. Roy—for Appellant.

Bisheshar Nath—for Respondents.

Judgment.—This is the defendant's appeal from the decree of the District Judge of Fyzabad, dated 17th August 1927, affirming the decree of the Munsif of the same place, dated 16th May 1927.

The plaintiff-respondent claims title to certain zamindari shares in villages Khora sahas patti and Lakhimpur in the District of Fyzabad. His case is that the property in suit belonged to one Bhawanidin, that on his death it devolved by right of inheritance on Mt. Menda, widow of Bhawanidin; that on the death of Mt. Menda in 1897 it devolved on Mt. Indersena, daughter of Bhawanidin; that Mt. Indersena died in the year 1925 after having made a transfer of the property in suit in favour of her daughter, Mt. Lakhpati; and that the plaintiff is entitled as a reversionary heir on the death of Mt. Indersena. The Courts below have

decreed the suit. The only questions which were argued at the hearing of the appeal were (1): as to whether the possession of Mt. Indersena was or was not adverse to the reversionary title, and (2) as to whether the plaintiff has succeeded in establishing that he was the sole reversioner on the date of Mt. Indersena's death.

As to the first point the argument is that, according to the family custom, Mt. Indersena was excluded from inheritance and consequently her possession was adverse. There is force in the argument to this extent that there may be a custom of exclusion of daughters; but in the circumstances of the case I am clearly of opinion that Mt. Indersena's possession was not adverse to the plaintiff's title as a reversioner. Mt. Indersena's name was entered in the revenue registers in place of her mother Mt. Menda distinctly on the ground that she was entitled to succeed under the Hindu law as the daughter of her father. This being so, she acquired no better title by adverse possession than the limited title of a Hindu female which came to an end on her death. On the second point mentioned above there is a clear finding, according to my reading of the judgment of the Court below, that the plaintiff was the sole reversioner of Bhawanidin. The finding is not vitiated by any error of law or procedure and is conclusive.

I accordingly dismiss this appeal with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 228

WAZIR HASAN, J.

Jia Lal and *another*—Objectors—Appellants.

v.

Mahommad Haroon and *others*—Decree-holders—Respondents.

Execution Decree Appeal No. 55 of 1927, Decided on 18th January 1928, from order of Addl. Sub-Judge, Fyzabad, D/- 12th August 1927.

Limitation Act, Art. 182—*Decree prepared by subordinate Court according to directions in the appellate judgment is the decree of appellate Court and not of the subordinate Court.*

The decree prepared in the office of the Subordinate Judge according to the directions contained in the judgment of the appellate Court is the decree of the Court of appeal and not a decree passed by the Subordinate Judge, and an application for execution within three years of the passing of the appellate judgment is within time. [P 229 C 1]

Naim Ullah—for Appellants.

Radha Krishan—for Respondents.

Judgment.—This is the judgment-debtors' appeal in execution proceedings against the order of the Additional Subordinate Judge of Fyzabad, dated 12th August 1927. The last application for execution was made on 2nd June 1927. The question in the case is as to whether it is within the prescribed period of limitation. It is agreed that if the first application for execution made by the decree-holders dated 8th February 1926, was an application in accordance with law the application of 2nd June 1927 is within limitation. The lower Court has held that the application of 8th February 1926 was an application in accordance with law. I agree with the lower Court, though the ground of my opinion is somewhat different from the ground on which the learned Additional Subordinate Judge based his judgment. The facts are these: The respondents decree-holders were defendants in a suit brought by the judgment-debtors appellants. There were a large number of defendants. The suit was dismissed by the trial Court under decree of 27th September 1923. As to the costs the only order passed by the trial Court was that the suit was dismissed with costs. In the decree prepared in pursuance of the judgment of the trial Court separate costs were allotted to several sets of the defendants. The plaintiffs appealed and the late Court of the Judicial Commissioner of Oudh reversed the order of the Court of first instance as to separate costs and directed a fresh decree to be prepared showing apportionment of one set of costs in favour of each group of the defendants. The order of the Judicial Commissioner was passed on 10th April 1924. A fresh decree was prepared according to the directions contained in the order of the Judicial Commissioner by the Subordinate Judge. In their application for execution of 8th February 1926 the respondents in Col. 3, which relates to the date of the decree, mentioned the date of the decree of the Court of first instance as 27th September 1923 and of the Court of appeal as 10th April 1924.

It is contended that the entry as to

both the dates was erroneous and therefore the application was not in accordance with law. I am unable to accept this contention. The date of the decree of the Court of first instance was certainly 27th September 1923 and the date of the decree of the Court of appeal must also be taken to bear the date on which the judgment of the Court of appeal was pronounced and this was admittedly the 10th April 1924. The entries in Col. 3 were therefore perfectly correct. The decree which was prepared in the office of the Subordinate Judge according to the directions contained in the judgment of the Judicial Commissioner was the decree of the Court of appeal and not a decree passed by the Subordinate Judge. The Subordinate Judge became functus officio after he had passed his decree of 27th September 1923 in respect of the case in which the decree was passed. When he carried out the directions contained in the judgment of the Judicial Commissioner he simply acted in a ministerial capacity and the decree which he prepared according to those directions was the decree of the Court of the Judicial Commissioner. The appeal fails and is dismissed with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 229

STUART, C. J., AND WAZIR HASAN, J.

Zakaullah Khan—Appellant.

v.

Gulkandi and *others*—Respondents.

Appeal No. 1 of 1927, Decided on 19th December 1927, from decree of Pullan, J., D/- 4th August 1927, in Execution Decree Appeal No. 21 of 1927 reported as *A.I.R.* 1927 *Oudh* 369 (1).

Oudh Rent Act, S. 145—Decree under, has the same meaning as it has under Civil P. C.—Total decretal amount exceeding Rs. 500—Liability of certain judgment-debtors falling short of Rs. 500—Execution against them after the lapse of three years can take place.

The word "decree" in the Oudh Rent Act has the same meaning as it has under the Code of Civil Procedure. A decree is a formal expression of adjudication on the whole and the Court has to look at the total amount which the decree involves, even where the decree determines liabilities of judgment-debtors inter se for an amount which is necessarily less than the total amount awarded. [P 229 C 2, P 230 C 1]

Where a decree in a suit for profits brought under the Oudh Rent Act awarded to the plaintiff against certain defendants a sum exceeding Rs. 500 but with a liability of below Rs. 500 in respect of some defendants, *held* that execution could take place against these defendants in respect of their separate liability under the decree after the lapse of three years from the date of the decree. [P 229 C 2]

Ghulam Hasan—for Appellant.

Judgment.—The District Judge of Hardoi passed, on 22nd November 1927, an appellate decree in a suit for profits brought under the Oudh Rent Act. This decree awarded to the plaintiff Rs. 1292-2-8 in all with proportionate costs against three sets of defendants. It awarded Rs. 665-8-6 against Rahatullah Khan and others, Rs. 255-11-0 against Bakaullah and others and Rs. 370-15-2 against Mohammad Ibadullah and others. The question which we have to consider is whether execution can take place against Bakaullah and others in respect of their separate liability under this decree after the lapse of three years from the date of the decree. In order to arrive at a decision on this point we have to consider the provisions of S. 145, Oudh Rent Act. In this section it is laid down that a process of execution shall not be issued on a decree under this Act, when the application for the issue of the process is made after the lapse of three years from the date of the decree, unless the decree is for a sum exceeding five hundred rupees, in which case the period within which execution may be had shall be regulated by the law for the time being in force as to the period allowed for the execution of the decree of civil Courts.

It is admitted that the application in execution, to which exception is taken, has been made within the period allowed for the execution of decrees of civil Courts. The question for determination is simply this: Are we to consider the words "for a sum exceeding five hundred rupees" applying to a decree, as denoting the total amount to be realized under the decree or are we to read the word "decree" as denoting the amount for which the judgment-debtors are liable individually under the decree, when there are several judgment-debtors and the decree separates their liabilities? The word "decree" in the Oudh Rent Act has the same meaning as it has under the Code of Civil Procedure. A decree is a formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with

regard to all or any of the matters in controversy in the suit. A decree is thus a formal expression of adjudication on the whole and we have to look at the total amount which the decree involves, even where the decree determines liabilities of judgment-debtors inter se for an amount which is necessarily less than the total amount awarded. We consider that the learned Judge of this Court who has arrived at the same view has arrived at a correct view and we accordingly dismiss this appeal with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 230

RAZA, J.

Gulab Singh and *another*—Plaintiffs—Appellants.

v.

Ali Begam—Defendant—Respondent.

Second Appeal No. 1 of 1928, Decided on 9th February 1928, against decree of Sub-Judge, Unao, D/- 20th September 1927.

Oudh Rent Act (22 *of* 1886), *S.* 60—*Land granted to a person for planting grove without any contract to pay rent—He is not a tenant but a grove-holder — Revenue Court cannot eject him.*

A person who is holding land for planting grove and paying rent for it he is necessarily a tenant but a person to whom land is granted for that purpose without any contract to pay rent is not a tenant within the meaning of the Oudh Rent Act. He is a grove-holder and is entitled to hold possession so long as the land retains the character of a grove and proceedings taken in ejeciment against him in the revenue Court are without jurisdiction. But where persons are not holding the land as grove-holders but as tenants and are paying rent for the same as such and claim no rights as grove-holders in the ejectment suit then the proceedings taken in ejectment against them in the revenue Court are not without jurisdiction : 6 *O. L. J.* 639 and 1 *O. C.* 231, *Foll.* [P 231 C 1]

Radha Krishna—for Appellants.

Niamatullah, *Naimullah* and *Masih-uddin Faruqi*—for Respondent.

Judgment.—This is an appeal from a decree of the Subordinate Judge, Unao, dated 20th September 1927, setting aside the decree of the Munsif, South Unao, dated 15th November 1926.

The dispute in this case relates to plot No. 643/2 (first settlement) measuring 1 bigha in 754 (second settlement) 906 (current settlement) village Rajepur in the district of Unao.

The plaintiffs were holding many plots including the plot in suit as the defendant's tenants. The defendant's predecessor-in-title took proceedings against the plaintiffs in the revenue Court for their ejectment from the holding (including tne plot in suit) treating them as a tenant paying rent. The plaintiffs contested the notice of ejectment but were unsuccessful. They were ejected from the entire holding including the plot in suit by order of the revenue Court and possession was delivered to the defendant's predecessor-in-title in June 1915. The plaintiffs brought the present suit in April 1926 claiming the plot in suit as a grove.

The learned Munsif held that the plaintiffs were grove-holders of the plot in suit, that the revenue Court was not competent to eject them from the grove in suit, that the decision of the revenue Court was not binding on the civil Court which alone could take cognizance of a case for possession of groves of tenants and that the plaintiffs were entitled to possession of the plot in suit which still maintained the character of a grove. He therefore decreed the plaintiffs' suit for possession and damages. The defendant appealed and the result was that the learned Subordinate Judge disagreed with the finding of the learned Munsif on almost all the important points and dismissed the suit with costs. The plaintiffs have now come to this Court in second appeal.

So far as I see there is no substance in this appeal.

It has been found by the learned Subordinate Judge that the plaintiffs were holding the plot in suit as tenant and not as a grove-holder. The plot in suit formed part of their holding for which they were paying rent to the defendaut. The plaintiffs are the successors of one Rudr Singh who was holding many plots including the plot in suit as a tenant at the time of the first settlement. There were no trees on the plot in suit at that time. The plot in suit was under cultivation at that time and some trees were planted on the plot sometime between the first and the second settlement. Rudr Singh and his successors continued to pay rent for the entire holding including the plot in suit and that rent was bilmukta rent for the entire holding. It was admitted by the plaintiffs in the ejectment suit

that Rs. 91 per annum was the bilmukta rent of the plot in suit and the other plots held by them as the defendant's tenants. It was therefore found by the learned Subordinate Judge that the "grove land in suit was liable to payment of rent under a bilmukta rent." This finding of the learned Subordinate Judge is based upon admissible evidence and must be accepted in second appeal. I agree with the learned Subordinate Judge that a person to whom land is given for the purpose of planting grove without any contract or agreement to pay rent is not a tenant within the meaning of the Oudh Rent Act, but he is necessarily a tenant when he is liable to pay rent for the land let out to him. As pointed out in the case of *Durga Prasad* v. *Ram Charan* (1) a person to whom land is granted for the purpose of planting a grove without any contract to pay rent is not a tenant within the meaning of the Oudh Rent Act. He is a grove-holder and is entitled to hold possession so long as the land retains the character of a grove. The proceedings taken in ejectment against a grove-holder in the revenue Court are without jurisdiction and the civil Court can declare him to be a grove-holder. The plaintiffs in this case were not, however, holding the plot in suit as grove-holders. They were holding the plot as tenants and were paying rent for the same as such. They themselves claimed no rights as grove-holders in the ejectment suit. The proceedings taken in ejectment against them in the revenue Court were not without jurisdiction. I think the learned Subordinate Judge was perfectly right in holding in this case that the decision of the revenue Court is binding on the plaintiffs and their suit for possession of the plot was not maintainable in the civil Court. As pointed out in the case of *Umrao Singh* v. *M. Ale Raza Khan* (2):

> It may be that there are cases in which a tenant ejected from a cultivatory holding must also give up his groves, as, for example, where the tenant holds cultivated lands and groves at a bilmukta rent in which case the groves are part of his holding.

It is neither alleged nor shown that the plaintiffs' ancestor had planted the trees on the plot in suit with the permission or consent of the landlord (defendant's ancestor). He and his successors continued to hold the plot in suit as the defendant's tenant and actually paid rent for the same as already observed. They never held the plot in suit as grove-holders and cannot be allowed to claim the plot as grove-holders after their ejectment from their holding.

I think the learned Subordinate Judge was perfectly right in dismissing the plaintiffs' suit. I dismiss the appeal with costs. The decree of the lower appellate Court is confirmed in all respects.

N.K. *Appeal dismissed.*

(1) [1919] 6 O. L. J. 689=48 I. C. 417.
(2) [1898] 1 O. C. 231.

A. I. R. 1928 Oudh 231

PULLAN, J.

Mohammad Shafi—Defendant—Appellant.

v.

Raunaq Ali—Plaintiff—Respondent.

Second Appeal No. 311 of 1927, Decided on 6th December 1927, against decree of Sub-Judge, Sitapur, D/- 2nd June 1927.

Mahomedan Law—Marriage contracted within the period of iddat is valid by lapse of time—Husband inherits wife's property.

A marriage contracted within the period of iddat is a fasid marriage and being only fasid or vitiated by a temporary defect can give rise to a right of inheritance between the two parties. Where therefore marriage takes place within the period of iddat, the husband is entitled to inherit the wife's property under Mahomedan Law: 23 *Cal.* 130; 41 *Bom.* 485, *Rel. on.* [P 232 C 1, 2]

Ali Jawad—for Appellant.

Murli Manohar and *G. N. Mukerji*—for Respondent.

Judgment.—The plaintiff in this case sued for possession of a house which was formerly owned by one Mt. Bahauti. The plaintiff based his claim on the fact that Bahauti was his legally married wife and that he was her heir under Mahomedan law. The lower Courts have found that Bahauti, who was formerly a Hindu, was converted to Islam and married by nikah to the plaintiff and this finding cannot be challenged in second appeal. The case has, however, come before me because the appellant has raised the question whether the marriage between the plaintiff and this woman was invalid under

Mahomedan law and whether, therefore, the plaintiff had no right of inheritance. This plea is based on the plaintiff's own statement that he married Bibauti three or four months after the death of her first husband. If this statement is to be taken as accurate, the period of iddat, which is four months and ten days, had not expired. This question was raised for the first time in the lower appellate Court, and no definite finding was passed as to whether the marriage took place within the period of iddat; but the lower appellate Court has held that, even if the marriage took place within that period, the plaintiff is entitled to inherit under Mahomedan law.

Marriages under Mahomedan law are of three kinds. First there are valid marriages, second there are marriages which are void (batil) and thirdly there are marriages which are fasid, a word which has been translated as "vitiated". I have been asked to find that there is no essential difference between marriages which are batil and marriages which are fasid on the authority of certain commentators on Mahomedan law, but the texts to which I have been referred, namely that in the Jamai-ur-Rumuz, Vol. II, p. 264, and that in the Rudd-ul-Muhtar, Vol. II, p. 444, which will be found in *Aizunnissa Khatoon* v. *Karimonnissa* (1), have not been accepted by the leading commentators as being a correct statement of Mahomedan law. Both these authorities are based on the Dur-ul-muhtar and that commentary undoubtedly admits a distinction between batil and fasid, and lays down definitely that in the case of a fasid marriage the custom of dower is obligatory. If the dower is obligatory, the marriage cannot be altogether void, and the general opinion of the commentators is that a fasid marriage which is vitiated only by some temporary defect, can become valid when the defect is removed. There is no question that a marriage contracted within the period of iddat is a fasid marriage.

In a case of this kind the only objection to the marriage is that a certain period has not elapsed since the death of the first husband and this is a defect which can be removed by mere lapse of time. Mr. Amir Ali, in his book on Muhammadan Law, 4th edn., Vol. II, pp. 397 and 398, has given a detailed statement showing the differences between a marriage that is batil and a marriage which is fasid He says:

> Connexions which are unlawful in themselves are null and void ab initio (batil) and create no civil rights and obligations between the parties. The wife has no right of dower against the husband and neither of them is entitled to inherit from the other.

As to invalid or fasid marriages he says:

> Marriages which are not vitiated and rendered illegal by a radical defect of the character above described, stand on a different footing. In such cases also the children are legitimate.

Mr. Tyabji in his Principles of Muhammadan law, 2nd edn. p. 162, says:

> The prohibition by iddat is a mere temporary prohibition (according to the view taken by the Hanafi school), for the marriage would be valid, if it were celebrated a few months latar; it is, therefore, considered more favourably by the law than a marriage that can never be valid.

Mr. Abdur Rahim in his book on Muhammadan Jurisprudence, at p. 330, says that

> a fasid marriage, although it may be annulled by the Court, when the fact is brought to its notice, is treated as capable of giving rise to certain legal effects.

These views of the commentators are accepted in a decision of the Bombay High Court of the year 1917, *Tajbi* v. *Mowla Khan* (2), where their Lordships held at p. 496 that

> marriage with a temporarily prohibited woman, if consummated, may have legal consequences.

They mention four principal consequences: right to dower; obligation to perform iddat; legitimacy of issue; the establishment of nasab or paternity. At p. 499 they say that

> an examination of the text-book writers, old and relatively modern, puts it beyond all doubt that in numerous instances of temporary prohibition, all the legal consequences of marriage may follow, if in fact there has been consummation.

It is true that I have been referred to no case in which a husband has claimed to inherit from a wife where he married within the period of iddat but, in view of the authorities which have been cited, I am prepared to hold that such a marriage being only fasid or vitiated by a temporary defect, can give rise to a right of inheritance between the two parties. I, therefore, dismiss this appeal with costs.

N.K. *Appeal dismissed.*

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(1) [1896] 23 Cal. 130.

(2) [1917] 41 Bom. 485=39 I. C. 603=19 Bom. L. R. 300.

A. I. R. 1928 Oudh 233

STUART, C. J., AND RAZA, J.

Raj Fateh Singh—Plaintiff — Appellant.

v.

Baldeo Singh and *another*—Defendants —Respondents.

First Appeal No. 39 of 1927, Decided on 10th January 1928, from decree of Sub-Judge, Bahraich, D/- 23rd December 1926.

(a) *Evidence Act, S. 18—Statement by an agent authorized to make admissions is admissible.*

Statements made by an agent to a party to proceedings in circumstances, which show that they are expressly or impliedly authorized to make the admissions are admissible in evidence. [P 235 C 2, P 236 C 1]

(b) *Evidence Act, S. 13—Judgment in previous suit is admissible to prove illegitimacy.*

Judgment in a previous suit is admissible in evidence under S. 13 to establish the illegitimacy of a certain person: 12 *All.* 1 (*F. B*). *Foll.* [P 236 C 1]

(c) *Evidence Act, S. 32—Statement of a deceased person about relationship before controversy is admissible.*

A statement by a deceased person as to the existence of relationship, the person having special means of knowledge, and the statement being made before the legitimacy of a certain person was called in question, is admissible in evidence. [P 236 C 2]

(d) *Hindu Law—An illegitimate son cannot succeed a collateral as an heir.*

There is distinct authority for holding that an illegitimate son is not a collateral heir. By an exceptional rule he takes his father's estate by the right of inheritance and also succeeds by right of survivorship. But there is no authority for holding that he succeeds to the estate of collaterals as an heir: 21 *All.* 99, *Foll.* [P 237 C 1]

Niamatullah, *Ali Zaheer*, *Radha Krishna* and *S. N. Srivastava*—for Appellant.

Bisheshar Nath—for Respondents 1 and 2.

Judgment.—This is a plaintiff's appeal against the decree of the learned Subordinate Judge of Bahraich, dated 23rd December 1926, dismissing the plaintiff's suit. The suit was originally for the possession of three villages, Harakhpur, Bojhia and Dharampur, and the superior proprietary rights in Lal Bhojia. All these villages are situated in the Nanpara tahsil of the Bahraich District. The plaintiff's case was that this property originally belonged to a certain Bakhtawar Singh, from whom it descended to Bakhtawar Singh's son Raghunandan Singh, who died on 27th February 1892, leaving a widow Indra Kuar and two daughters Bhagwant Kuar and Sukhraj Kuar. The plaint proceeded that after the death of Raghunandan Singh Indra Kuar had succeeded to the property with the estate of a Hindu widow, that she died on 20th June 1894, and was then succeeded by her two daughters, Bhagwant Kuar and Sukhraj Kuar, who held the estate of daughters in the property, that Sukhraj Kuar had died on 20th January 1908, that her sister Bhagwant Kuar then obtained a daughter's estate in the whole property, that Bhagwant Kuar died on 18th September 1920, that on that date the succession opened to Amir Singh the plaintiff's father, and that Amir Singh having died on 2nd September 1924 the plaintiff, as the heir of Amir Singh, was entitled to succeed to the property. Amir Singh was the son of Mahipat Singh. Mahipat Singh was the son of Ram Singh. The plaintiff's case was that Ram Singh and Bakhtawar Singh were brothers, being the sons of Chheda Singh and that his father Amir Singh was the nearest collateral on the date of Bhagwant Kuar's death. The suit was instituted against Baldeo Singh, the husband of the deceased Bhagwant Kuar, who was in possession of a portion of the property and also against Sardar Karam Singh, who had purchased Harakhpur from Bhagwant Kuar and Sukhraj Kuar on 23rd July 1895 for Rs. 100,000 and had purchased Bojhia from Baldeo Singh on 15th October 1923, for Rs. 200,000. Later Kailash Kuar, the second wife of Baldeo Singh, was impleaded as a defendant. Other persons had been joined as defendants, but the plaintiff subsequently withdrew the suit against them.

The array of parties when the suit proceeded to evidence was Raj Fateh Singh, plaintiff-appellant on one side, and Baldeo Singh and his wife Kailash Kuar together with Sardar Karam Singh on the other. Sardar Karam Singh contested the suit taking, amongst other pleas, the plea that neither Ram Singh nor Bakhtawar Singh was the legitimate son of Chheda Singh. Baldeo Singh did not directly state that Bakhtawar Singh and Ram Singh were illegitimate, but he refused to admit the pedigree set up by the plaintiff and thereby put the plaintiff to

proof. Baldeo Singh asserted a title in himself based upon allegations that Raghunandan Singh had left a full estate under a will to Indra Kuar from whom the estate had descended with full proprietary title to his deceased wife Bhagwant Kuar, and he took the plea that he was the heir of Bhagwant Kuar. He accepted the transfer in favour of Sardar Karam Singh in respect of both of Harakhpur and Bojhia. Issues were framed. The first three issues were concerned with what the learned Subordinate Judge considered to be the question that should be decided first. That was the question as to whether Bakhtawar Singh and Ram Singh were the legitimate sons of Chheda Singh, and the learned Subordinate Judge proceeded to take evidence upon these issues; after hearing this evidence he arrived at the finding that Bakhtawar Singh and Ram Singh were illegimate sons of Chheda Singh from separate mothers. Having arrived at this finding he arrived at the subsequent finding that under the Mitakshara law Amir Singh had no title to succeed to the property of Raghunandan Singh. It is necessary to state here a a pecular feature of the conduct of the case. Sardar Karam Singh stood, if the plaintiff succeeded, to lose both Harakhpur and Bojhia villages for which he had paid Rs. 300,000. Provided he retained his title to Harakhpur and Bojhia, it would ordinarily be of no interest to him what happened to the remaining property in suit.

After the plaintiff's evidence had been recorded in full on these issues, Sardar Karam Singh, acting in conjunction with Baldeo Singh and Kailash Kuar, opened evidence. Five witnessess had been called for the defence up to 17th March 1926. On 20th March 1926, Sardar Karam Singh paid Rs. 15,000 in cash to the plaintiff-appellant, and the plaintiff-appellant withdrew the case against Sardar Karam Singh and renounced his claim to Harakhpur and Bojhia, leaving Sardar Karam Singh in uninterrupted possession and enjoyment of those villages. Baldeo Singh and Kailash Kuar, who were no party to this arrangement and had nothing to gain by it, continued to call evidence. After their evidence was concluded they filed an application on 14th September 1926, pointing out that they had all along denied the case asserted by the plaintiff in respect of the pedigree and that this case involved a decision as as to whether Bakhtawar Singh and Ram Singh were the legitimate sons of Chheda Singh, and that they had accepted the explicit assertion of Sardar Karam Singh that these two persons were illegitimate, but that being apprehensive as to what might be considered to result from the withdrawal of Sardar Karam Singh from the suit, they wished to re-assert their position, and to state that they wished the evidence produced by Sardar Karam Singh to be considered as evidence for them. The learned trial Judge accepted their plea and decided the suit in accordance with it. On 12th January 1926 Baldeo Singh and Kailash Kuar clearly joined Sardar Karam Singh in his application that evidence should be taken on the first three issues and that the three issues should be decided as preliminary. The first three grounds of appeal impugn the action taken by the learned trial Judge.

The position taken by the learned counsel for the appellant is, that, as Sardar Karam Singh had retired from the case and as he alone had asserted the illegitimacy of Bakhtawar Singh and Ram Singh, the Subordinate Judge had no right to decide whether those persons were or were not legitimate. He asserted in effect that Baldeo Singh and Kailash Kuar were estopped in the matter, and that they had no right to have the plea determined. We do not agree with the learned counsel on this point. It is perfectly clear that Baldeo Singh and Kailash Kuar put Raj Fateh Singh to the proof of the predigree. It was for him to prove that Amir Singh was the nearest collateral to Raghunandan Singh at the time of Bhagwant Kuar's death. A necessary step to the proof of this case was to establish that Ram Singh and Bakhtawar Singh were the legitimate sons of Chheda Singh. The learned trial Judge took a proper course in recording evidence upon these issues and in deciding these issues, in spite of the fact that Sardar Karam Singh had retired from the suit, the plaintiff-appellant having withdrawn the suit against him.

We now come to the next plea raised in the appeal which contests the finding of fact that Ram Singh and Bakhtawar Singh were illegitimate. The main evidence upon this point is documentary evidence. Chheda Singh was the pro-

prietor of the Isanagar estate. It is admitted that he died about 1811 A. D. He was succeeded by his son Ranjit Singh. Ranjit Singh was recognised by the British Government after 1857 as the proprietor of the Isanagar estate. He obtained a sanad and his name is recorded as taluqdar of the Isanagar estate in the Kheri District. It was entered as 120 in List I and as 51 in List II of the Lists prepared under Act 1 of 1869. It is further admitted that Chheda Singh had born to him four sons: Ranjit Singh, Ram Singh, Bakhtawar Singh and Jagat Singh. Jagat Singh died childless. In addition to the property in the Kheri District there was property in the Bahraich District.

We find from Ex. 22 that Mahipat Singh, the son of Ram Singh, instituted in 1868 in the settlement Courts a claim for the village of Urgurwa in the Bahraich District, which stood in the name of Ranjit Singh, on the ground that this village had been granted to his father as muafi. We further find that Mahipat Singh claimed under-proprietary rights in 1870 from Ranjit Singh in respect of a village called Raipur in the Kheri District from the settlement Courts. In respect of the property now in dispute we find that there was a suit, which terminated by an order of the Commissioner of Fyzabad in 1870, in which Bahraich property was the subject of dispute between Ranjit Singh and Raghunandan Singh, the dispute terminating in a portion of the property being allotted to Raghunandan Singh and a portion of the property being allotted to Ranjit Singh. The question of the legitimacy of Ram Singh and Raghunandan Singh is discussed in these proceedings. We shall take first the case of Ram Singh. In the Bahraich proceedings we find that Mahipat Singh's agent' Azimulla, holding a properly executed power-of-attorney, made a statement before the Court, on the 31st July 1869, of which Ex. A-37 is a certified copy. In this he clearly stated that Chheda Singh had been legally married to two wives. From one wife he had no issue. From the other wife he had as issue Jagat Singh and Ranjit Singh. He continued that Chheda Singh had two wives (as he calls them) to whom he was not married; in other words, that he had two mistresses and that Bakhtawar Singh was born from one mistress and that Ram Singh was born from the other mistress.

The case in respect of Urgurwa and other villages was not affected by consideration of the legitimacy of Bakhtawar Singh and Ram Singh. The Settlement Officer dismissed it because he found that Mahipat Singh had never held a separate kabuliyat. In respect of the claim to Raipur we find that Saktu Lal, who was the agent of Mahipat Singh, made a statement before the Settlement Officer, a certified copy of which is Ex. A-22, in which he is recorded as having said: " My principal is a bastard. My claim in Bahraich was dismissed." The Settlement Officer dismissed the claim in Ex. A-18, finding that Mahipat Singh had failed to make good a claim for sub-settlement. The claim to sub-settlement was based, not upon Mahipat Singh's relationship to Chheda Singh, but on an alleged parwana of the year 1828 A. D. It respect of Bakhtawar Singh we find a judgment (Ex. A-10) in which the Commissioner of Fyzabad states as follows:

> There is little, if any, dispute about most of the facts. The illaqa originally belonged to some Banjaras, who are said to have robbed their neighbours and to have become so troublesome that in the year 1224 Fasli, the Nizam Hakeem Mahdi Ali Khan determined to crush them and called on the neighouring taluqdars for assistance. Chheda Singh, Taluqdar of Isanagar had died in 1219,F, leaving a legitimate son Ranjit Singh, the present taluqdar, then a year old, also an illegitimate son Bakhtawar Singh, father of Raghunandan Singh, who was grown up and who became manager on Chheda Singh's death.

Now, if these documents to which we have referred are admissible in evidence, it would be difficult to find, in our opinion, evidence more cogent or more reliable to establish that neither Ram Singh nor Bakhtawar Singh was the legitimate son of Chheda Singh. There is a clear admission of two agents of Mahipat Singh, the son of Ram Singh, that Ram Singh was not legitimate. There is the clear finding of a Court that Bakhtawar Singh was admitted by his own son Raghunandan Singh not to be legitimate. The learned counsel for the appellant has devoted considerable argument to show that these documents are not admissible in evidence. We consider that Azim Ullah's statement (Ex. A-37) and Sakhtu Lal's statement (Ex. A-22) are certainly admissible in evidence under, amongst other sections, S. 18, Act 1, 1872. They were statements made by an agent to a party to

proceedings in circumstances, which, in our opinion, show that they were expressly or impliedly authorized to make the admissions. They thus fall under the head of admissions and they are admissions by Mahipat Singh who was the father of Amir Singh under whom the plaintiff claimed. They are, we consider, also admissible under the provisions of S. 13, Act 1, 1872 as establishing an instance in which the legitimacy of Ram Singh was denied They may also be admissible under Ss. 32 and 50, but that point need not be decided. It is sufficient that they are admissible. The judgment (Ex A-10) stands, however, on a different footing. It can be admitted, if admitted at all, only under the provisions of S. 13. Applying what we consider to be the principle laid down in the decision of a Full Bench of the Allahabad High Court: *the Collector of Gorakhpur* v. *Palakdhri* (1). we consider that this judgment is admissible in evidence under S. 13 to establish the illegitimacy of Bakhtawar Singh. The judgment, as will be seen, states that there was practically no dispute as to the fact that Bakhtawar Singh was illegitimate.

Now it is to be noted here that the parties in this suit appear to have accepted this position. The dispute did not turn upon the question as to whether Bakhtawar Singh was or was not illegitimate, but on the question as to whether the property, which had been granted as a reward for the assistance given by Bakhtawar Singh in quelling the raids of the Banjaras, had been granted to him or to Ranjit Singh or to both jointly. Nothing turned upon the determination of the question of legitimacy between the parties but the relationship was clearly stated by both parties in order to enable the Court to understand the situation, which was that Bakhtawar Singh made no claim to the Isanagar taluqa because he was legitimate, that he was in fact illegitimate and that he was acting as manager of the Isanagar taluqa on behalf of the minor Ranjit Singh. Such being the case, the Court had to determine whether the grant had been given to him in his individual capacity, or as manager on behalf of the taluqdar, and this question the Court decided by dividing the property, taking the view that as it was unsafe to say how it had been granted, it was more equitable, to partition it between the two rival claimants. This appears to us to be a clear instance in which the illegitimacy of Bakhtawar Singh was recognized.

There is, however, further documentary evidence on the subject. Raghuraj Singh, the son of Ranjit Singh, who succeeded his father as taluqdar of Isanagar, gave evidence in 1902 in a suit before the Subordinate Judge of Sitapur. A certified copy of this evidence is Ex. A-76. In re-examination this is what he deposed to as to Raghunandan Singh. He said :

> Raghunandan Singh was illegitimate, hence I said his wife did relate to me as sister-in-law. Raghunandan Singh's father was the offspring of the connexion between my grandfather and a female servant who had gone with my real grandmother. She was not married to my grandfather, nor do I know of what caste she was. I do not know where Raghunandan's, father or Raghunandan, was married. I did never dine with Raghunandan Singh, nor my father did, as Raghunandan's father was illegitimate. No other members of my family dine with him. Excepting in matters of interdining, he was treated by us as a member of the brotherhood. My grandfather gave some villages to Raghunandan's father and my father gave some villages to Raghunandan Singh in the shape of maintenance.

This deposition is clearly admissible in evidence uuder the provisions of S. 32, Act 1, 1872. It is a statement by a deceased person as to the existence of relationship, the person having special means of knowledge, and the statement being made before the legitimacy of Bakhtawar Singh was called in question. We do not find that up till that period anything had turned on the decision of the question as to whether Bakhtawar Singh was or was not legitimate. The statement is further admissible under S. 50, Act 1, 1872 as showing conduct. There is further, an important piece of evidence as to conduct shown in the succession to the Isanagar taluqa. The judgment (Ex. A2) is evidence of this. It clearly shows that on the death of Chheda Singh, Ranjit Singh was a child of only one year old, and that Bakhtawar Singh was a grown up man. If Bakhtawar Singh had been legitimate he should clearly have succeeded to the estate of Isanagar. He clearly did not succeed. There could hardly be any question of his being kept out of his rights (if he had any) by force, for we find that he was managing the estate on behalf of the

(1) [1880] 12 All. 1 (F. B.).

infant Ranjit Singh. This evidence certainly supports the conclusion that Bakhtawar Singh was not legitimate. There are other documents, but they are not so important. Aga nst this documentary evidence the plaintiff-appellant has put up statements of Rajindra Bahadur Singh, the son of Raghuraj Singh. (The judgment then discussed their evidence and proceeded.) We find upon the evidence that Bakhtawar Singh and Ram Singh were illegitimate sons of Chheda Singh by different mothers.

The learned counsel for the appellant has argued that even on the finding that Bakhtawar Singh and Ram Singh are the illegitimate sons of Chheda Singh by different mothers, his client should succeed as the nearest collateral. He can adduce no authority in support of this proposition. It is sufficient in our opinion in deciding against this proposition to refer to the decision of a Bench of the Allahabad High Court in *Shome Shankar Rajendra* v. *Shwami Jangam* (2). In this decision Banerji, J., discusses the rights of inheritance of illegitimate sons amongst Sudras. Bakhtawar Singh and Ram Singh were, according to our finding, Sudras. They were illegitimate sons of a Thakur. They could thus be only Sudras. Therefore this decision, which applies the Mitakshara law to the case of Sudras, is of great value and we find it of absolute authority. Banerji, J., in it has discussed the actual text of the Mitakshara and of Manu and has found that

> there is distinct authority for holding that an illegitimate son is not a collateral heir. By an exceptional rule he takes his father's estate by the right of inheritance and also, according to their Lordships of the Judicial Committee, succeeds by right of survivorship. But there is no authority for holding that he succeeds to the estate of collaterals as an heir.

The rule guiding collaterals' succession is based on the text of Manu that the inheritance belongs to the nearest sapinda and, according to the view taken by Banerji, J., which is the view which we adopt, a sapinda relationship presupposes a lawful marriage We thus have it that Ram Singh could not have succeeded as sapinda to Bakhtawar Singh and it follows as a necessary conclusion that a successor of Ram Singh cannot succeed as a sapinda to a successor of Bakhtawar Singh, and under the Hindu law the plaintiff-appellant has no right whatever. The last question raised in appeal is as to the costs. We consider that the learned trial Judge very rightly awarded full costs to Baldeo Singh and Kailash Kuar. It is, however, suggested to us that they have received costs for producing evidence which they did not as a matter of fact produce. If this be the case, the decree will be corrected. The office will check it. The point is this. It is suggested that Sardar Karam Singh produced a considerable amount of evidence which was utilized by Baldeo Singh and Kailash Kuar and it is further suggested that the costs of producing this evidence have been granted to Baldeo Singh and Kailash Kuar, although as a matter of fact they in no way contributed towards the costs. If that be so, the decree will be corrected accordingly. The point is a very small one. This will be a purely clerical alteration and in no way affects the validity of the decree. We dismiss this appeal with costs.

N.K. *Appeal dismissed.*

(2) [1898] 21 All. 99=(1898) A. W. N. 170.

A. I. R. 1928 Oudh 237

STUART, C. J. AND WAZIR HASAN, J.

Data Din and *another*—Plaintiffs.

v.

Baldeo and *others*—Defendants.

Reference for Ruling No. 1 of 1927, Decided on 20th December 1927.

Prov. Small Cause Courts Act (9 *of* 1887), *Sch.* 2, *Art.* 41—*Claim for contribution—Test to determine its nature—Sale of joint share in process of execution of a decree for arrears of rent—Sale set aside in respect of share of a person on payment—Suit to recover from other co-sharers—Article applies.*

It cannot be laid down broadly as a proposition of law that every claim for contribution founded upon a decree is not a claim of the nature specified in Art. 41. The fact that a decree may furnish the cause of action for a suit for contribution is itself no ground for holding that it cannot be a suit of the nature contemplated by Art. 41. The right test always is the nature of the suit as brought and not the circumstances which constitute the cause of action.

B brought a suit in the Court of revenue for recovery of arrears of rent against a large number of persons. He obtained a decree for a certain sum. In the process of execution of that decree *B* sold certain zamindary shares belonging to the plaintiffs and other cosharers. The sale was set aside in respect of the plaintiff's share on payment of that sum. The plaintiffs sued to recover that sum with interest from the cosharers the majority of whom were party to the decree obtained by *B*.

Held : that it was a suit by sharer in joint property in respect of payment made by him of money due from a cosharer and there-

fore its cognizance by a Small Cause Court was excluded under Art. 41. [P 238 C 2]

Mahabir Prasad—for Plaintiffs.

H. D. Chandra—for Defendants.

Judgment.—This is a reference under R. 6, O. 46, Civil P. C., by the Additional Subordinate Judge of Gonda for a ruling as to whether a certain suit pending before him in the character of a Judge of a Small Cause Court is maintainable as such or its cognizance is excluded by Art. 41, Sch. 2, Act. 9, 1887, Small Cause Courts Act.

The learned Judge of the Court below is of opinion that cognizance of the suit by the Small Cause Court is excluded by Art. 41, Sch. 2, Act 9, 1887. We agree with the learned Judge. We want to state at the outset our appreciation of the way in which the learned Judge has clearly and forcibly marshalled arguments in support of his opinion. The nature of the suit is as follows :

One Bishen Narain brought a suit in the Court of revenue for recovery of arrears of rent against a large number of persons. He obtained a decree for a sum of Rs. 394-10-6 on 22nd December 1918. In the process of execution of that decree Bishen Narain sold certain zamindari shares belonging to the plaintiffs and other cosharers. The sale was set aside in respect of the plaintiff's share on payment of a sum of Rs. 182-7-3 on 7th April 1924. The plaintiffs now claim a sum of Rs. 240-15-2 as principal and interest from the defendants, the majority of whom were party to the decree obtained by Bishan Narain.

The liability of each defendant is specified in the list attached to the plaint and is in proportion to the share which each defendant holds in the under-proprietary tenure in respect of which the decree for rent was passed. The question in the case is whether a suit of the nature described above is or is not covered by Art. 41, Small Cause Courts Act, 1887. The only argument urged in favour of the plea that it is not covered by that article is that the cause of action for this suit is the decree for rent obtained by Bishan Narain, and a claim for contribution between co-judgment-debtors is not a claim which would fall within the article mentioned above. The argument is sought to be supported by the cases of *Bhairon* v *Ram Baran* (1), *Bhagwati Prasad Singh* v. *Muhammad Abdul Hasan Khan* (2) and *Sidhnath* v. *Sheo Dayal* (3). There is no doubt that these decisions establish to a certain extent the point taken in the argument, but we are of opinion that it cannot be laid down broadly as a proposition of law that every claim for contribution founded upon a decree is not a claim of the nature specified in Art. 41, Small Cause Courts Act, 1887. In our judgment the fact that a decree may furnish the cause of action for a suit for contribution is itself no ground for holding that it cannot be a suit of the nature contemplated by Art. 41. We think the right test always is the nature of the suit as brought and not the circumstances which constitute the cause of action. In the present case the fact which has given rise to or supplied the cause of action for the present suit is certainly the decree of the rent Court, but that fact alone makes the present suit one for contribution and a suit by sharer in joint property in respect of payment made by him of money due from a cosharer still remains to be determined. That the plaintiffs are sharers in the joint property is not disputed and it was in that character alone that they were made liable in the decree for rent. That they are also judgment-debtors does not detract from their status of sharers. The payment of money which they made and now claim was, on the same reasoning, the money due from the other cosharers in the joint property. This aspect of the case is brought into prominence by the fact that neither the plaintiff's own share of liability nor those of the defendants' can be ascertained without reference to the extent of share which each holds in the under-proprietary tenure held by them jointly.

From what we have said above it would appear that the case of *Bhairon* v. *Ram Baran* (1) is clearly distinguishable from the present case and the case of *Bhagwati Prasad Singh* v. *Muhammad Abdul Hasan Khan* (2) and *Sidhnath* v. *Sheo Dayal* (3) are not helpful. The point of view now taken was not placed for consideration in the last two mentioned cases. This answer to the reference, together with the reference should be returned.

N.K. *Reference returned.*

(1) [1905] 28 All. 292.

(2) [1918] 5 O. L. J. 109=45 I. C. 236.

(3) A. I. R. 1925 Oudh 683.

A. I. R. 1928 Oudh 239

STUART, C. J.

Kashi Nath Rai— Plaintiff — Applicant.

v.

Nand Behari Singh—Defendant— Opposite Party.

Application No. 54 of 1927, Decided on 5th January 1928, from decree of Sub-Judge, Fyzabad, D/- 17th September 1927.

Provincial Small Cause Courts Act (9 *of* 1887), *Sch.* 2, *Art.* 41— A *and* B *sharing benefits of a joint bond—Certain payment by* A *to satisfy debt—Fresh bond by* A *for the balance*—B *making no payment — Creditor recovering amount from* A—*Suit by* A *against* B *for his share is not for contribution — Small Cause Court can take cognizance.*

A and *B* executed jointly a bond in favour of *C* for a certain sum. A made payments towards it. At the time of taking accounts a certain sum was found due on the bond. *A* alone executed a promissory note in full satisfaction of that liability. B was asked to join in the execution of the bond. He agreed but did not join in it. *C* instituted a suit on the basis of the promissory note against *A* alone who paid the decretal amount. *A* brought a suit against *B* for his share of the amount paid to *C*.

Held : that suit by *A* was not a suit for contribution and there is nothing in the Provincial Small Cause Courts Act to prevent a suit of this nature being brought in the Small Cause Court : 16 *O. C.* 285, *Dist.* [P 240 C 1]

S. N. Roy—for Applicant.

Naimullah—for Opposite Party.

Judgment.—The facts are as follows : On 16th January 1919 Kashi Nath Rai and Thakur Nand Behari Singh executed jointly a bond in favour of Hanuman Prasad for Rs. 187-8-0. I find on the facts that Kashi Nath Rai paid in respect of the liability on this bond Rs. 40 on 1st February 1920, Rs. 25 on 2nd February 1921, Rs. 10 on 2nd May 1921 and Rs. 20 on 1st April 1922. Thakur Nand Behari Singh paid nothing. The consideration in question of the first bond had been shared equally between Kashi Nath Rai and Thakur Nand Behari Singh. On 25th September 1922 over Rs. 300 was found due on the bond of 16th June 1919. Hanuman Prasad obtained from Kashi Nath Rai a promissory note for Rs. 300 in full satisfaction of this liability. Thakur Nand Behari Singh was asked to join in the execution of this promissory note. He agreed to do so, but refrained from executing it. Hanuman Prasad instituted a suit on the basis of the promissory note against Kashi Nath Rai alone. A decree was obtained. Kashi Nath Rai has paid in all Rs. 646 in satisfaction of this decree between February 1925 and the 23rd February 1927. On the 23rd February 1927 he instituted the suit, which I am now considering, against Thakur Nand Behari Singh. The learned Small Cause Court Judge has decided on the facts much as I have decided. The facts are very clear. Thakur Nand Behari Singh shared in the benefits derived from the execution of the bond of 16th June 1919. He left Kashi Nath Rai to make all the payments, that were made prior to 25th September 1922. He left Kashi Nath Rai to stand alone for the liability of satisfying the balance. The learned Small Cause Court Judge accepts this view of the facts, but he dismissed the suit on the ground that it was a suit for contribution, and as such could not be maintained according to the decision of the late Court of the Judicial Commissioner in *Sardha Bakhsh Singh* v. *Durga Bakhsh Singh* (1). This decision has no bearing on the case. The present suit is not a suit for contribution. There was no question of joint promise in respect of the promissory note of 25th September 1922, inasmuch as Thakur Nand Behari Singh did not join in the execution of the promissory note. The plaintiff Kashi Nath Rai has no remedy in respect of the payments made before 25th September 1922. Any such remedy as he might have in respect of those payments is barred by time, but he is certainly entitled to a remedy in respect of payments which he has made since February 1925. How does the case stand? If Thakur Nand Behari Singh had acted, as he should have acted, he would have joined Kashi Nath Rai in executing the promissory note of 25th September 1922. By the action which he has taken he has put Kashi Nath Rai at a loss to the extent of Rs. 323 and the cause of action is within time. There is nothing in the Provincial Small Cause Act to prevent a suit of this nature being brought in the Small Cause Court. I accordingly allow the application to this extent. I direct that a decree shall be passed in favour of Kashi Nath Rai against Thakur Nand Behari Singh for Rs. 323. I see no reason to allow interest. Thakur Nand Behari Singh will pay his own costs and

(1) (1913) 16 O. C. 285=22 I. C. 263.

those of Kashi Nath Rai in both Courts. I do not reduce costs.

N.K. *Application allowed.*

A. I. R. 1928 Oudh 240

PULLAN, J.

Gur Saran and *another*—Appellant.

v.

Jagannath and *another*—Respondents.

Second Appeal No. 273 of 1927, Decided on 16th December 1927.

Landlord and Tenant—Thekadar leasing for a fixed period—Landlord after expiry of the period leasing the same to another—Former holds land until lawfully ejected—Onus is on landlord to prove restriction on thekadar's powers as landlord.

Where the thekadar leases certain land to the person for a certain period and after the expiry of the period the landlord gives a lease of the same to another person, the lessee from the thekadar is entitled to hold the land until he is legally ejected and, as no such ejectment according to law takes place the lessee from landlord cannot claim possession in virtue of their lease. In such a case it is for the landowner to show as against the tenants who have been admitted to tenancy by the thekadar: (a) that he restricted his thekadar's ordinary powers as a landlord a d mode restriction known to the tenants; and (b) that the transactions between the thekadar and the tenants were not made in good faith in the ordinary course of village business and management: *S. D. 9 of* 1892, *Foll.* [P 240 C 2]

Zahur Ahmad—for Appellants.

A. P. Sen and *Radha Krishna*—for Respondents.

Judgment.—This is a second appeal from a order of the First Subordinate Judge of Bahraich who allowed an appeal from a decision of the Munsif of Bahraich. The facts of the case are as follows: This village belongs to the Nanpara estate which was at that time under the Court of Wards. The village was on theka till the end of the year 1331 Fasli, corresponding to 30th June 1924. The thekadar had leased certain land to the defendants in this case for three years from 1329 Fasli. Shortly before the expiry of the year 1331, that is in March 1924, the special manager of the Nanpara estate gave a lease of the land in suit to the plaintiffs. It has now been found that the land for which the lease was given to the plaintiffs includes certain land which was in the cultivation of the defendants. The plaintiffs have been unable to obtain possession and they have brought this suit for damages against defendants. The first Court decreed the suit, but the lower appellate Court allowed the appeal mainly on the ground that defendants were entitled to hold the land until they were legally ejected and, as no such ejectment according to law had ever taken place the plaintiffs could not claim possession in virtue of their lease.

The main argument in appeal is that the thekadar had, under the terms of his theka, no right to let land out to the defendants and that, therefore, these persons have no right, and the plaintiffs must be held entitled to the land in virtue of their lease from the landlord. It certainly appears that the terms of the theka do not contemplate that the thekadar should create new tenancies, and there is a clause in the theka prescribing the penalty in case he should do so. But a tenant who cultivates the land direct from a thekadar has his rights, and this was held by the Board of Revenue in *Lal* v. *Raja Udey Partap Udya Dutt Singh* (1), where it is laid down that in such a case it is for the landowner to show as against the tenants who have been admitted to tenancy by the thekadar: (a) that he restricted his thekadar's ordinary powers as a landlord and mode restriction known to the tenants; and (b) that the transactions between the thekadar and the tenants were not made in good faith in the ordinary course of village business and management. In the present case I would lay stress particularly on the second portion of Cl. 1 and the whole of Cl. 2. When these defendants came into possession they had no reason to suppose that the thekadar, who put them in possession, was acting contrary to the terms of the theka and no step was taken by the landlord to interfere with their tenancy. As the landlord made enquirities before giving the land to the plaintiffs, he should have ascertained that these defendants were in possession and he should have taken steps to secure their ejectment according to law. Not only did he not do so, but he disregarded his own lease in favour of the plaintiffs and accepted rents from these very defendants. In my opinion the decision of the Court below is correct, and I dismiss this appeal with costs.

N.K. *Appeal dismissed.*

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(1) [1892] S. D. 9 of 1892.

A. I. R. 1928 Oudh 241 (1)

STUART, C. J., AND PULLAN, J.

Pateshwari—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 3 of 1928 and Capital Sentence Case No. 71 of 1927, Decided on 20th January 1928, from order of Addl. Sess. Judge, Gonda, D/- 17th December 1927.

Penal Code, S. 302—Murder of the lover of the wife—Wife deserted by accused for a long time—Lover killed while asleep—Sentence of death should be inflicted.

In a case of murder of the lover of his wife by the accused, where the accused had himself left his wife for a period of several months and thereby subjected her to temptation and he killed her lover while he was asleep, and the murder was thought out and deliberate and there was no grave or sudden provocation:

Held: that punishment of death was the fit punishment to be inflicted. [P 241 C 2]

Satya Nand Roy—for Appellant.

G. H. Thomas—for the Crown.

Judgment.— Pateshwari Prasad has been convicted by the learned Additional Sessions Judge of Gonda of the offence of murder under S. 302, I. P. C., and also for an offence of attempted murder under S. 307, I. P. C.

The facts are not in dispute and the Court below has accepted the statement made by the accused as being correct. This man left his wife for a period of seven or eight months, and when he returned he found that she was pregnant by some other man. She admitted to him that she had connexion with two persons, her husband's cousin Jot Narain and a Kahar named Girau. The accused thereupon sharpened his gandasa and went to the house of Jot Narain by night. He found Jot Narain asleep and cut his throat with the gandasa. He then went to the house where his wife was asleep along with his sister and his sister's small child and made an attack upon his wife with the gandasa. She also received a blow on the neck but survived. The accused states that he had intended to kill Girau also, but after his attempt upon his wife he decided to surrender himself, and he went to the thana and made a full confession. We have only to decide whether the sentence of death inflicted by the lower Court should be confirmed or whether the accused should be sentenced only to transportation for life. There are cases in which a man who has killed his wife's lover to save his own honour may receive lenient treatment to this extent that a sentence of death may not be inflicted upon him. But there are two factors in this case which we must take into account. The first is that he had himself left his wife for a period of several months and thereby subjected her to temptation and the second is that he killed her lover while he was asleep. There is no question that the murder was thought out and deliberate and there was no grave or sudden provocation. In our opinion this is a case in which the extreme penalty should be inflicted. We, therefore, dismiss the appeal, uphold the sentence and conviction and order that Pateshwari Prasad shall be hanged by the neck till he be dead.

The sentence under S. 307 will of course not be carried out if the other sentence is carried out.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 241 (2)

STUART, C. J., AND WAZIR HASAN, J.

Jagatjit Singh — Defendant — Appellant.

v.

Brij Mohan Das—Plaintiff—Respondent.

First Appeal No. 67 of 1927, Decided on 19th December 1927 from decree of Sub-Judge, Kheri, D/- 16th February 1927.

(a) *Grant—Land given to a Mahant of a temple and his heirs as occupancy tenants under a settlement decree without a right of transfer with condition that the grant to last so long as temple would be in existence—No conditon of income being devoted to expenses of the temple—Grant is not for temple but is personal—Land covered by settlement decree is not wakf property—Charitable & Religious Trusts Act does not apply.*

The Settlement Officer, gave a Mahant and his heirs rights as occupancy tenants without a right of transfer, without any condition as to the purposes to which the income of the land was to be devoted, without any reference to their being Mahants of a particular temple and without suggesting that the temple was to benefit from their possession. There were no conditions requiring the Mahant and his successors to devote any portion of the income towards the expenses of the temple. They were granted the property subject only to the condition that they might retain it so long as the temple was in existence.

Held: that the grant was not a grant to the temple, but a grant to an individual on the condition that he satisfied certain expenses of the temple from the income of the property granted, and the land given by the settlement decree was not wakf property given for religious or charitable purpose and Act 14 of 1920 was not applicable. [P 245 C 1, 2]

Wazir Hasan, J.—The essence of a trust for a public or religious purpose lies in its characteristic of permanency. The possibility of such a trust cannot be conceived in a tenure where the tenure can come to an end on default or even on the exercise of a volition on the part of the trustee. Where the right of occupancy which the plaintiff's predecessor had obtained in the lands in suit from the settlement Court is liable to be extinguished altogether in the event of non-payment or refusing to pay rent to the superior proprietor, the case is not one of trust falling within the purview of Act 14 of 1920: *A. I. R.* 1924 *P. C.* 109 and 5 *Cal.* 438 (*P. C.*), *Foll.* [P 246 C 1]

(*b*) *Civil P. C., S.* 11—*Decision in a previous suit based upon interpretation of judgment of settlement Court—Decision does not operate as res judicata in a subsequent suit between parties.*

Where in a previous suit the Court's decision was based entirely upon the interpretation of the judgment of the settlement Court and the decision was no more than the statement of the legal meaning which the Court attached to the words of the settlement Court's judgment and decree, *Held*: the decision would not act as res judicata in a subsequent suit between parties. [P 244 C 2]

Ali Zaheer, *Bisheshar Nath* and *Bhagwati Nath*—for Appellant.

A. P. Sen and *S. C. Das*—for Respondent.

Stuart, C. J.—The suit, out of which this appeal arises, came to be instituted in the following manner: There is in the district of Kheri a small town called Dhaurahra, which was formarly a portion of what was known as the Dhaurahra estate, which was held by certain Jangre Thakurs. This estate was confiscated after 1857 and divided amongst certain grantees, the portion, which included Dhaurahra town, being granted to Captain John Hearsey. Captain Hearsey sold this village to a Colonel Boileau and Colonel Boileau sold it to the Maharaja of Kapurthala, the predecessor-in-interest of the present defendant-appellant. According to tradition Tulshi Das, the author of the Ramayana, visited Dhaurahra in the 17th century. It is admitted on both sides that in connexion with this alleged visit a temple came into being. In the first regular settlement of the Kheri District Mahant Gobind Das, who was manager of this temple, applied to the settlement Officer in respect of rights in Dhaurahra. His claim included two prayers: one in respect of rights to land in Dhaurahra which he asserted, were in his possession and the other in respect of rights to lands in Parauri which he asserted had formerly been in his possession, but from which he had been subsequently dispossessed. His claim was against Colonel Boileau, who was then the owner of the village. We are not concerned with the decision as to the rights in Parauri. We have, however, to note that the latter only were the rights which, according to the Mahant, had been granted by a certain Raja Arjun Singh who, as far as we can gather from the wajib-ul-arz, was in possession of the estate from 1837 to 1855. The rights in Dhaurahra, he stated, had been granted by a King of Oudh. Colonel Boileau took the position in respect of the Dhaurahra rights that they had been granted by a taluqdar in the time of the Kings of Oudh and not by a King. The order of the Extra Assistant Commissioner on this application was passed on 18th March 1871. It is filed as Ex. A-9. The decree in accordance with the order is filed Ex. 1. It is of the same date. The order on the decree can be stated practically in full. It is very short:

> Four hundred and thirty four bighas ten biswas of land, as detailed, were awarded to Mahant Gobind Das in occupancy right on condition that he paid the land revenue assessed upon those lands together with 15 per cent. to Colonel Boileau, the superior proprietor.

That is all which the decree states, but the judgment states that Mahant Gobind Das and his heirs are entitled to remain in possession of this land "as long as the "Thakurdwara, i.e., the temple, exists." It further stated that their rights should be heritable, but not transferable. Mahant Gobind Das remained in possession accordingly. We find that on 16th September 1916 he executed a registered deed of agreement in favour of Brijmohan Das, the present plaintiff-respondent, who was his disciple. In this he stated that of his own will he transferred to Brijmohan Das all his rights in the lands in question. In this document he stated very clearly that the grant of the rights in these lands had been made by a Rajah of Dhaurahra

in the name of the temple, that he (Mahant Gobind Das) was as Mahant the manager of the temple, and that the grant had been made for the expenses of the temple and for its maintenance. The agreement laid down very clearly that no .manager had the right of transfer. This agreement is Ex. A-4. It is somewhat surprising, after having read the averments of Mahant Gobind Das in Ex. A-4, to find that in 1919 it was ascertained that he himself had been alienating the property freely. In that year there was decided in the Court of the Subordinate Judge of Kheri a suit between the Maharaja of Kapurthala as plaintiff and Mahant Gobind Das and Brijmohan Das with others as defendants. Mahant Gobind Das had made three transfers prior to 16th September 1916, of what he had himself described as temple property for a total consideration of more than Rs. 3,200. This was a suit which purported to be brought by the Maharaja of Kapurthala as superior proprietor, for a declaration that certain transfers made by Mahant Gobind Das and Brijmohan Das were invalid and ineffective. The suit was decided on 29th May 1919. It was dismissed, although it was found that these transfers had been made, and that these persons had no right to make the transfers, because it was found that the plaintiff was not entitled to a declaration.

We find on reference to our registers that the Maharaja of Kapurthala appealed against this decision and that his appeal (First Civil Appeal No. 55 of 1919) was dismissed on 27th May 1920, by the Judicial Commissioner, but there is no exhibit on the record to show the judgment in that appeal. In 1921 there was a further litigation. The Maharaja again brought a suit for a declaration that certain other transfers made by Mahant Gobind Das and Brijmohan Das were invalid. On this occasion he obtained a decree from the Subordinate Judge of Kheri on 22nd September 1922. This is Ex. 3. Some of the defendants appealed against this decree to the Court of the Judicial Commissioner. Their appeal was dismissed on 17th December 1923. The decision is Ex. A-1. It is to be noted that there is a slight misdescription in this judgment, it being stated there that the property had been granted by Raja Arjun Singh. As we have shown, it was never suggested that the Dhaurahra property was granted by Raja Arjun Singh.

The next proceedings were proceedings by the Maharaja against Brijmohan Das alone under the provisions of Act 14 of 1920. Under S. 3 the Maharaja applied to the District Judge of Sitapur, on the ground that the Dhaurahra temple was the property of a trust created or existed for a public purpose of a charitable or religious nature, for directions that Brijmohan Das should furnish through the Court particulars as to the nature and objects of the trust and other particulars.

Brijmohan Das, apparently asserting that there was no such trust, undertook to institute within three months a suit for a declaration to that effect. The District Judge ordered stay of proceedings, and the suit out of which this appeal has arisen was instituted. It has been decreed. The present appeal is preferred.

We have been put to some difficulty in understanding the form of the suit. Act 14 of 1920 provides only for such a suit being instituted, when the existence of the trust is denied or when there is a denial that it is a trust, to which the Act applies. Brijmohan Das has not asked for a declaration to either effect. He has asked for a declaration that the land which was covered by the settlement decree (Ex. 1) is not wakf property given for religious or charitable purposes, and is not governed by Act 14 of 1920, but that the said property was given for the maintenance of the ancestors of the plaintiff and his successors and that the plaintiff is the occupancy tenant of the land. He has received a declaration to this effect. Although we should have been in a better position to decide the suit had we known how the plaintiff came to ask for such a declaration we note that the defendant took no exception to the form of the suit either in the lower Court or in appeal. It would have been advantageous if the application of the plaintiff before the District Judge and the District Judge's order had been proved before us. They have not been proved before us. We must, however, consider the suit as maintainable in view of the action of the parties. We have further to note that Ex. 4 is a certificate of the Local Government granting the plaintiff

permission under S. 86, Act 5, 1908 to bring a suit against the defendant (who is a Ruling Prince), for a declaration that the plots of land known as Chak Ram situated in village Dhaurahra, pargana Dhaurahra, District Kheri which are in his possession are not trust property.

We, therefore, propose to deal with this appeal upon its merits. The first point which I wish to note is that it is clear upon the evidence and the admission of parties that the temple came into existence many years before the grant was made. It clearly came into existence about the seventeenth century, and the grant could not have possibly been made at the earliest until the eighteenth century as it was made either during the rule of the Kings of Oudh or possibly of the Nawabs. The next point upon which I lay stress is that there is absolutely no evidence to show the nature of the grant prior to the decision of the Settlement Court in Ex. A-9. The evidence afforded by the decision of the Settlement Court as to the nature of the grant is simply this : Mahant Gobind Das and his heirs, were to hold this land as occupancy tenants without power of transfer so long as the temple existed. It was nowhere said that they were to hold it as Mahants of the temple. It was nowhere said that the temple was the grantee. It was not even said that any portion of the income from these lands was to be devoted towards the maintenance of worship or other objects connected with the temple. It is further to be noted that here there was nothing in the nature of a college or asthan. There was a sole Mahant who nominated a disciple as his successor. The evidence afforded by the settlement proceedings would certainly go to show not only that the grant was not made to the temple but that the grant was made to Mahant Gobind Das as long as the temple existed. It is true that in the subsequent agreement (Ex. A-4) Mahant Gobind Das makes a distinct assertion that the grant was to the temple and not to himself. It is clear that he could have no personal knowledge on the subject. The settlement proceedings to which he was a party show that he was absolutely vague even as to the time when the grant was made, and that he did not know who had made it. Further the value of his assertions that the property was temple property is nullified by the fact that before he made those assertions he had been dealing with the property as though it was his own, in fact contravening the terms of the decree which gave him title. That had given him heritable but nontransferable rights. It is admitted by the plaintiff-respondent that the temple in question is a temple to which the public have access, but we are not dealing here with the question as to whether the temple is a public trust. We are dealing with the question as to whether this particular grant was a grant to the temple or a grant to Mahant Gobind Das and his heirs. There are in the grounds of appeal pleas that the plaintiff's suit was barred on the principle of res judicata and on the principle of estoppel. I can find nothing to bar it on the principle of res judicata. It is true that in the judgment (Ex. A-8) the learned Subordinate Judge decided that the Maharaja of Kapurthala's predecessor-in-title had given the land and the groves in suit by way of muafi to Mahant Gobind Das's ancestor for the purpose of meeting the expenses of the Thakurdwara. But this decision was based entirely upon the interpretation of the judgment of the Settlement Court to which I have already adverted. The learned Judge said :

> The fact that the judgment decreed that defendant 1 and his successors were to hold possession so long only as the Thakurdwara remains in existence clearly goes to show that the land was granted for the expenses for the maintenance of the Thakurdwara which is in existence in this patti.

It was for that reason and for that reason alone that he decided this issue in this manner, and his decision is no more than the statement of the legal meaning which he attaches to the words of the Settlement Court's judgment and decree. The legal meaning to be attached to these words constitutes a question of law, and cannot be considered in my opinion binding on a subsequent Court especially as nothing turned on this decision. Although this point was decided in favour of the Maharaja of Kapurthala his suit, as has already been stated, was dismissed, and the dismissal was upheld on appeal. In the second litigation there was no decision on the point in question. Further I can find no ground of estoppel. I consider the evidence afforded by Mahant Gobind Das's

statement in Ex. A-4 of no value at all, and I find myself in consequence confined, for the decision in this appeal, to the interpretation which I place upon the settlement proceedings. There is no other evidence that I can see of value in the matter. Although there are decisions to the effect that the evidence, as to the manner in which property has been treated by the heads of religious institutions is valuable to show that the property in question pertains to the institutions and not to the heads in their individual capacity, none of these decisions assist particularly towards determining the nature of the title in the property in question. There is, however, a recent decision of their Lordships of the Judicial Committee which is of very great value as a guide towards the determination of the point. I refer to the decision in *Mohammad Raza* v. *Yadgar Hussain* (1). There in a case very similar to this where the Chief Commissioner of the Central Provinces has ordered that certain villages were to remain revenue-free, as long as a certain imambara was in existence, on the condition that the income arising from the muafi was properly spent and reports of management were submitted to Government for sanction, their Lordships decided that the grant was not wakf but a personal grant subject to a condition. I do not think that I am falling into the error of construing the terms of one document from the meaning attached to the terms of another in arriving at the conclusion that the doctrine laid down by their Lordships in this decision assists materially to the decision of the present appeal. Here we find that the Settlement Officer, while giving Mahant Gobind Das and his heirs as occupancy tenants without a right of transfer, without any condition as to the purposes to which the income of the land was to be devoted, without any reference to their being Mahants of a particular temple and without suggesting that the temple was to benefit from their possession superadded the condition as long as the temple would last.

In the case before them their Lordships held that the grant was a grant *sub conditione* although the temple benefited very largely from the grant. The expenses of the temple had to be defrayed from the revenue and the income arising from the muafi had to be properly spent and reports of management had to be submitted to Government for sanction. Nevertheless they held that the grant was not a grant to the temple but a grant to an individual on the condition that he satisfied certain expenses of the temple from the income of the property granted. Here the case is very much stronger for here there are no conditions requiring the Mahant and his successors to devote any portion of the income towards the expenses of the temple. They are granted the property subject only to the condition that they may retain it so long as the temple is in existence. For the above reasons I consider that the suit of the plaintiff-respondent has been rightly decreed and would dismiss this appeal with costs.

Wazir Hasan, J.—This is the defendant's appeal from the decree of the Subordinate Judge of Kheri, dated 16th February 1927.

The suit in which this appeal is made arises out of proceedings taken by the appellant against the plaintiff-respondent under Act 14, 1920. The purpose of the suit is to obtain a declaration that the property in suit is not trust property within the meaning of the said Act. The Act deals with

> express or constructive trust created or existing for a public purpose of a charitable or a religious nature.

It is not contended that the case before us can be a case of constructive trust. If the matter at all falls within the purview of Act 14, 1920 then the present case must be a case of express trust. The trial Court is of opinion that no such trust has been established and has, therefore, granted the decree which is now being challenged in appeal.

The learned Chief Judge has, if I may respectfully say so, exhaustively and ably dealt with the question in issue and I have very little to add as I entirely concur with him in his opinion that the appeal should be dismissed.

It seems to me that there can be a perfectly valid tenure in law where a person holds property as an owner burdened with a charge for the support of a religious foundation—see the case of *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (2); and fur-

(1) A. I. R. 1924 P. C. 109=51 Cal. 446 = 51 I. A. 192 (P. C.).

(2) [1879] 5 Cal. 438=6 I. A. 182 = 4 Sar. 58 (P. C.).

ther there can be a valid tenure in law where the owner of a property holds it subject to certain obligations for the maintenance of a religious institution : see the case of *Muhammad Raza* v. *Yadgar Hussain* (1). I think that the present case is of the latter character. Whatever might have been the nature of the title on which the property now in suit was held as a subordinate tenure prior to the confiscation of the soil of Oudh under Lord Canning's proclamation of March 1858, the title and its nature must now be sought in the decree of the Court of Settlement passed in the present case on the 18th March 1871: Ex. A 9. I construe this decree to mean that the plaintiff's predecessor-in-interest obtained under it a right of occupancy with the incidents of heritability and non-transferability attached to it. To this right of his was added the obligation of maintaining the Thakurdwara. It need hardly be said that the essence of a trust for a public or religious purpose lies in its characteristic of permanency. I cannot conceive the possibility of such a trust in a tenure where the tenure can come to an end on default or even on the exercise of volition on the part of the trustee. In the present case the right of occupancy, which the plaintiff's predecessor had obtained in the lands in suit from the Settlement Court was liable to be extinguished altogether in the event of non-payment or refusing to pay rent to the superior proprietor.

By Court.—The appeal is dismissed with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 246

PULLAN, J.

Faqir Baksh Singh—Defendant—Appellant.

v.

Prag Singh—Plaintiff—Respondent.

Second Appeal No. 322 of 1927, Decided on 9th January 1928, against decree of 3rd Addl. Dist. Judge, Lucknow, D/- 20th May 1927.

(*a*) *Limitation Act, Art.* 144—*Tenant of grove dying without heir—Custom that in such a case grove passes to landlord—Landlord bringing declaratory suit—Article applicable is* 144 *and not* 142.

The original tenant of a certain grove died leaving no heir. Under the law of the province and village custom, a tenant's grove escheats to the landlord if the tenant has no heir. The plaintiff being a village landlord sued for a declaration that he was the owner and possessor of that grove. The trial Court, regarding the suit as one only for possession, held that the suit fell under Art. 142 and threw the suit on the ground that the plaintiff had not proved possession within twelve years.

Held: that this was not a suit to which Art. 142, Lim. Act, applies, but that the article more strictly applicable was Art. 144. The essential difference between these two articles is that in the first case the owner bases his claim from the date of his dispossession, and in the second he bases his claim on his title without regard to his possession or dispossession, and time begins to run from the date that the defendant's possession becomes adverse to the plaintiff.

[P 247 C 1]

(*b*) *Evidence Act, S.* 102—*Suit for declaration of title and possession against trespasser—Title admitted—Trespasser must prove adverse possession.*

Where the plaintiff brings a suit on the basis of his title which is admitted, it is not for him to prove possession on his own part within twelve years, but it is for the trespasser to prove his adverse possession: *A. I. R.* 1926 *Oudh* 313; *A. I R.* 1916 *P. C.* 21 ; *A. I. R.* 1921 *Bom.* 368, *Ref.* [P 247 C 1]

K. C. Misra—for Appellant.

J. P. C. Bhattacharji and *N. N. Sinha*—for Respondent.

Judgment.—The plaintiff in this suit is a village landlord and he sued for a declaration that he was the owner and possessor of a certain grove. In the alternative he prayed for possession of the grove in the event of the Court finding that he had been dispossessed and he also sued for Rs. 5 by way of mesne profits on account of certain mango fruit which had been taken by the defendant. The facts of the case are very simple. The original tenant of the grove was one Bajrangi Lal. He died leaving no heir. Under the law of this province and village custom, a tenant's grove escheats to the landlord if the tenant has no heir. It is therefore admitted that in law the plaintiff became the owner of the grove on the death of Bajrangi Singh without an heir. The defence put up in this suit was, first of all, that the defendant really was the heir of Bajrangi Singh; and secondly, even if he were not the heir, he had obtained a title by adverse possession. The plaintiff's title under the law was never denied. The Court of first instance ignoring the fact that the plaintiff sued for a declaration and regarding the suit as one only for possession, held that the suit fell under Art. 142, Lim. Act, being a suit for possession of immovable pro-

perty where the plaintiff, while in possession of the property, had been dispossessed. He threw the suit on the ground that the plaintiff had not proved possession within twelve years and that the defendant had proved continuous possession for over twelve years. The lower appellate Court pointed out that this was not a suit to which Art. 142, Lim. Act, applies, but that the article more strictly applicable is Art. 144. The essential difference between these two articles is that in the first case the owner bases his claim from the date of his dispossession; and in the second he bases his claim on his title without regard to his possession or dispossession, and time begins to run from the date that the defendant's possession became adverse to the plaintiff.

In the present case the plaintiff's title is actually admitted, and in his plaint he has never stated that he has been dispossessed. All that he says is that if the Court finds that he has been dispossessed he should be given a decree for possession. His claim is that he has been in continuous possession, but his possession has been interfered with by the defendant who has obtained the entry of his name in the revenue papers, and in the year 1925 took possession of the fruit of the mango trees. It is not an easy matter to determine the possession of a grove of mango trees in a village. Generally speaking, the trees are not watered or tended in any way and the only assertion of possession is by taking the fruit. It is not proved that the defendant took the fruit of these trees before the year 1925 and, even if he did take the fruit, it does not amount to dispossession. It may have been merely an act of theft. The possession of the trees themselves remains unaltered. If then it be the case that the plaintiff has brought this suit on the basis of his title which is admitted, it is not for him to prove possession on his own part within twelve years, but it is for the trespasser to prove his adverse possession. Both the Courts below found that the defendant failed to prove that he was the heir of Bajrangi and he was, therefore, a trespasser. The Court of first instance found that he has been in continuous possession for fourteen years and he would have been prepared to give him a decree presumably on that finding had he held that it was necessary for the defendant to prove adverse possession. The lower appellate Court did not accept the evidence of the defendant that he had been in possession for fourteen years. He discarded the oral evidenec as unreliable. He found that Bajrangi Singh died somewhere between the years 1910 and 1915 and the first piece of evidence of the defendant's possession was the khasra for 1322 Fasli corresponding to the year 1914-15 A. D., which was less than twelve years before the suit was brought in 1925. It is unnecessary to go further into the defendant's case of adverse possession as the earliest proof which he can adduce was less than twelve years before the suit was filed, but I may remark that he did not improve his case by falsifying two copies of the khasras for the years 1323 and 1324 Fasli by inserting marks against this number indicating his possession, whereas in the original no such marks appear. Thus the defendant failed to prove adverse possession, and in my opinion the burden of proof was upon him.

The lower appellate Court has referred to a decision of a single Judge of this Court reported in *Sukhdeo* v. *Ram Dulari* (1) and also to a ruling of their Lordships of the Privy Council reported in *Secretary of State* v. *Chellikani Rama Rao* (2) and the judgment of the Bombay High Court reported in *Swamirao Shriniwas* v. *Bhimabai* (3). The judgment of their Lordships of the Privy Council referred to lays down most emphatically the principle of law that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. As their Lordships observe :

> It would be contrary to all legal principles to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.

I am of opinion that this appeal was rightly decided by the Court below and I dismiss the appeal with costs.

N.K. *Appeal dismissed.*

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(1) A. I. R. 1926 Oudh 313=29 O. C. 131.
(2) A. I. R. 1916 P. C. 21=39 Mad. 617=43 I. A. 192 (P. C.).
(3) A. I. R. 1921 Bom. 368=45 Bom. 1020.

A. I. R. 1928 Oudh 248

PULLAN, J.

Ahmad Shaji and *others*—Defendants—Appellants.

v.

Jamal Ahmad and *others*—Plaintiffs—Respondents.

Second Appeal No. 356 of 1927, Decided on 10th January 1928, from order of Sub-Judge, Unao, D/- 22nd August 1927.

Evidence Act, S. 32—Receipt by deceased person stating property in dispute as one of the boundaries to an adjacent plot and consisting of acknowledgment of the receipt of money is admissible in evidence under S. 32 and not S. 13.

A receipt, stating the disputed property a sono of the boundaries to an adjacent plot, executed by a deceased person in the ordinary course of business and consisting of an acknowledgment written or signed by him of the receipt of money, is admissible in evidence under S. 32, and not under S. 13 : 19 *C. W. N.* 468 and *A. I. R.* 1922 *Cal.* 251, *Dist.* [P 248 C 2]

Zahur Ahmad—for Appellants.

Ali Mohammad and *Hakimuddin*—for Respondents.

Pullan, J.—These two appeals have been preferred against the judgment of the Subordinate Judge of Unao, who modified a decision of the Munsif of Safipur in a case brought by certain persons for a share of property which is admittedly in the possession of their two uncles. The first Court decreed the suit for four items of property and dismissed the suit for the remaining four, holding that in respect of these items plaintiffs had not proved their right to a share. The appellate Court went through each item and decided that all of them belonged either to the grandfather or the great uncle of the plaintiffs, and that the plaintiffs were, therefore, entitled to a share in each and every item. Prima facie these are pure findings of fact and it has lain heavily upon the appellants to show how they can be challenged in second appeal. The first five grounds of appeal all allege that there was no legal evidence on the record to justify the finding and this is the point which has been pressed for my consideration. The 6th, 7th, 8th and 9th grounds of appeal have not been pressed and I shall consider the bearing of the 10th ground of appeal later.

The objection raised to the finding of the lower appellate Court as to the first item is that the Court relied upon a receipt executed by one Muhammad Taqi who was a cousin of the parties and is now deceased in which he gave the boundaries of an adjacent plot and stated that one of the boundaries was the diwankhana of Imdad Rasool. The lower Court finds and I cannot contest the finding that this refers to the plot in suit No. 658, but I am asked to consider that the receipt in question is not admissible in evidence on the authority of the Calcutta High Court as expressed in two rulings : *Abdul Ali* v. *Rejan Ali* (1) and *Saraj Kumar Acharji* v. *Umed Ali* (2). It appears from these rulings that the Calcutta High Court has not always maintained the same opinion on this question, but, apart from that, there is an inherent difficulty in applying either of these rulings to the present case because they are rulings based on S. 13, Evidence Act, which lays down what facts are relevant where the question is as to the existence of any right of custom. No such question arises in the present case, and I am unable to apply principles which are laid down for guidance in cases which fall under S. 13, Evidence Act, to cases like the present where all that the document is required to prove is the reputed ownership of a certain property.

In my opinion such a document as this is admissible in evidence under S. 32, Evidence Act. It is a statement made by a deceased person in the ordinary course of business and it consists of an acknowledgment written or signed by him of the receipt of money. It may be that it is a weak piece of evidence but it is admissible and even if the finding of the Court below were based entirely on that document I could not hold that it was based on inadmissible evidence. But besides this document there is other evidence on which the Court relies, namely, the statement of witnesses. It is true that the first Court disbelieved the plaintiff's witnesses, but the lower appellate Court nowhere says that he shared that view and he mentions without adverse comment, the fact that grand father of two of the plaintiffs used to sit and hold his wrestling bouts on this ground. I must hold, therefore, that the finding of the lower appellate Court as to this house is a finding of fact based on legal evidence and one which cannot be challenged in second appeal.

(1) [1913] 19 C. W. N. 468=21 I. C. 618.
(2) A. I. R. 1922 Cal 251.

Two other findings are seriously contested. First the finding as to the second item, plots 659 to 661, and secondly the finding as to the fourth item which is plot 180. In his finding on the second item the lower appellate Court has made certain observations which I cannot understand; in particular he says:

> Thus the possession of defendant 1, during the lifetime of his father Imdad Rasol was possession of Imdad.

I do not see how this follows from the preceding sentence and in general I can see no reason why an adult Mahomedan should not possess land on his own account in the lifetime of his father. I find that the plaintiffs' witnesses have stated that an old room of Imdad Rasool existed on these plots and only fell down four or five years ago when it was rebuilt by the defendant. As the lower appellate Court took into account the plaintiffs' witnesses in regard to the first item it may be presumed that he did not reject them entirely in regard to the other items, and in this case too he has further used the evidence of one of the defendant's witnesses which he interprets to mean that the defendant's father was actually in possession of this plot. Although the finding of the Court below is unsatisfactory in form I am not prepared to find that it is not based on legal evidence and as it is certainly a finding of fact I am not prepared to interfere with it in second appeal.

The finding on item 4, which is plot No. 180 is also one to which I might very well take exception if I were sitting as a Court of first appeal. This plot is known as Mangal Bazar and the house on it belonged to a certain Chandi Lodh. There is documentary evidence to which the lower Court pays no attention that the market rights belonged to a certain Qurban Ali as far back as the year 1867 and that he shared them with a certain Farzand Ali. The defendant alleges, though he cannot prove, that he obtained the rights of Farzand Ali's widow over the plot and the evidence that the plot ever belonged to Imdad Rasol is hardly convincing. Here too it must be supposed that the lower appellate Court had before him the evidence of the plaintiff's witnesses but he seems to have based his conclusion principally on the statement of Sajjad Husain who is one of the defendant's witnesses, in particular that part of his cross-examination in which he stated that defendant 1 was in possession of Mangal Bazar in the lifetime of his father

> because the latter was an old man and that when he could not settle disputes as to this bazar his father used to settle them.

Undoubtedly this statement suggests that the defendant was in possession of the plot as an agent for his father and the finding of the lower appellate Court that Imdad Rasool was really in possesion of Mangal Bazar is like the other findings of fact based on legal evidence and one which I cannot reverse in second appeal.

There remains only the last ground of appeal which, as framed, appears to be a plea of equity, although the learned pleader has attempted to revive in this form a plea of acquiescence which he dropped in the Court below. The plea is that the Court below erred in giving a decree for joint possession over plots 658 to 661 in spite of the proved fact that the defendants-appellants had erected houses thereon at considerable cost without objection on the part of the plaintiffs-respondents. Now the plea of acquiescence was, as I have stated, dropped in the Court below and, therefore, the fact that the plaintiffs-respondents made no objection to these constructions is not now relevant. The possession of the defendants, who are, as I have stated, uncles of the plaintiffs, of property which descended from their common ancestor must be regarded as possession on behalf of the whole family and I cannot myself see how any other decree can be given than a decree for joint possession. What this implies must be decided in the execution Court.

For these reasons I dismiss these appeals with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 249

PULLAN, J.

Thakur Din—Defendant—Appellant.

v.

Uma Prasad Dubey and *another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 319 of 1927, Decided on 22nd December 1927, from decree of Addl. Sub-Judge, Fyzabad, D/- 28th August 1927.

Landlord and Tenant—Notice of ejectment by landlord—Decision of Board of Revenue that tenant holding land under special agreement —Suit for declaration by landlord—Tenant not contesting the suit on the ground that he had under-proprietary or thekadari rights—Landlord is entitled to a declaratory decree as cloud is cast upon the landlord's title.

The landlord issued a notice of ejectment to the tenants and they contested the notice on the ground that they were under-proprietors. The Board of Revenue decided that the tenants were not liable to ejectment as they held the plots under a special agreement and a decree of the Court. The landlord brought a suit for a declaration that the tenants are only tenants of certain plots and had no under-proprietary or pukhtadari rights in them :

Held : that it was a case in which a cloud had been cast on landlord's title which had not been finally removed by the decision of the revenue Courts which were not competent to decide the question of under-proprietary title. The landlord had a right to sue and as his claim was not contested in the sense that the tenants did not assert any pukhtadari or under-proprietary right, the landlord was entitled to a decree : *A. I. R.* 1923 *P. C.* 118 ; *7 O. C.* 187 ; *7 O. C.* 372, *Dist.* : *A. I. R.* 1916 *P. C.* 150 and *A.I.R.* 1924 *Oudh* 69, *Foll.* [P 250 C 2 ; P 251 C 1]

R. D. Sinha—for Appellant.

Radha Krishna—for Respondents 1 and 2.

Judgment.—This is an appeal from order of the Additional Subordinate Judge of Fyzabad who allowed the appeal from the probationary Munsif and decreed the suit brought by a zamindar for a declaration that the defendants are only tenants of certain plots and had no under-proprietary or pukhtadari rights in them. The main ground of appeal is that the plaintiff had no cause of action in the present suit. It is true that the defendants did not in the present case assert thát they had under-proprietary or pukhtadari rights. They contested the suit on other grounds, in particular, on the question of jurisdiction and on the question of limitation. The plaintiffs issued a notice of ejectment to the defendants and they contested the notice on the ground that they were under-proprietors. This case was contested up to the Board of Revenue and, the final decision of the suit was that the present defendants were not liable to ejectment as they held the plots under a special agreement and a decree of the Court. It is now argued before me on behalf of the appellants that that decision settled the question once for all and that it would be impossible for the appellants ever again to set up a title as under-proprietors. In support of this view I am referred to a case reported in *Muhammad Mumtaz Ali Khan* v. *Mohan Singh* (1), where it is held that a simple assertion of proprietary rights in a judicial proceeding, which ex hypothesi was unfounded at the date when it was made, cannot, by the mere lapse of time, convert what was a tenant's title into that of an under-proprietor.

It is, therefore, argued that the appellants can never again revive the pleas which they made in the revenue Courts, and such pleas must be taken to be mere verbiage as held in a decision of the late Court of the Judicial Commissioner of Oudh in a case reported in *Thakur Chhattardhari Singh* v. *Bhagwan Din* (2). I am also referred to another case of the same volume at p. 372, *Mahabir Prasad* v. *Muhammad Ewaz Ali Khan* (3), where it is laid down that it is not merely an assertion of an adverse title on the part of a tenant which necessitates a suit for a declaration on behalf of the landlord with respect to his title. It is only when on the basis of such an assertion an order adverse to the landlord has been passed by the revenne Court, that the landlord will be required to file a declaratory suit ; but that is not a case in which the landlord was in any way bound to file a declaratory suit. In my opinion it is a case in which a cloud has been cast upon his title which has not been finally removed by the decision of the revenue Courts which are not competent to decide the question of under-proprietary title. A very similar question arose in a case decided by their Lordships of the Privy Council reported in *Mohammad Abdul Hasan Khan* v. *Prag* (4). In that case the defendants did not in their written pleadings claim to hold any under-proprietary right in the village, nor any position in the village other than that of tenants, but they had previously filed objections in revenue Courts claiming to be in possession of certain villages as zamindari and in that case their Lordships held that the landlord was entitled to bring the suit against them. This case was referred to

(1) A. I. R. 1923 P. C. 118=45 All. 419=50 I. A. 202.
(2) [1904] 7 O. C. 187.
(3) [1904] 7 O. C. 372.
(4) A. I. R. 1916 P. C. 150=20 O. C. 8.

and a similar view expressed by a Bench of the late Judicial Commissioner's Court in a case reported in *Bishunath Saran Singh* v. *Sitla Bakhsh Singh*.(5).

I find, therefore, that the plaintiffs had in this case a right to sue and as their claim was not contested in the sense that the defendants did not assert any pukhtadari or under-proprietary right the plaintiffs were entitled to a decree. Another question raised in this appeal is that the lower appellate Court passed a decree against one of the respondents on the basis of a compromise. That compromise was executed by one of the respondents only, and as this was a joint tenancy, the compromise, not being executed by the other defendants, was incomplete, and no decree should have been passed. The decree should be one for a simple declaration that the defendants had no rights pukhtadari or under-proprietary in the plots. I order that the decree of the lower Court should be amended to that extent. In other respects the decree of the lower Court stands, and I dismiss the appeal with costs.

N.K. *Appeal dismissed.*

(5) A. I. R. 1924 Oudh 69.

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* * A. I. R. 1928 Oudh 251

Full Bench

STUART, C. J., WAZIR HASAN AND GOKARAN NATH MISRA, JJ.

Gulab Khan—Defendant—Appellant

v.

Ataullah and *another*—Plaintiffs—Respondents.

Second Appeal No. 290 of 1927, Decided on 12th March 1928, against decree of Sub-Judge, Partabgarh, D/- 21st April 1927.

* * (a) *Civil P. C., O. 21, R. 95—Purchase of a share—Possession taken by beat of drum is effective delivery under R. 95.*

The delivery of possession by means of beat of drum under O. 21, R. 95 to an auction purchaser who has purchased a share in a property so sold can be considered to be a valid and effective delivery of possession sufficient to give to the auction puchaser a fresh start for limitation : *A. I. R.* 1921 *All.* 9 (*F. B.*) and 36 *Bom.* 373 (*F. B.*), *Dist.* [P 256 C 1]

* * (b) *Limitation Act, Arts. 142 and 144—Auction purchaser of a share taking formal possession by beat of drum—His subsequent suit for possession is governed by Art. 142 and not by Art. 144—Time begins to run from the date of formal delivery.*

Where the auction-purchaser of only a share in a certain property, who has obtained under O. 21, R. 95 possession by beat of drum, sues for recovery of possession on the ground that he has not obtained actual possession the suit is governed by Art. 142 and not Art. 144; and the possession of the judgment-debtor who has remained in actual possession in spite of the formal delivery of possession through Court, should be deemed to have become adverse only from the date of such formal delivery. [P 256 C 2]

(c) *Civil P. C., O. 21, R. 95 — Possession means such as nature of property is capable of.*

Per Wazir Hasan, J.—On general principle possession for the purposes of R. 95 must mean such possession as the nature of the property is capable of. This is the juristice conception of the word " possession." There is no reason to make a departure therefrom for the purpose of interpreting the rules of procedure as laid down in the Code. [P 255 C 1]

(d) *Limitation Act, Art. 142—Possession includes constructive possession.*

Per Wazir Hasan, J.—The word "possession" used in Art. 142 should not be read to connote " occupation" or " detention" merely. It will certainly include constructive possession : *Lake* v. *Dean*: 28 *Beav.* 207, *Rel. on.* [P 255 C 2]

Ali Zaheer—for Appellant.

S. N. Srivastava for *Mr. Radha Krishna*—for Respondents.

Order of Reference. — This is an appeal arising out of a suit for recovery of possession of a half-share in certain under-proprietary plots of land, situate in village Jagdish Garh, district Partabgarh. The facts of the case are that these plots along with others were owned by one Sitla Bakhsh. He transferred them to the defendant-appellant Gulab Khan, but prior to the transfer he had mortgaged them to one Mathura, the father of defendants 2, 3, and 4, who are no party to this appeal. Mathura, the mortgagee, instituted a suit on the basis of the mortgage and obtained a decree on the 13th February 1904 : Exs. 4 and 5, against Sitla Bakhsh, the original proprietor of the land and the present appellant Gulab Khan, who subsequently purchased the property. The decree was made absolute on the 12th January 1907, Ex. 6. Mathura brought the mortgaged property to sale, and purchased a half-share in the plots in suit on the 20th June 1911. The sale was confirmed on the 12th August 1911. He applied for a sale certificate on the 17th July 1914 and it was issued to him on the 4th August 1914 : Ex. 1. After obtaining

the sale certificate he applied for delivery of possession and a warrant to that effect was issued under O. 21, R. 95, Civil P. C. by the Court on the 8th August 1914 : Ex. 7. On the 23rd August 1914, possession was delivered to Mathura, the auction purchaser, by beat of drum. The endorsement on the back of the warrant of delivery of possession ran as follows :

Waqa tarikh 23 *August*, 1914, *ko ba awaz dohal mushtahar munadi karake arazi mandarja warrant dakhal dehani ki Mathura mushtari certificate ko dakhal hasb zabita diladiya.*

The translation of the above endorsement runs as follows :

On the 23rd August 1914, after making a proclamation by beat of drum the possession of the property mentioned in the warrant of delivery of possession was handed over to Mathura the purchaser entered in the certificate of sale, in accordance with the rules (hasb zabita).

It appears that although Mathura obtained possession through Court, yet he did not succeed in getting actual possession over plots in suit. Mathura died some time in 1924, and after his death, his sons at first executed a deed of lease in favour of the respondents 1 and 2 (Ex. 3), and then subsequently sold the property to them under a registered sale-deed dated the 16th December 1925 : Ex. 2. It is on the basis of this sale-deed that the present suit was brought on the 3rd August 1926 by the plaintiffs-respondents for possession of the property in suit.

The defence raised in the case consisted principally of the plea of limitation. It was urged by the appellant that the plaintiffs-respondents not having obtained actual possession over property in suit, their claim for possession was barred by limitation.

This plea has been overruled by both the Courts below. They have held that Mathura having obtained delivery of possession through Court on the 23rd August 1914, the period of limitation should be considered to run from that date ; and the plaintiffs' suit, having been brought within 12 years from that date, is within limitation. The lower appellate Court has distinguished the Full Bench ruling reported in the case of *Jang Bahadur Singh* v. *Hanwant Singh* (1) on the ground that it was not possible in the present case for the auction-purchaser to get actual possession of the plots in suit since he had purchased only a half-share in them ; and consequently the possession which was delivered to him through Court, though a possession merely by beat of drum, was quite enough in law to constitute a valid delivery of possession in order to give him a fresh start for limitation.

The defendant-appellant has now appealed to this Court and the main point for decision is whether the possession which was delivered to the auction purchaser on the 23rd August 1914, by beat of drum was the only possession which could be delivered in the circumstances of the case and should be deemed to be such as to give a fresh start for the period of limitation in favour of the auction purchaser. The argument urged on behalf of the appellant is that the warrant for delivery of possession issued by the Court, being one under O. 21, R. 95, Civil P. C., the auction purchaser should have been delivered actual possession over the property purchased by him ; and if no such possession was delivered, the proceedings taken in August 1914, would not have the effect in law of giving to the purchaser a fresh start for limitation. The limitation, it was contended, should run from the date of the confirmation of the sale, namely, the 12th August 1911 and the suit having been brought more than 12 years after the said date, is barred by limitation. Reliance was placed on a Full Bench decision of the Bombay High Court in *Mahadev Sakharam* v. *Janu Namji* (2), and the Full Bench decision of the Allahabad High Court quoted above.

On behalf of the respondents it is contended that the rule of law laid down in the said decision of the Allahabad High Court cannot apply to the present case since the property purchased at the auction sale was only a half-share in the plots in suit and it was not, therefore, possible for the purchaser to take actual possession of the plots purchased. The auction purchaser, it was contended, could at best obtain only a joint possession over the plots in suit and that possession should be deemed to have been delivered to him under the warrant of delivery of possession on the 23rd August 1914. It was, therefore, urged that the possession which was delivered to the purchaser was the only one which could

(1) A. I. R. 1921 All. 9=43 All. 520 (F. B.).

(2) [1912] 36 Bom. 373 = 14 I. C. 447 = 14 Bom. L. R. 115 (F. B.).

only be delivered in the circumstances of the case, and, therefore, the delivery of possession on the 23rd August 1914 should give the plaintiffs a fresh start for limitation. Reliance was placed on a Privy Council decision in *Radha Krishna Chandraji* v. *Ram Bahadur* (3), a decision of the Calcutta High Court in *Bhulu Beg* v. *Jatindra Nath Sen* (4) and a decision of a Bench of this Court in *Ali Husain* v. *Mohammad* (5). It was also urged on behalf of the respondents that as the finding of the Courts below was to the effect that the auction purchaser had not succeeded in getting actual possession over the property in suit, the suit brought by the plaintiffs could not be considered to be governed by Art. 142, Lim. Act. It was argued that the only article which could be considered to be applicable in the circumstances of the case was Art 144. Under that article a plaintiff's suit, if brought within 12 years of the date when the possession of the defendant becomes adverse to the plaintiff is fully maintainable. The argument was that the possession of the defendant-appellant could become adverse only after the 23rd August, 1914, and the suit having been brought within 12 years from that date was within limitation.

As the point involved in the case is one of great importance and frequently arises I refer it for decision to a Full Bench of this Court, under S. 14, Oudh Courts Act (4 of 1925). The point which I refer is as follows :

(a) Whether the delivery of possession by means of beat of drum under O. 21, R. 95, Civil P. C., to an auction-purchaser, who has purchased a share in a property sold, can be considered to be a valid and effective delivery of possession sufficient to give to the auction purchaser a fresh start for limitation.

(b) Whether Art. 144, Lim. Act, would be applicable in a case where the auction purchaser of only a share in a certain property sues for recovery of possession on the ground that he has not obtained actual possession ; and if so whether the possession of the judgment-debtor who has remained in actual possession, in spite of the formal delivery of possession through Court, should be deemed to have become adverse only from the date of such formal delivery.

(3) [1919] 20 Bom. L. R. 502 = 43 I. C. 268 = 16 A. L. J. 93 (P. C.).
(4) A. I. R. 1923 Cal. 138.
(5) A. I. R. 1928 Oudh 8.

Opinion

Stuart, C. J.—The question raised in the reference before us is a question of considerable importance. Before I state my views upon it, I state the facts with which we are concerned. Two brothers of the name of Sheomangalpal and Narsingh Bahadur owned 19 bighas 13 biswas 15 biswansis of under-proprietary land in a village in the Partabgarh District. It appears that Sheomangalpal executed a deed of simple mortgage in respect of his interest in this property in favour of a certain Mathura. He appears then to have transferred the remainder of his interests in a moiety of 6 bighas 2 biswas and 5 biswansis out of this total area to a certain Gulab Khan. His rights in the remainder appeared to have passed through the hands of various people in execution of decrees against him, and we finally find that Mathura, in the year 1910, instituted a suit on basis of his mortgage-deed and obtained a decree against the mortgaged property. He put this decree in execution and himself purchased a moiety in the 19 bighas 13 biswas 15 biswansis. The sale was confirmed on the 12th August 1911. Now we have it that Gulab Khan was in physical possession of 6 bighas, 2 biswas and 5 biswansis. On the 23rd August 1914, Mathura obtained possession through the Court over a half-share in this 6 bighas 2 biswas and 5 biswansis, which was in the physical possession of Gulab Khan. Subsequently Mathura sold his interest in these plots to Ataulla and Ebadullah Khan, and Ataulla Khan and Ebadullah Khan instituted a suit for possession over the half-share in these plots against Gulab Khan. This suit was instituted on the 3rd August 1926. It has been decreed by the Courts below. The question which is now raised in second appeal is whether such a suit is or is not time barred, and a learned Judge of this Court, before whom the matter had come in second appeal, has referred the questions of law involved under the provisions of S. 14, Oudh Courts Act, 4, 1925, for a decision by a Full Bench.

I find at the beginning that on 23rd August 1914 the whole of the seven plots of an area of 6 bighas 2 biswas and 5

biswansis were in physical possession of Gulab Khan. Gulab Khan was undoubtedly a judgment-debtor under the decree. When Mathura obtained delivery of possession over a moiety of these plots he obtained delivery clearly under the provisions of O. 21, R. 95. Ordinarily, if Mathura had brought a suit for possession the limitation would have been under Art. 138, Sch. 1, Act 9, 1908, but this is not a suit by a purchaser at a sale in execution of his decree when the judgment-debtor was in possession at the date of the sale, for the property transferred by the sale. It is a suit brought by the vendee of a person who, the plaintiff declares, had obtained possession of the property on 23rd August 1914, and the article of limitation which in my opinion is applicable is Art. 142. According to the findings of the Courts below Mathura obtained possession on 23rd August 1914, under the order of the Court. He did not obtain physical possession. The Courts below found that he failed to obtain such possession. He did not obtain enjoyment of the property. But if he obtained effective possession on 23rd August 1914, the suit is within limitation. If he did not obtain effective possession the suit is not within limitation. In support of the argument that he did not obtain effective possession the learned counsel for the appellants, who has argued the case with great skill, has laid stress upon a decision of the Full Bench of the Allahabad High Court in *Jang Rahadur Singh* v. *Hanwant Singh* (1), and also on the decision of a Bench of the Bombay High Court in *Mahadev Sakharam Parkar* v. *Janu Namji Hatle* (2). The decision of the Full Bench of the Bombay High Court appears to have been questioned in a subsequent decision of the Bombay High Court in *Mahadevappa Dundappa* v. *Bhima Daddapa* (6). In the Bombay decision great stress was laid upon a distinction between symbolical possession and non-symbolical possession I am not disposed myself to found a decision upon a distinction between the delivery of possession which is symbolical and the delivery of possession which is non-symbolical.

In a very large number of instances it is only possible to grant symbolical possession and the question, as it appears to me, has little to do with the distinction between what is symbolical and what is non-symbolical. The question is: Is the delivery effective in the circumstances of each particular case? It is admitted that on 23rd August 1914 Gulab Khan was in actual physical possession of this 6 bighas 2 biswas 5 biswansis and at that season of the year ploughing would ordinarily have taken place and some young crops would be standing on the ground. If Mathura had obtained a sale certificate for the whole of the plots, the matter would have been simple. He could have taken physical possession over the crops, continued to tend them, could have reaped them when they were ready and utilized the land afterwards as he wished, but his sale certificate only gave him a right to an unspecified moiety and it is clear to me that at the time that possession was given in terms of that sale certificate the officer of the Court granting possession had no authority to delimit specific portions of the plots and award them to Mathura. In these circumstances to my mind the only sort of possession which could have been granted was a constructive possession which would have enabled Mathura either to obtain partition over the plots or to obtain a share of the profits, and on my understanding of what happened such possession was granted and that possession was effective. I would, therefore, reply to the reference before us that the article of limitation governing the case would be Art. 142 and that date from which the time began to run was 23rd August 1914.

Wazir Hasan, J.—I have very little to add. Two admitted facts are of outstanding importance. Mathura at the auction sale obtained a right of ownership under the purchase to a one-half share in seven specified plots. This is the first fact The second fact is that the other half-share in the plots has all along legally vested in the defendant-appellant Gulab Khan. Now, when Mathura proceeded to obtain possession of the property, which he acquired under the auction sale, he took proceedings under O. 21, R. 95, Civil P. C., and not under R. 96 of the same order. The Court through its proper officer put him in possession of the purchased property under the same rule of procedure under which Mathura had applied. In my judgment that was the only procedure which could reasonably

(6) A. I. R. 1922 Bom. 27 =46 Bom. 710.

and properly be availed of in the circumstances of the case. On the date of the sale in favour of Mathura of the half-share in the seven plots Gulab Khan was in possession of the entire area of those plots. This being so R. 96 was inapplicable. The difference between the two rules is substantial. R 95 clearly relates to cases where the delivery of possession in favour of a purchaser is to take place in respect of property in the occupancy of the judgment-debtor. In the present case, as I have just now said, the property in its entirety, including the share purchased by Mathura, was in the occupancy of Gulab Khan. R. 96, on the other hand, applies to cases where the property sold is "in the occupancy of a tenant or other person entitled to occupy the same." Therefore, on the facts of the case R. 95 was inapplicable. Delivery of possession under R. 95 may take place in two modes: (1) by putting the purchaser "in possession of the property" simply; and (2), if need be, "by removing any person who refuses to vacate the same." In the present case the second mode could not be resorted to, the reason being that Gulab Khan being a cosharer to the extent of one-half was in lawful possession of the whole, *per my et per tout*. He, therefore, could not be made to vacate the possession. I am unable to read in the rule words which would restrict its application only to cases where actual physical delivery of possession is to be given to the purchaser of immovable property. It seems to me that on general principle possession for the purposes of R. 95 must mean such possession as the nature of the property is capable of. This is the juristic conception of the word "possession" and I see no reason to make a departure therefrom for the purpose of interpreting the rules of procedure as laid down in the Code.

I now come to the question as to which article of the Indian Limitation Act is applicable to the suit out of which this reference has arisen. So far as the nature of the suit is disclosed by the allegations made in the plaint there can be no two opinions that it is a suit for recovery of possession of immovable property caused by dispossession of the plaintiff. This being so, prima facie the article applicable is Art. 142, Indian Lim. Act; but it is argued on behalf of the appellants that, having regard to the finding that the possession which the auction purchaser obtained in proceedings subsequent to the grant of certificate in his favour, did not amount to actual possession in the sense that Gulab Khan was not made to vacate the plots it should be held that the auction purchaser never obtained possession and, therefore, there was no dispossession within the meaning of Art. 142, Lim. Act. It seems to me that this argument begs the whole question at issue. It assumes that "possession" in Art 142 can mean nothing less than actual possession of one person by ousting another person who holds possesson of a similar nature. I am unable to accept this assumption as well founded in law. Courts in India are familiar with cases which may fall under Art. 142, and yet there may not be possession actual and physical either on the part of the plaintiff or on the part of the trespasser. Two instances will suffice. Take the case of possession of a zamindar in an undivided mahal and possession of a landlord over any other immovable property, not zamindari property, in which the zamindar or the landlord is a cosharer with other persons and the actual possession is in the hands of a third party with the consent of the entire body of the proprietors.

I think in the state of law as administered in the Courts of British India it would amount almost to an absurdity to contend that the zamindar or the landlord, as the case may be, is not in possession of the immovable property within the meaning of Art. 142, Sch. 2, Lim. Act. Discontinuance and dispossession are equally very familiar incidents of immovable property in this country. Dispossession may properly ensue only by realizing rent from persons in actual possession of the property of another or by merely obtaining atonement from such persons. It seems to me equally absurd to contend that such realization of rent or atonement is not di-possession of the other within the meaning of Art. 142, Sch. 2, Lim. Act. The word used in Art. 142 is "possession." It should not be read to connote "occupation" or "detention" merely. It will be agreed that it certainly includes constructive possession. As was observed by Romilly M. R., in *Lake* v. *Dean* (7)

(7) [1858] 28 Beav. 607.

"there is perhaps no legal conception more open to a variety of meanings than possession." Similar observations were made in *Lyell* v. *Kinnedy* (8). I am, therefore, of opinion that the word "possession" in Art. 142, Sch. 2, Lim. Act, should be given the meaning which that word can reasonably bear in relation to the nature of the property to which it is sought to be applied. The opinion, that the word "possession" generally means possession as the nature of the property is capable of, was expressed in the decision of the House of Lords in the case of *Lord Advocate* v. *Young* (9). As regards the cases which the learned counsel for the appellant has quoted before us I need say no more than what the Hon'ble. the Chief Judge has said. To my mind the reference can best be answered on the lines on which I have tried to answer it. Generally my answer, therefore, to the reference is that the suit out of which this reference has arisen is not barred by limitation and is governed by Act. 142, Sch. 2, Lim. Act.

Gokaran Nath Misra, J.—I am in full agreement with the judgment just delivered by my brother Mr. Justice Hasan. The two points which have been referred to us are as follows :

(1) Whether the delivery of possession by means of beat of drum under O. 21, R. 95, Civil P. C., to an auction-purchaser who has purchased a share in a property so sold, can be considered to be a valid and effective delivery of possession sufficient to give to the auction purchaser a fresh start for limitation.

(2) Whether Art 144, Lim. Act., would be applicable in a case where the auction purchaser of only a share in a certain property sues for recovery of possession on the ground that he has not obtained actual possession ; and if so, whether the possession of the judgment-debtor who has remained in actual possession, in spite of the formal delivery of possession through Court, should be deemed to have become adverse only from the date of such formal delivery.

As to the first point: I am clearly of opinion that in a case where an auction-purchaser has purchased a share in a property sold, and thereby becomes a co-sharer with other persons, the only way of his getting a valid and effective delivery of possession, sufficient to give him a fresh start for limitation, is by getting delivery under O. 21, R. 95, Civil P. C. as was obtained in this case.

From the facts already given it is clear that when Mathura purchased half the share in the plots in dispute the appellant Gulab Khan was in possession of these plots in entirety and it was not possible for Mathura to have ousted him from possession of those plots. The only thing to which he was entitled was a right to possess those plots jointly with Gulab Khan to the extent of one-half. This right he may have enforced either by partition or by a suit for profits. In order to vest him with such a right the possession which was delivered to him in the present case under O. 21, R. 95 was in my opinion, an effective delivery of possession. To meet such cases the Legislature has expressly provided in O. 21, R. 35, that where a decree is for the joint possession of immovable property such possession is to be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree. The difficulty is that no such provision has been made in the case of auction purchasers. The rule relating to auction-purchasers is contained in O. 21, R. 95, and it appears to me that where the judgment-debtor is in possession of the property and the auction-purchaser has purchased only a share in that property the only way in which he can obtain possession is by the way indicated by the legislature in O. 21, R. 35, just now referred to. I am, therefore, of opinion that the possession delivered in the present case was a valid and effective delivery of possession and amounted to the dispossession of the judgment-debtor Gulab Khan to the extent of half the share in the plots in dispute.

As to the second question, which relates to the applicability or otherwise of Art. 144, Lim. Act, to a case like the one which we have at present before us: I am in entire agreement with my learned brother Mr. Justice Hasan that in a case like the present the article which would clearly apply would be Art. 142 and not Art. 144. If the delivery of possession such as was effected in the present case was a sufficient effective delivery of possession to the decree-holder and would amount to a dispossession of the judgment-debtor, Art. 142 would be the only article which could be considered to be applicable in the case. In such a case

(8) [1887] 18 Q. B. D. 796.
(9) [1887] 12 A. C. 544.

the period of limitation for the auction purchaser commences from the date when he would take possession through Court and he would be justifiably entitled to treat his not actually getting possession subsequently as dispossession. I am, therefore, in entire agreement with the way how the reference has been answered by my two learned brethern. I would also answer it in the same way and hold that the suit in the present case was quite within limitation. (In view of the above opinion the appeal was dismissed.)

R.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 257

WAZIR HASAN AND PULLAN, JJ.

Gaya Prasad and *others*— Defendants —Appellants.

v.

Sahdeo Singh—Plaintiff—Respondent.

Second Appeal No. 360 of 1927, Decided on 24th February 1928, from decree of Sub-J. Sitapur, D/- 27th August 1927.

(a) *Easements Act, S. 12—Lambardar cannot acquire adverse possession nor easement over manure collected by the non-agriculturists—Adverse possession.*

A lambardar cannot obtain rights over manure which is collected year by year by the non-agriculturists in the village by means of adverse possession, nor can he acquire an easement over it. [P 257 C 2]

(b) *Custom— Manure collected by non-agriculturists at the absolute disposal of lambardar —Custom is not unnatural.*

There is nothing unusual in the existence of a custom whereby all manure belonging to non-agriculturists resident in the village is at the absolute disposal of the lambardar. [P 257 C 2]

Hyder Husein and *Rajeshwari Prasad* —for Appellants.

A. P. Sen, Ali Zaheer and *Kashi Prasad Srivastava*—for Respondent.

Judgment.—This is a defendants' appeal in a case which was brought by a lambardar claiming Rs. 4 as the price of manure said to have been misappropriated by the defendants and for a declaration that the plaintiff as lambardar of the village is alone competent to appropriate the manure of the non-agriculturists residing in the village. There was also a plea for a perpetual injunction restraining the defendants, who are cosharers in the village, from interfering with the said manure as long as the plaintiff remains lambardar of the village. The suit was decreed by the Courts below, but the reasons given by the Courts are not, in our opinion, satisfactory. The Court of first instance decided that the lambardar was entitled to the manure of all the non-agriculturists in the village by means of adverse possession and this was amended by the lower appellate Court into a finding that the lambardar's right was rather a prescriptive right of easement over the manure of the non-agriculturists. We are not prepared to hold that a lambardar could obtain rights over manure which is collected year by year by the non-agriculturists in the village by means of adverse possession nor are we able to see how he could acquire an easement over it. On the other hand, we find that according to the record of rights in this village all manure belonging to non-agriculturists resident in the village is at the absolute disposal of the lambardar. Nothing is said as to the rights of the cosharers and we are unable to read into these words the interpretation given by the Court below, namely, that the lambardar took possession as manager for the benefit of himself and his cosharers. It has been found as a fact in the present case that the plaintiff-lambardar has been taking possession of this manure year by year for the last 25 or 30 years and his right was only interfered with in the year 1924. It appears that this is one of those perquisites given by village custom to the lambardar, and we find nothing unusual in the existence of such a custom. We also find that it is proved that the custom was accepted at the time of the settlement of the year 1867 and has been acted upon until the events out of which the present suit arose.

The second ground on which the appellants seek to meet the plaintiff's claim is that in the year 1917, there was a partition of the village by which the appellants were entitled to a half-share in the various sewai items including manure. The evidence of this is the partition proceeding. We have read that proceeding and we do not find any reference to the manure of non-agriculturists and we are unable to interpret this section which appears in the printed form of the partition proceeding, to refer to the manure of the non-agriculturist. Generally speaking, these sewai items deal with the property of the agriculturists, and the manure is the manure of cattle grazing of the vil-

lage grass lands. Nor can we hold that this partition, even supposing it to be an agreement between the parties, deprives the lambardar of the right given to him by the wajib-ul-arz, which remains unaffected by the partition proceedings and is still valid. Last of all there is nothing shown to us which gives the appellants any right to take the manure for themselves and to make a partition of it according to what they consider to be their shares. In our opinion, the plaintiff-lambardar was entitled to win his suit on these grounds if not on those on which the decrees were passed by the lower Courts. We, therefore, dismiss this appeal with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 258

STUART, C. J., AND WAZIR HASAN, J.

Mary Akhtar Mirza—Appellant.

v.

Alice Sangster—Respondent.

First Appeal No. 98 of 1927, Decided on 21st February 1928, against decree of Chief Judge, Oudh, D/- 24th April 1927.

Succession Act (34 *of* 1925), *S.* 63 (*c*)—*No evidence on record of testator and witness being in actual visual presence of each other—Presumption that one signed in the presence of the other cannot be made.*

Where at the time of signing the will the testator and the witness were in different rooms and there was no evidence on the record to the effect that the two rooms were so situated that the testator and the witness occupied such a position in relation to each other that the one could be said to be in actual visual presence of the other while each was signing the declaration.

Held: that a presumption cannot be made that the testator and the witness were in visual presence of each other while signing the declarations: *Brown v. Skirrow*, (1902) *P.* 3, *Ref.*

[P 259 C 2]

Hyder Husein and *Rauf Ahmad*—for Appellant.

St. G. Jackson and *Satya Nand Roy*—for Respondent.

Judgment.—This is an appeal from the order of Mr. Justice King, dated 14th April 1927, in two testamentary cases. Both parties asked by separate applications for letters of administration to the estate of one A. W. Sangster, who died on 13th June 1925. The first party, Mrs. Sangster, asked for bare letters of administration. The second party, Mrs. Mary Akhtar Mirza, prayed for the letters of administration with will annexed. The former is admittedly the widow of the deceased Sangster and the latter claimed to be the daughter of the same. Mrs. Mary Akhtar Mirza's alleged relationship with the deceased was disputed by the widow.

The trial Court has held that Mrs. Mary Akhtar Mirza was not the daughter of A. W. Sangster. This finding was accepted before us in the appeal. In support of her claim for the letters of administration with will annexed Mrs. Mary Akhtar Mirza produced two documents (Exs. A2 and A3). They are both dated 6th April 1925 and are declarations of A. W. Sangster in respect of railway provident fund of which he was the owner and which had accumulated in his favour as an employee of the E. I. Ry. (O. and R. Ry. Branch). He was Deputy Superintendent of the Oudh and Rohilkhand Railway Press. The widow impeached the genuineness and the validity of these two documents and it is not disputed that if they are valid they constitute the last testament of A. W. Sangster in relation to the provident fund.

The trial Court has repelled all grounds of attack against these declarations except one and that ground is that the declarations were not executed in accordance with law relating to the execution of wills by which A. W. Sangster was governed. The finding of the trial Court in respect of this ground of attack is that the two declarations were not attested according to the requirements of law as laid down in S. 63, Succession Act, 1925. It is agreed that Mr. Sangster's disposition is governed by the said section. In this view of the case the trial Court has rejected the application of Mrs. Mary Akhtar Mirza and granted that of the widow, Mrs. Sangster.

In appeal before us the finding of the trial Court is disputed on behalf of Mrs. Mary Akhtar Mirza and no other point was raised either on her behalf or on behalf of the respondent Mrs. Sangster. After anxious and careful consideration of the evidence relating to the execution of the declarations of 6th April 1925, we have come to the conclusion that the finding of the trial Court is correct and must be affirmed.

There is no question that the declarations bear the signature of A. W. Sangster.

There is also no question that they bear the signature of one J. H. Willmer and of one W. John as witnesses to the execution of the declarations. According to Cl. (c) of S. 63, Succession Act, 1925,

the will shall be attested by two or more witnesses each of whom has seen the testator sign or has received from the testator a personal acknowledgment of his signature and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time.

The controversy in the case is as to whether Willmer and John signed these declarations in the presence of Sangster. Both Willmer and John gave evidence in this case and their evidence has been accepted as true by the trial Court and we see no reason for taking a contrary view.

Willmer was produced by Mrs. Mary Akhtar Mirza and John was produced by the widow. Willmer stated:

These declarations were sigued by Mr. Sangster. They were signed in my presence. They both bear my signature . . . .The other witness was Mr. W. John . . . .I identify his signature on these documents, but I do not remember whether he signed in my presence.

In cross-examination he said:

Mr. Sangster signed in my presence. I cannot say whether they bore Mr. John's signature before I signed. I do not remember if Mr. John signed before me.

This evidence is lacking in one of the essentials required by law, that is,

each of the witnesses shall sign the will in the presence of the testator.

Willmer does not say expressly that he signed the declarations in the presence of the testator though the trend of his evidence points to the conclusion that Willmer did sign in the presence of Sangster. As regards the signature of John, Willmer simply identifies it and gives no details as to when and how it was made. It follows that Willmer's evidence per se does not establish valid attestation of the declarations as wills. Had this evidence stood alone it might have been possible to hold in favour of valid attestation by aid of presumptions; but there being direct evidence as to when and how John signed these declarations no room is left for making any presumption. John states that the two forms bearing the declarations were brought to him filled in by the chaprasi of the office. He further says:

They bore Mr. Sangster's signature and I signed as a witness. They did not bear Mr. Willmer's signature at that time. The two columns for the signature of witnesses were blank. I signed in the lower space for the witnesses' signature.

In cross-examination he stated:

When these forms were brought to me for signature Mr. Sangster was in a different room . . . .On looking at the declarations I was fully satisfied that they bore the signatures of Mr. Sangster and so I signed them.

This evidence proves the fact that neither Sangster nor John signed in the presence of each other. First Sangster signed in one room while John was in another room and afterwards John signed in the other room when Sangster was in the former room. There is no evidence on the record to the effect that the two rooms were so situated that the testator and the witness occupied such a position in relation to each other that the one could be said to be in actual visual presence of the other while each was signing the declaration: see in this connexion the decision of Gorell Barnes, J., in *Brown* v. *Skirrow* (1). We were hard pressed with the argument that we should make a presumption that the testator and the witness John were in visual presence of each other while signing the declarations. We are unable to make any such presumption in the circumstances of this case.

The appellant's case as disclosed by her in her evidence, which has not been accepted as true by the trial Court and we were not asked to accept it as true in appeal, is that Sangster brought two forms from the office and showed them to the appellant. She further stated that he,

did not sign them in my presence. They came from the office signed. The signature of the witness John was made in my presence. John signed at my father's request. At the time when John signed only my father and I were present.

Having regard to the statements of Willmer and John who are absolutely reliable witnesses, the story deposed to by the appellant as to when and how the witnesses signed the declarations must be treated as totally false and is wholly inconsistent with the presumption which we are now asked to make that Sangster and John were in the visual presence of each other at the railway offices.

The appeal, therefore, fails and is dismissed with costs.

N.K. *Appeal dismissed.*

(1) [1902] P. 3=71 L. J. P. 19=18 T. L. R. 59=85 L.T. 645.

A. I. R. 1928 Oudh 260

PULLAN, J.

Rajendra Bakhsh Singh—Plaintiff.

v.

Bahu Rani and *another*—Defendants.

Original Suit No. 2 of 1927, Decided on 25th November 1927.

Court-fees Act, S. 7, Cls. (4) (c) and (d)—Relief under—Court can interfere with the valuation set up by the plaintiff if it is absurd and outrageous under S. 151, Civil P. C.

There is no direct authority for the Court to interfere with the valuation set up by a plaintiff who seeks a relief under S. 7, Cl. (4), sub-Cl. (c) or sub-Cl. (d) of the Court-fees Act, unless the Court can take advantage of S. 151 of the Civil P. C. That section may be brought into use if a plaintiff makes an absurd and outrageous misrepresentation as to the value of his suit in order to have it tried by some particular Court: 32 *Cal.* 734 ; *A. I. R.* 1918 *P. C.* 135 ; 40 *Cal.* 245 ; 36 *All.* 500 and 6 *O.C.* 255, *Ref.*[P 261 C 2]

Niamat Ullah and *Ghulam Hassan* — for Plaintiff.

Ishwari Prasad, *Kedar Nath Tandon*, *Thakur Prasad*, *Bisheshwar Nath Srivastava*, *Girja Shankar* and *Bhairon Nath*—for Defendants.

Judgment.—For the second time this suit has come before this Court for determination of the question of valuation. The plaintiff when he filed his suit in the first instance valued it at over six lacs of rupees, but in so doing he omitted to notice the provisions of S. 254 of the Oudh Civil Digest, which limited the valuation of his suit to Rs. 1,000 on account of the first relief claimed and Rs. 40,000 on account of the second relief. When this objection was made the plaintiff sought to amend his plaint, but my learned predecessor decided that the amendment could not be allowed at that stage. and that he should first of all determine the valuation of the suit as filed. He accordingly found that the valuation was Rs. 41,000, and returned the plaint for presentation to the proper Court. The plaintiff amended his plaint in the manner which he had already proposed, and again presented the plaint in this Court on the ground that, on the allegations now disclosed and the reliefs now sought, the suit was within the jurisdiction of this Court.

In the first instance the plaintiff had assailed a deed of gift executed by a certain lady partly because she denied that he was the validly adopted son of Thakur Mahabir Bakhsh Singh and partly because the document transferred certain property to which he was entitled as reversioner. In the plaint as amended he has also asked that the whole deed of gift should be set aside and he has further sought an injunction against the defendants, that is to say, the donor and the donee, restraining them from dealing with the property in a manner inconsistent with the rights of defendant 1, as a Hindu widow, and prejudicial to the interests of the plaintiff, and there is still another relief which has been laid open to him by the action of the defendants, who, in their written statements, set up the case that this was a joint Hindu family, contrary to the allegations in the plaint. The plaintiff is now able to say that if the Court finds that this is a joint Hindu family he is entitled to possession of the whole property, except one village Sardaha, which has not been transferred by the deed of gift. I am asked by the defendants to find that these are not genuine additions to the plaint, but have been inserted merely as a device to bring the suit within the jurisdiction of the Court.

No doubt this is the primary object of the plaintiff. He has always tried to have this suit tried in this Court and he has always valued the suit at upwards of six lacs. It is now admitted that the deed of gift was grossly undervalued and, even on the admission of the defendants, the property transferred by that deed of gift could not be worth less than two and half lacs of rupees. Consequently, the reduction in the valuation of the plaintiff's suit, to meet the technical provision of the Oudh Civil Digest, was brought about primarily by the dishonesty of the defendants, who wished to execute a deed of gift on a stamp of less value than that prescribed by law. I am not prepared to find at this stage that the new reliefs claimed are without any meaning or that they can be rejected summarily without a hearing. This plaint has now been amended and I have got to consider it in its amended form, and as long as I find that the reliefs asked are reasonable and such as would have been considered by the Court without question had not the defendants been able to impute dishonest motives for their insertion, I consider that they may be taken into account in order to estimate

the valuation of the suit for the purposes of jurisdiction.

Now there is no question that these reliefs are included in S. 7, Cl. 4 of the Court-fees Act, which must be read with S. 8, Suits Valuation Act (7 of 1887), that is to say, the valuation for the purposes of jurisdiction must be the same as the valuation for the purpose of Court-fee. Where a plaintiff seeks to obtain a declaratory decree with consequential relief [S. 7, Cl. iv sub-Cl. (c),or to obtain an injunction [(sub-Cl. (d)], the suit must be valued according to the amount for which the relief sought is valued in the plaint. I have been referred to several rulings commencing with *Hari Shankar Dutt* v. *Kali Kumar Patra* (1), which pointed out that in such a suit the Court must accept the value of the relief stated in the plaint and this view was accepted by their Lordships of the Privy Council in the case of *Sunderbai* v. *Collector of Belgaum* (2), where they quoted with approval a decision of the High Court of Bombay which laid down this principle. At the same time I must point out that in every case that has been shown to me the Courts have been regarding the matter from an opposite standpoint to that which I must adopt in the present case. They have always considered cases in which the plaintiff has sought to pay a lower Court-fee by an under-valuation of some part of his claim, and no case has been brought to my notice where a plaintiff has sought to bring his suit in a Court of higher jurisdiction by falsely overestimating the value of his claim, and paying a higher Court-fee than that which the law demanded. In the present case no question of Court-fee arises, as the plaintiff has paid the maximum. In several cases I have been shown remarks directed against arbitrary valuation on the part of the plaintiff, but it has always been an arbitrary under-valuation and never an arbitrary over-valuation. Such was the case of *Raj Krishna Dey* v. *Bipin Behari Dey* (3) and *Jageshra* v. *Durga Prashad Singh* (4). All that the rulings show me in favour of the defendants in the present case is that Courts have not uniformly accepted the plaintiff's valuation of his suit for the purposes of Court-fee when they have held that the valuation for the purpose of jurisdiction was higher. No doubt, the observations of Mr. Chamier in *Thakur Sheodat Singh* v. *Thakur Bishunath Singh* (5), where he says that the Courts have always accepted the plaintiff's valuation as determining the forum, except in cases where it has been proved that the plaintiff has misrepresented the true value with the intention of getting a trial in a different Court from that intended by the legislature or has acted recklessly in valuing his suit, or has adopted a wrong method of valuation, may be considered, if taken apart from their context, to assist the defendants' plea. But this again is a case in which the plaintiff sought to under-estimate and not to over-estimate the valuation, and, moreover, it was a suit for pre-emption which stands on a somewhat different footing from other suits. In my opinion, therefore, there is no direct authority for the Court to interfere with the valuation set up by a plaintiff who seeks a relief under S. 7, Cl. 4, sub-Cl. (c) or (d), Court-fees Act, unless the Court can take advantage of S. 151, Civil P. C. There can be no doubt that that section may be brought into use if a plaintiff makes an absurd and outrageous misrepresentation as to the value of his suit in order to have it tried by some particular Court. If a person attempted to sue in a Munsif's Court for property worth a lac of rupees by declaring it to be worth one hundred, the Court would refuse to entertain his plaint and similarly this Court would refuse to entertain a plaint if the valuation was demonstrably far below the minimum of five lacs, which is prescribed for the original jurisdiction of this Court.

I have, therefore, considered carefully what the real valuation of this property is, for the whole property as stated in the plaint may be taken into account for the purpose of valuation if reliefs (c) and (d) are read together. There is no contest as to the recorded profits of the villages in suit. The average for the last six years has been shown to be Rs. 11,615 but the plaintiff has been able to show that in two villages at least defendant

(1) [1905] 32 Cal. 734=9 C.W.N. 690.
(2) A.I.R. 1918 P.C. 135=43 Bom. 376=46 I. A. 15 (P.C.).
(3) [1913] 40 Cal. 245=16 C.L.J. 194=17 I.C. 162=17 C.W.N. 591.
(4) [1914] 36 All. 500=24 I.C. 679=12 A.L.J. 844.
(5) [1904] 6 O.C. 255.

1 has given leases to her servants on very low terms. A patwari Samsan Ali, who has been called as a witness (P. W. No. 7) shows that one village has been let out to a certain Taluqdar Singh, defendant's mukhtar, at a rent of Rs. 90 a year, and that he has sub-let considerably less than half of the whole for Rs. 114. Similarly in another village 452 bighas have been let out to one Jagdish Bakhsh Singh at a rental of Rs. 286-9-0 whereas the true rental of this holding could not be less than Rs. 700. The plaintiff, therefore, has made out a good case for showing that the profits are more than Rs. 11,615 which is the amount stated by the defendants.

The plaintiff has given two other methods of calculating the value. First of all he has argued that in this part of the province sales are frequently calculated on the value of the land per bigha. He has taken the cultivated land and shown that at a rate of Rs. 35 per katcha bigha the value of these villages is upwards of four and a half lacs of rupees. He has produced exemplars in the form of sale-deeds of other land in neighbouring villages where it appears that a very high price has been fetched; sometimes over Rs. 60 per katcha bigha. No doubt, some of these sale-deeds were executed in exceptional circumstances and the sale consideration was not in cash, but went to pay off debts. Still they are valuable as showing that this principle of valuation is from time to time adopted in the neighbourhood.

The other basis of calculation is taken from the fact that defendant 2 by the terms of the deed of gift agrees to pay the donor a sum of Rs. 12,000 a year. Now it is argued that a man who receives a gift of property does not pay the donor an annual sum in excess of the profits, and the plaintiff, therefore, argues that at least I should accept this sum of Rs. 12,000, as representing the annual value of the seven villages which are contained in the sale-deed. It is not, however, necessary to set the price of the villages so high because, in my opinion, village land is generally sold at a rate representing something like 30 years' purchase. The defendants themselves examined a witness, who stated that a certain property had been sold for Rs. 14,000 of which the nikasi was Rs. 500 and from that nikasi the land revenue had to be deducted. It is, therefore, not likely that this land was sold at less than 30 years' purchase; and indeed this contention is in accordance with common experience. If the profits of the land are to be taken as Rs. 11,615 a year, I cannot estimate its value as less than 30 times that figure, namely Rs. 3,48,450. But this is not the whole of the plaintiff's claim. He states that there is in the possession of the defendants a quantity of valuable moveable property of which he has filed a list, and the value of which he states to be Rs. 1,30,000. The defendants do not admit the existence of this property and consequently they give no other valuation. Clearly the whole valuation given by the plaintiff must be accepted for purposes of jurisdiction and Court-fee because no other value can be given and there is still a comparatively small sum of Rs. 25,000 which the plaintiff claims as a share of a pension granted by Government to this family, and which may be properly included in this suit. The total, therefore, comes to more than five lacs of rupees and I, therefore, find that this suit is within the jurisdiction of this Court and I decide this preliminary issue in favour of the plaintiff. The plaintiff will receive his costs from the defendants.

The 8th December is fixed for issues, and the 17th for filing of documents which must be admitted on or before 23rd December before the Registrar

N.K. *Order accordingly.*

A. I. R. 1928 Oudh 262

WAZIR HASAN AND RAZA, JJ.

Sheo Partab Singh—Defendant — Appellant.

v.

Ghirrao Singh — Plaintiff — Respondent.

Second Appeal No. 243 of 1927, Decided on 22nd February 1928, from decree of Dist. J. Fyzabad, D/- 19th April 1927.

Civil P. C., S. 151—Defendant ordered to appear before the Court—Court's order striking out his defence for his persistent failure to attend is competent.

Where the defendant was ordered by the trial Court to appear before it and the Court made attempts from time to time to persuade the

defendant to attend the Court, but he persistently failed to comply with the order and the Court struck out the defence.

Held: that the order of the Court in striking out the defence was not open to any objection as it had full power to pass the order under S. 151. [P 263 C 1, 2]

A. P. Sen, *S. C. Dass* and *M. H. Kidwai* —for Appellant.

Ali Zaheer—for Respondent.

Judgment.—This is an appeal from a decree of the District Judge, Fyzabad, dated 19th April 1927, affirming a decree of the Additional Subordinate Judge, Sultanpur, dated 28th February 1927.

The appeal arises out of a suit for pre-emption. The material facts are as follows :

Jagmohan Singh and Mt. Subraji Kuer, defendants 2 and 3 sold the property in suit to B. Sheo Partab Singh (defendant 1) by a sale-deed dated 14th May 1925. The plaintiff, Ghirrau Singh, brought the present suit for pre-emption on the ground that he and defendants 2 and 3 were cosharers in the mahal in which the property in suit was situated and that he was also related to the vendors (defendants 2 and 3). He prayed that he might be allowed to pre-empt the property in suit on payment of Rs. 696 or such other sum as might be fixed by the Court.

The claim was resisted by defendant 1 (vendee) on various grounds. The learned Subordinate Judge decreed the plaintiff's suit with costs. Defendant 1 appealed, but his appeal was dismissed by the learned District Judge of Fyzabad. Defendant 1 has now come to this Court in second appeal. We think there is no substance in this appeal.

The appellant complains that the learned trial Judge was wrong in striking out the defence of the appellant and that in doing so he acted without jurisdiction and with material irregularity. This is the first ground of appeal. We think the learned Subordinate Judge was perfectly right in striking out the defence of the defendant-appellant in this case. Defendant 1 was ordered by the learned trial Judge to appear before the Court but he failed to comply with the order without any sufficient cause. The learned Subordinate Judge made attempts from time to time to persuade the defendant-appellant to attend the Court, but he (defendant-appellant) persistently failed to comply with the order of the Court. The defendant-appellant has himself to thank for the consequences of defying the order of the lower Court. His conduct was impertinent and improper. The order of the learned trial Judge is not open to any objection and must be upheld. He had full power to pass the order in question under the Code of Civil Procedure : see O. 9, R. 12 and S. 151, Civil P. C. The appellant's learned counsel has really nothing to say on the merits. He has attempted to show that on a proper construction of the sale-deed, dated 14th May 1925, the sale comprised only trees standing on the plots in suit and was not therefore liable to pre-emption. We have examined the sale-deed carefully. The deed shows clearly that the land on which the trees stand has also been sold by the deed in question.

The defendant-appellant has not been allowed credit for Rs. 249 as there is no evidence on record showing the payment of this amount to Basdeo Shukul. There is no evidence to prove the payment of sums due to the prior mortgagees. No other point was urged in the appeal before us.

The result is that the appeal fails and must be dismissed. We dismiss the appeal with costs. The decree of the lower appellate Court is confirmed in all respects.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 263

STUART, C. J., AND NANAVUTTY, J.

Nand Lal Mukerjee— Insolvent—Applicant.

v.

Girdhari Lal — Creditor — Opposite Party.

Civil Revn. No. 5 of 1928, Decided on 9th March 1928, from order of Dist. Judge, Lucknow, D/- 20th January 1928.

Provincial Insolvency Act, Ss. 41 and 42 (b) to (i) — Removal of insolvent's disabilities as an insolvent need not be accompanied by an absolute acquittance in respect of the liabilities which he has not discharged.

Ordinarily, when an insolvent in India whose case is governed by the provisions of the provincial Insolvency Act, has paid up 8-annas in the rupee he is entitled to be free from the disabilities of an insolvent unless it is established that his case falls under the provisions of S. 42 (b) to (i). The removal of his disabilities as an insolvent need not be accompanied by an absolute acquittance in respect of the liabilities which he has not discharged, for

S. 41, gives to the Court a discretion similar to the discretion given in S. 26 of the English Act to impose conditions for the payment of the balance of the liabilities which will bind the insolvent after discharge: *In re Kutner*, (1921) 3 *K. B.* 93, *Foll.* [P 264 C 2]

A. P. Bose—for Applicant.

Mahesh Prasad and *Karta Krishana*—for Opposite Party.

Judgment.—This a revision against a decision of the learned District Judge of Lucknow contained in an order passed in appeal under the provisions of S. 75, Act 5, 1920 (the Provincial Insolvency Act). The facts are these: Nanda Lal Mukerjee was declared an insolvent on 14th August 1922. He applied for his discharge on 15th October 1924. His discharge was then suspended for two years. He again applied for his discharge in 1926, and the learned Small Cause Court Judge, sitting as a Court of insolvency, granted him an absolute order of discharge on the ground that he had paid up one-half of his proved liabilities to the extent of 8-annas in the rupee. This order, under S. 41, Act 5, 1920, was taken in appeal to the learned District Judge who, reading S. 41 as giving him an unfettered discretion to grant or refuse an absolute order of discharge, set aside the order of the learned Judge of the Small Cause Court and directed Nand Lal Mukerjee to continue an insolvent and to continue payments until he liquidated the total amount of his debts or could show to the Court that he was no longer in a position to make payments. Nand Lal Mukerjee has come here in revision taking pleas that the learned District Judge has acted without jurisdiction or illegally in the exercise of his jurisdiction in taking a view of the law which cannot be borne out upon a proper interpretation thereof.

The main contention for the applicant is that once it is established that an insolvent has paid 8-annas in the rupee he is entitled to his discharge provided that it is not established that his case falls under the provisions of S. 42 (b) to (i), Act 5, 1920,and in support of his contention the learned counsel for the applicant has referred us to a decision of the Court of appeal in *Re Kutner* (1). This decision was cited before the learned District Judge. He was of opinion that it was not authoritative and did not bind him. In determining the weight to be attached to the pronouncements of English Courts of law the first consideration to be applied is whether the English Courts were dealing with facts similar to the facts in the particular case before the Indian Courts. Here their Lordships in appeal were considering the validity of an order of a Registrar in bankruptcy by which he refused to grant an absolute order of discharge to a certain Kutner until Kutner had paid fifteen shillings in the pound. They were of opinion that that order was without jurisdiction and remitted the matter back to the Registrar to be decided in accordance with law. In order to arrive at their decision their Lordships had to consider the provisions of S. 26, English Bankruptcy Act, 4 and 5 George V, Ch. 59.

The provisions of Ss. 41 and 42 of the Indian Act, 5 of 1920, are so closely akin to the provisions of S. 25 of that Act that the views of the learned Judge of appeal are of the greatest value in determining the point before us; and we unhesitatingly arrive at the conclusion that, on the same reasoning as satisfied their Lordships in appeal in that case, we must hoid that ordinarily, when an insolvent in India whose case is governed by the provisions of Act 5, 1920, has paid up 8-annas in the rupee he is entitled to be free from the disabilities of an insolvent unless it be established that his case falls under the provisions of S. 42 (b) to (i). It does not, however, follow in our opinion that the removal of his disabilities as an insolvent should be accompanied by an absolute acquittance in respect of the liabilities which he has not discharged, for S. 41, Act 5, 1920, gives to the Court a discretion similar to the discretion given in S. 26 of the English Act to impose conditions for the payment of the balance of the liabilities which will bind the insolvent after discharge. The case, as it stands before us, is that the learned District Judge has not only misapprehended the law, but has actually passed an order which is without jurisdiction as it stands and withheld for an indefinite period the order of discharge. We set aside the order. But we express no opinion as to the subsequent results. The case will go back to the learned District Judge and he or his successor will hear

(1) [1921] 3 K. B. 93.

out the appeal again and dispose of it according to the provisions of Ss. 41 and 42, Act 5, 1920. Costs will follow result.

N.K. *Order set aside.*

A. I. R. 1928 Oudh 265

STUART, C. J., AND RAZA, J.

Narpat and *another* — Defendants—Appellants.

v.

Mohamad Rafi — Plaintiff —Respondent.

Second Appeal No. 267 of 1927, Decided on 14th February 1928, from decree of the Sub-Judge, Lucknow, D/- 30th April 1927.

(a) *Wajib-ul-arz—Entry in, is admissible to prove custom—Custom onerous to tenants—Entry of zamindar's statement is not of much value.*

An entry in the wajib-ul-arz regarding the existence of custom under which the cultivators of a village are under obligations to perform services or make gifts to the zamindars is admissible in evidence where it was the duty of the Settlement Officer to record such custom, but the value of such entry varies very greatly. Where it is distinctly to the interest of the zamindars to record the existence of a cultivator's liabilities, and where the cultivators have no opportunity of stating their experiences, the value of such an entry is necessarily not so great as in a case where the zamindars are recording the existence of customs from which they themselves may suffer. [P 265 C 2]

(b) *Custom — Razils of Mohamadnagar, Lucknow District—Custom of supplying the zamindar with pair of bullocks and fodder was held not proved.*

There is no binding custom by which cultivators of the village Mohamadnagar in the Lucknow District belonging to the class called Razil are obliged to give to the zamindars of the village the services of a pair of bullocks for ploughing two days in the year, and further a bundle of fodder and a bundle of bhusa annually. [P 266 C 1]

Bisheshar Nath for *A. P. Sen*—for Appellants.

Niamat Ullah and *Ishri Prasad*—for Respondent.

Judgment.—This second appeal involves the determination of a question which is of considerable importance to the village of Mohammad Nagar in the Lucknow District. It has been referred by a learned Judge of this Court for decision by a Bench. The question which we have to decide is as follows : Is there a binding custom by which cultivators of this village belonging to the class called Razil are obliged to give to the zamindars of the village the services of a pair of bullocks for ploughing two days in the year and further a bundle of fodder and a bundle of bhusa annually. There can be no doubt as to the fact that in the wajib-ul-arz of 1869 it is recorded that cultivators of the Razil class are under an obligation to supply these bullocks and supply this fodder and bhusa and that cultivators of the Kamin class are under a liability to make certain presents to the zamindars on the occasion of the birth of the first son of the cultivator or marriages in the cultivator's family. The learned Munsif who tried the suit found against the liability of the cultivators on the grounds that the evidence afforded by the entry in the wajib-ul-arz was of doubtful value and that the remaining evidence, properly considered negatived the existence of any such custom. In appeal the learned Subordinate Judge took the view that the passage in the wajib-ul-arz conclusively established the existence of the custom and expressed no opinion on the value of the remaining evidence. We have to consider the evidence as a whole. The entry in the wajib-ul-arz is certainly admissible in evidence. It was the duty of the Settlement Officer in the First Regular Settlement to record the existence of customs such as these, under which the cultivators of a village were under obligations to perform services or make gifts to the zamindars ; but we consider that the value of such evidence varies very greatly. Where, as here, it is distinctly to the interest of the zamindars to record the existence of cultivator's liabilities and where the cultivators, as here, have no opportunity of stating their experiences the value of such an entry is necessarily not so great as in a case where the zamindars are recording the existence of customs from which they themselves may suffer ; and we consider that the proper view in a case such as this is to look at the whole of the evidence and see whether upon it the existence of such a custom is established.

We have the following facts established clearly : The plaintiff-respondent, who is the zamindar of the village has purchased his interests very recently. Until three years before the institution of the suit out of which this appeal arises he had no interest in the village. In order

to support the existence of this custom he has put into the withess-box his own ziladar, two pasi goraits who are in his service, and one pasi tenant whose evidence contradicts the allegations in the wajib-ul-arz, as he says that he supplies the services exacted from the Razil, when on the face of it he must be a Kamin, if anybody in the village is to be considered a Kamin. This evidence is vague to a degree, and, if believed, is not sufficient to justify a finding that such a custom exists. We do not believe it. We arrive at our findings of fact under the provisions of S. 103, Civil P. C., as the lower appellate Court has not arrived at findings on the value of the oral evidence. Against this there is very valuable evidence. A certain Shafi Ahmad, who was a former zamindar in the village and whose father was zamindar before him has deposed clearly and distinctly that there is no such custom in the village and that no cultivator ever gives these dues. We can see no reason for distrusting the evidence of this witness. Further, there is the evidence of Sadhu Lal, who has been patwari of the village for nearly twenty years. He has never known of such dues being exacted. It is obvious that, if there had been a genuine custom of a binding nature, the patwari must have known of its existence. If the custom is real and effective the occasions on which goats are supplied to the zamindars on the birth of the first son of a Kamin cultivator must be reasonably numerous and the supply of fodder and bhusa by Razil would be especially apparent. We have it that Sadhu Lal, who, in our opinion, is telling the truth, has never heard of anything of the kind.

In these circumstances we are of opinion that, although the entry in the wajib-ul-arz exists, there is no custom established and that the cultivators of this village are under no obligation to perform these services. As this is our finding upon the major point it is unnecessary to enter into the question as to whether Ahirs are or are not Razil. We accordingly allow this appeal and direct that the plaintiff-respondent's suit stand dismissed. The plaintiff-respondent will pay his own costs and those of the defendant-appellants in all Courts.

N.K. *Appeal allowed.*

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* A. I. R. 1928 Oudh 266

Full Bench

STUART, C. J., WAZIR HASAN AND GOKARAN NATH MISRA, JJ.

Mohammad Yakub Khan—Plaintiff—Appellant.

v.

Bhikhari Ahir—Defendant—Respondent.

Second Rent Appeal No. 37 of 1927, Decided on 21st March 1928, against decree of Dist. Judge, Rae Bareli, D/- 1st June 1927.

* *Oudh Rent Act* (1886), *S.* 126 (1)—*In the absence of the cosharers appointing a manager, lambardar must be presumed to be the manager within S.* 126 (1).

In a joint estate or under-proprietary or other tenure in which division of land has not been made among the sharers, the person, who is entitled to exercise the powers conferred by the Act in regard to the recovery of the arrears of rent is the manager appointed on behalf of all the sharers, if the sharers have appointed a manager. But if the sharers have not appointed a manager it must be presnmed that they have accepted the lambardar as their manager and authorized him to collect the rents : 11 *O. L. J.* 27, *Diss. from* ; 18 *O. C.* 5 *Appr.* [P 268 C 1, 2]

Naimullah—for Appellant.

Ganesh Prasad—for Respondent.

Order of Reference.

Gokaran Nath Misra, J.—This appeal arises out of a suit for recovery of arrears of rent. The respondent is a tenant of the land in suit which is situate in Mohal Mohammad Yusuf in village Sidhauna, District Rae Bareli. Mohal Mohammad Yusuf is an undivided mohal and constitutes a joint estate the owners of which are Mohammad Yakub, the plaintiff-appellant, Musammat Aziz-un-nisa and Muhammad Asbgar. The plaintiff is admittedly the lambardar of the entire mohal in which the land in suit is situate. The defendant contended that he was not liable to pay the rent since he had already paid it to Mt. Aziz-un-nisa, a cosharer of the mohal. He also contended that the suit could not be maintained on the ground that under S. 126, Cl. (1), Oudh Rent Act, the plaintiff alone was not entitled to sue for the arrears of rent.

Both the Courts below have dismissed the suit on the ground that the plaintiff, though a lambardar of the mohal, cannot be considered to be a manager authorized to collect rent of that Mohal on behalf of

all the cosharers under the provisions of S. 126, Cl. (1), Oudh Rent Act, and thus entitled to maintain the present suit.

In second appeal two contentions have been raised on behalf of the plaintiff-appellant. Firstly that the plaintiff being a lambardar of the entire mohal should be considered to be the manager of that mohal entitled to collect rent on behalf of all the cosharers within the meaning of S. 126, Cl (1), of the said Act. Secondly that even if it be held that the plaintiff alone was not entitled to maintain the suit, the Courts below should not have dismissed it, but should have allowed the appellant an opportunity to implead the other cosharers as defendants in the case.

I have heard arguments in this case at great length and it appears to me that the view taken by the Courts below cannot be maintained. It was uniformly held by the late Court of the Judicial Commissioner of Oudh that a lambardar of a joint mohal was entitled to exercise powers under the Oudh Rent Act in regard to the recovery of arears of rent on the ground that he should be deemed to be a manager authorized to collect rents on behalf of all the cosharers within the meaning of S. 126, Cl. (1), of the said Act. In *Bhan Partab Sahi* v. *Manohar Lal* (1), Mr. Lindsay (now Mr. Justice Lindsay) held that a lambardar of joint estate should be deemed to be the manager of the common lands appertaining to such estate entitled to collect rents, settle tenants, eject tenants, procure enhancement of rent and do all necessary acts relating to the management of the estate for the common benefit of all. The same view was taken by Mr. Wazir Hasan, A. J. C. (now Mr. Justice Wazir Hasan) in *Kunjan Lal* v. *Rukmangad Singh* (2). Again the same view was taken in respect of the Agra Tenancy Act by the Allahabad High Court in three cases, viz, *Gulzari Lal* v. *Jai Ram* (3), decided by a Full Bench of the said Court consisting of Richards, C. J., Banerji and Tudball, JJ., *Mojiz Fatima* v *Ali Akbar* (4), decided by Piggot and Walsh, JJ., and *Mohammad Abdullah Khan* v. *Kundan* (5), decided by Mukerji, J.

On behalf of the respondent reliance was placed on a decision of the Board of Revenue in *Hanuman Singh* v. *Ahmad Ali Khan* (6). Reference is also made in para. 232 of the Manual of Revenue Department published in 1924, where the duties of a lambardar in respect of collecting rents from tenants under S. 194, Agra Tenancy Act, 1901, are stated to apply only to those mohals in which by custom or agreement the lambardar possesses these powers.

I have always been of opinion that a lambardar in Oudh has a right to exercise powers to collect rents, to eject tenants and all other powers as are stated in S. 126, Cl. (1), Oudh Rent Act, to be exerciseable by a manager appointed by all the cosharers for the purpose. A lambardar is appointed on the nomination of the cosharers under S. 45, U. P. Land Revenue Act, 3 of 1901, and if his appointment depends upon the nomination of the other cosharers, he must be deemed to be virtually a manager appointed by them for exercising the powers mentioned in S. 126, Cl. (1), Oudh Rent Act. This view has also been consistently held by the late Court of the Judicial Commissioner of Oudh as will appear from the decisions quoted above in the earlier part of this order. This view has also prevailed, as stated above, in the sister province of Agra. I am not prepared to agree with the decision of the Hon'ble Members of the Board of Revenue reported in *Hanuman Singh* v. *Ahmed Ali Khan* (6). As this question is of great general importance it is, in my opinion, expedient that an authoritative decision of this Court should be arrived at on this point. I, therefore, refer the following question of law for the decision of a Full Bench of this Court, under S. 14, Cl. (1), Oudh Courts Act (4 of 1925) :

Can a lambardar, appointed with the consent of all the cosharers in a joint estate, be deemed to be a manager authorized to collect rents on their behalf within the meaning of S. 126, Cl. (1), Oudh Rent Act (22 of 1886) ?

Opinion.

Stuart, C. J.—This is a reference under S. 14, Cl. 1, Oudh Courts Act (4 of 1925) made to a Full Bench by a learned Judge of this Court. The question for decision is as follows: Mohammad

(1) [1915] 18 O. C. 5=28 I. C. 236=2 O. L. J. 123.
(2) A. I. R. 1926 Oudh 159.
(3) [1914] 36 All. 441=24 I. C. 178=12 A. L. J. 606 (F. B.).
(4) [1920] 42 All. 414=56 I. C. 112=18 A. L. J. 435.
(5) A. I. R. 1925 All. 817.
(6) [1922] 11 O. L. J. 27.

Yaqub Khan is the lambardar of joint estate in Oudh. In this joint estate there are three sharers including himself. He has sued a certain Bhikhari for arears of rent. Bhikhari took two pleas. The first plea was that under the provisions of S. 126, Oudh Rent Act (Act 22 of 1886), Mohammad Yaqub had no right to sue him as he was not a manager authorized to collect the rents on behalf of all the cosharers. The second plea was that he had already paid his rent in good faith to another of the cosharers. We are not concerned with this second plea, which can still be argued when the appeal goes back for hearing. The only plea with which we are concerned is the first .plea. S. 126 (Act 22 of 1886)), makes a distinction between joint estates or under-proprietary or other tenures in which division of land has not been made amongst the sharers, and pattidari estates or tenures. In the first class of estates the powers conferred by the Act in regard to the recovery of arrears of rent (that is the only power with which I am concerned here) shall not be exercised otherwise than through a manager authorized to collect the rents on behalf of all the sharers. In the second class of estates it is laid down distinctly that those powers shall be exercised through the lambardar or through the pattidar who is entitled to collect the rents of the patti.

The question which has now arisen before us had arisen in 1914 and it was decided in the Judicial Commissioner's Court by Mr. Lindsay, who was then Judicial Commissioner, in *Bhan Partab Sahi* v. *Manohar Lal* (1). Mr. Lindsay was dealing there, as we are dealing here, with a joint estate in which division of land had not been made among the sharers and he decided that in an estate such as that the manager referred to must be considered to be the lambardar and that the lambardar alone was entitled to sue for arrears of rent. This view has never been controverted in the Court of the Judicial Commissioner or in this Court up till the present time. I accept the view generally, but it appears to me that Mr. Lindsay might have stated his conclusion somewhat differently. I am in complete accord with his general view, but I should state the conclusion as follows : In a joint estate or under-proprietary or other tenure in which division of land has not been made among the sharers, the person, who is entitled to exercise the powers conferred by the act in regard to the recovery of the arrears of rent is the manager appointed on behalf of all the sharers, if the sharers have appointed a manager. But if the sharers have not appointed a manager it must be presumed that they have accepted the lambardar as their manager and authorized him to collect the rents. The reason why in my opinion, the legislature has not referred in this portion of the section to the lambardar by name is because it occasionally happens that in an estate of this nature there is more than one lambardar ; and it may further happen that the sharers have preferred to appoint as their manager a person other than the lambardar. We should not have had to arrive at a decision in this matter if there had not been a decision of the Board of Revenue which has dissented definitely from Mr. Lindsay's views and in so doing has dissented from the views invariably taken both in the Judicial Commissioner's Court and in this Court. That decision will be found in *Hanuman Singh* v. *Ahmad Ali Khan* (6). It was a decision of Mr. Hopkins, the senior member of the Board, and Mr. Fremantle the junior member of the Board. At p. 36 in the Oudh Law Journal report Mr. Hapkins referring to Mr. Lindsay's decision has said :

> If the legislature had intended that the power mentioned in sub-S. (1) should be exercised by the lambardar it could have said so. The clear inference is that the words actually used 'A manager authorized to collect the rents on behalf of all the sharers' are not synonymous with "lambardar."

I take no exception to the last sentence. I have already stated that in my opinion the words are not synonymous with lambardar, for it is possible to appoint a manager other than the lambardar ; but the criticizm in no way affects the general soundness of the principle laid down by Mr. Lindsay. If accepted it would involve consequences of a somewhat extraordinary nature. According to the view taken by Mr. Hopkins, unless the sharers have appointed a manager to collect the rents no one can collect the rent through the Court ; and if the lambardar has no right to collect through the Court he has no right to collect otherwise. Thus in estates in which the

sharers have omitted to appoint a manager no rent could be collected. This certainly appears condemned as an impossible proposition. The lambardar is responsible for the payment of the land revenue, and unless he can collect the rents or has arranged with somebody else to collect on his behalf, it is difficult to see how he can pay it. It would certainly be open to sharers in such an estate to select one of their number as manager to collect the rents and for that manager to pay over to the lambardar such portion of the rents as was required to pay the land revenue, but the proposition laid down in the selected decision of the Board of Revenue ignores the situation which could easily arise in which the sharers have not appointed such a manager. According to Mr. Lindsay's view such a situation could not arise. I have no hesitation in expressing my dissent from the view taken in the selected decision in question. I should accordingly answer the reference in the affirmative.

Hasan, J.—I agree.

Misra, J.—I am also of the same opinion.

R.D. *Answered in the affirmative.*

A. I. R. 1928 Oudh 269

WAZIR HASAN AND PULLAN, JJ.

Khalil Ahmad Khan and *another*—Defendants—Appellants.

v.

Mohammad Mustafa Khan and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 242 of 1927, Decided on 27th February 1928, from decree of Dist. Judge, Fyzabad, D/- 19-4-1927.

(*a*) *Civil P. C., S.* 100—*Questions of custom are mixed questions of law and fact.*

Questions of custom are mixed questions of law and fact. There may be findings as to the existence of a custom which are pure findings of fact, but all questions of interpretation involve an element of law. [P 269 C 2]

Where there was no question that the documents relied on to establish custom were silent as to the rights of a father to inherit from his son, yet two diametrically opposite interpretations were placed by the parties on this omission:

Held: that this was a fit matter for second appeal: *A. I. R.* 1917 *P. C.* 33, *Foll.* [P 270 C 1]

(*b*) *Custom — Converts to Christianity or Mahomedanism may be governed by Hindu law and custom in certain matters.*

Though the conversion of a hindu to another religion releases the convert from the trammels of the Hindu law, yet it does not of necessity involve any change of the rights of relations of the convert in matters with which the new religion has no concern, such as his rights and interest in and his power over property. It is in no way uncommon for Hindu converts to Islam to retain many of their Hindu customs, in particular those which deal with succession: *A. I. R.* 1927 *Oudh* 442; 20 *Bom.* 53; 43 *Bom.* 647; & 9 *M. I. A.* 195 (*P. C.*), *Foll.* [P 270 C 2]

(*c*) *Evidence—Rule of.*

It is more important to look to the positive evidence than to the negative. [P 271 C 1]

(*d*) *Custom—Bhale Sultans are governed by Hindu law in matter of succession—Hindu law.*

The Mahomedan Bhale Sultans have as a whole retained customs of inheritance which are generally in accordance with Hindu law, and they have not adopted the Mahomedan law of succession and, therefore, the father has no share in the property left by his son: 9 *M. I. A.* 195 (*P. C.*), *Foll.*: *A. I. R.* 1922 *P. C.* 59, *Dist.* [P 271 C 2]

Ali Zaheer, Niamat Ullah and *Naimullah*—for Appellants.

Zahur Ahmad for *Hyder Husein*—for Respondents 1 and 2.

Judgment.—This second appeal arises out of a suit brought by one Mustafa Khan for a share in certain property inherited by his son Abdul Gaffar in the possession of the sons of the latter. The parties are Mahomedans by religion and, if the Mahomedan law of succession applies to them, the plaintiff has undoubtedly a share in the property left by his son. It was, therefore, for the defendants to prove that, for some reason, the Mahomedan law of succession is inapplicable to this case. They raised two grounds. The first was that the plaintiff has renounced his claim to this property, and the second that, under the customary law of the family, the father has no claim to a share in his son's estate in presence of his son's sons. The first ground has not been pressed before us and we have only to consider the question of custom set up by the defendants.

An objection has been raised on the part of the plaintiff-respondent that the matter has been decided by findings of fact passed by the Court below. Speaking generally, questions of custom are, as laid down by their Lordships of the Privy Council in *Palaniappa Chetti* v. *Deivasikamony Pandara* (1), mixed questions of law and fact. There may be findings as to the existence of a custom which are pure findings of fact, but all questions of interpretation involve an

(1) A. I. R. 1917 P. C. 33=40 Mad. 709=44 I. A. 147 (P. C.).

element of law. In this case there is no question that the documents relied on to establish custom are silent as to the rights of a father to inherit from his son, yet two diametrically opposite interpretations are placed by the parties on this omission. The respondents argue that the fact of there being no reference to inheritance by the father means that Mahomedan law must be applied, whereas the appellants argue that the terms of the documents produced go to prove the abrogation of Mahomedan law in matters of succession and, if Mahomedan law is not to be followed, a father cannot inherit from his son in the presence of his grandsons. Thus, in our opinion, this is a fit matter for second appeal. Although the parties are Mahomedans, they are admittedly members of a clan known as Bhale Sultan, resident in the district of Sultanpur. It is not disputed that the Bhale Sultans were originally Hindu Rajputs. Some members of the clan are still Hindus, though others became Mahomedans in the time of a certain Palhan Deo, who lived, according to the accepted tradition, in the reign of Emperor Sher Shah.

It has been held on several occasions by the late Court of the Judicial Commissioner of Oudh that the Mahomedan Bhale Sultans of Sultanpur District retain many of their Hindu customs. Several of these judgments have been filed as exhibits in the case, and we have been referred in particular to a judgment of a Bench of the Judicial Commissioner's Court, dated 27th March 1906 (First Civil Appeal No. 65 of 1904), which is Ex. A25. In that judgment it was very clearly held that these Bhale Sultans, while they adopted the religion of Islam, adhered to their own rules of succession and that these rules of succession were consistent with Hindu law rather than Mahomedan law. The only judgment of the Judicial Commissioner's Court which expresses a slightly different view was distinguished in the ruling which we have cited and does not appear to be good authority in this case, because it was held that the evidence was based on wajib-ul-arzes, which had been concocted for their own purposes by certain individuals, and furthermore the case did not refer to the district of Sultanpur but to the district of Rai Bareli. It is in no way uncommon for Hindu converts to Islam to retain many of their Hindu customs, in particular those which deal with succession, and this point has been discussed by this very Bench in a recent case, *Binaik Dat* v. *Mohammad Ghafur Khan* (2). The same has been the case in other provinces of India and we may quote as parallels the case of the Menons of Bombay who have been the subject of numerous judicial decisions by the Bombay High Court. In particular we would refer to *Bai Baiji* v. *Bai Santok* (3) and *Mohmed Haji* v. *Khatubai* (4). These were cases in which Hindus had been converted to Islam, and in the case decided by their Lordships of the Privy Council in 1863, *Abraham* v. *Abraham* (5) the parties were Christians who had retained certain Hindu customs after their conversion to Christianity. Their Lordships laid down in that case that

> though the profession of Christianity releases the convert from the trammels of the Hindu law, yet it does not of necessity involve any change of the rights of relations of the convert in matters with which Christianity has no concern, such as his rights and interest in and his power over property.

Similarly a Hindu may accept the religion of Islam while retaining Hindu customs as to succession.

Practically the whole evidence in this case consists of the various wajib-ul-arzes of villages belonging to various branches of Bhale Sultans who have been converted from Hinduism to Islam. The parties themselves own no villages with the exception of the property in dispute, but the plaintiff's father Karam Sher Khan and the latter's mother Mt. Rahmani are both proved to have been descended from a certain Parwesh Khan of Daultapur and the family is, therefore, the same as the families which are now in occupation of the various villages which have been cited in proof of the custom put forward by the defendants. The custom varies slightly from village to village, but there is not a single village in which the Bhale Sultans are shown to have adopted the Mahomedan law of succession. On the contrary, one after another the wajib-ul-arzes lay down rules of succession which are consonant with Hindu law but totally opposite to Mahomedan law. The lower

(2) A. I. R. 1927 Oudh 442.
(3) [1893] 20 Bom. 53.
(4) [1918] 43 Bom. 647=51 I. C. 513=21 Bom. L. R. 85.
(5) [1863] 9 M. I. A. 195=1 W. R. 1=1 Suther. 501=2 Sar. 10 (P. C.).

appellate Court has quoted 15 of these wajib-ul-arzes in which it is expressly said that in the presence of sons neither the widow nor the daughter have any right of succession, and one wajib-ul-arz alone states that the custom of inheritance is according to Mahomedan law, while in another there is a distinction between those pattis which are inhabited by the Bhale Sultans and those which are inhabited by the Saiyids. In that village Atkara the rule of succession is in accordance with Hindu law, whereas in the portions occupied by the Saiyids it is particularly stated that the Mahomedan law prevails. Among other Hindu customs, we find detailed in these wajib-ul-arzes the custom of jethwansi, the custom of joint family and the custom of a widow holding a life interest, whereas we do not find a single custom in accordance with the Mahomedan law of succession. The lower Courts have held that because there is no specific mention of inheritance by a father, it must be assumed that, in this respect, Mahomedan law prevails and that the intention of this clan was only to exclude females. Now it is obvious that in dealing with customs of succession the last form of succession which would occur to the ordinary villager is a succession by a father to his son, and the absence of a reference to such a succession merely indicates that it did not occur to the framers of these wajib-ul-arzes to consider such case. We consider that it is more important to look to the positive evidence than to the negative.

We find that in these documents it is laid down that where there are sons they succeed. In some cases, failing sons, daughters succeed, but in most cases the daughters are permanently excluded. The position of the widow is also taken into account and in one case the position of the brothers of the deceased is also considered in reference to the claim of the widow where there are no sons. We are unable to follow the lower Court in the view that we should stop at the exclusion of daughters and widow, and assume that only those Hindu customs, which are expressly stated, should be held to be the custom of this clan and that, wherever the silence of the wajib-ul-arz gives the opportunity, we should saddle these people with the Mahomedan law of inheritance, although there is no indication that they have ever wished to adopt that law. We have been referred to a judgment of their Lordships of the Privy Council, *Muhammad Ibrahim Rowther* v. *Ibrahim Rowther* (6), in which it was held, with reference to a community who were recent converts from Hinduism, that it was not proved that these people had not adopted the Mahomedan law of inheritance. In particular their Lordships oberved that weight could not be given to the consideration that the Lubbai community were recent converts from Hinduism, since it was not suggested that the community had elected to be governed by Hindu law in its entirety.

But the facts of that case are unlike those before us. And it is clear from the passage from which reference is made to the older decision of *Abraham* v. *Abraham* (5), that their Lordships were not dissenting from the general principles laid down in that judgment, but were considering the case before them: first in the light of the provisions of the Madras Civil Courts Act, 1873, and secondly on the deficiency of the evidence adduced in proof of the alleged custom. In our opinion the evidence in the present case establishes: first, that the Mahomedan Bhale Sultans have as a whole retained customs of inheritance which are generally in accordance with Hindu law, and they have not adopted the Mahomedan law of succession; and secondly, that this family belongs to the clan of Bhale Sultans who have so retained their Hindu customs of succession in preference to the Mahomedan law. This being so, the father has no share in the property left by his son, and we consider that the case has been wrongly decided by the Courts below. We allow this appeal with costs, set aside the decree of the lower Court and order that the suit be dismissed with costs.

N.K. *Appeal allowed.*

(6) A. I. R. 1922 P. C. 59=45 Mad. 308=49 I. A. 119 (P. C.).

A. I. R. 1928 Oudh 271

STUART, C. J., AND RAZA, J.

Amir Ahmad and *others*—Plaintiffs—Appellants.

v.

Town Area Magistrate, Laharpur — Defendant—Respondent

Second Appeals Nos. 230, 231, 232 and 233 of 1927, Decided on 8th November 1927, against decree of District Judge, Sitapur, D/- 11th March 1927, in Civil Appeal No. 34 of 1926.

(a) *The United Provinces Town Areas Act* (2 *of* 1914), *S.* 26—*District Magistrate cannot order that town area authorities should credit to the town fund sale proceeds of refuse to which private persons are entitled.*

The District Magistrate can, under the provisions of S. 26 of the Act, make an order in writing prohibiting any person from depositing or storing manure, refuse or other offensive matter in a manner prejudicial to the public health, comfort or convenience, but under that section he cannot make an order directing that collections of property of other persons are to be made by the town area authorities, whether they do or do not return a portion of the sale proceeds to the rightful owner. [P 272 C 2]

(b) *The United Provinces Town Areas Act* (2 *of* 1914), *S.* 22 (*e*)—*Sale proceeds under—They do not include sale-proceeds of refuse to which private persons are entitled.*

Under S. 22 (e) sale-proceeds of things like sweepings and refuse of villages to which a private person is entitled cannot be credited to to the town fund. [P 272 C 2]

Ali Zaheer for *M. Wasim* — for Appellants.

H. K. Ghose—for Respondent.

Judgment.—These four appeals can be decided together. They have arisen in the following way: The villages of Pahladpur, Bankat, Tanda Salar and Shah Qulipur have been included under the provisions of Local Act 2 of 1914 (the United Provinces Town Areas Act) in the town area of Laharpur. Laharpur is a small town. The villages in question stand outside it. The plaintiffs in the suits out of which these appeals arise are persons who are admittedly entitled to the sweepings and refuse of the villages of Pahladpur, Bankat, Tanda Salar and Shah Qulipur. The panchayat of Laharpur town area has, however, asserted a right to collect such sweeping and refuse in those places. In the assertion of this right they have made collections. They have sold the refuse and credited the proceeds to the town fund. When the plaintiffs took exception to this action of the panchayat the panchayat admitted the plaintiff's rights in part, and offered to settle the matter by making to them a money payment to be taken from the sale-proceeds. The plaintiffs refused to accept this offer. The panchayat refused to cease making collections, and the result has been the filing of these suits. The relief sought in each case was for a declaration that the plaintiffs possessed the rights in question, and for an order restraining the panchayat in perpetuity from making such collections and selling the refuse.

The trial Courts in each instance decreed the suits. The learned District Judge on appeal has dismissed the suits. The plaintiffs come here in second appeal. We are unable to find that the town area authorities have any justification for making these collections. It is not denied that before the Act came into existence the plaintiffs possessed the rights to make these collections. There is nothing in the Act or anywhere else which has taken their rights away. The District Magistrate can, under the provisions of S. 26, of the Act, make an order in writing prohibiting the plaintiffs or anybody else from depositing or storing manure, refuse or other offensive matter in a manner prejudicial to the public health, comfort or convenience, but under that section he certainly cannot make an order directing that collections of property of other persons are to be made by the town area authorities, whether they do or do not return a portion of the sale-proceeds to the rightful owner. It is true that under the provisions of S. 22 (e) of the same Act the sale-proceeds of all dust, dirt, dung, or refuse including the dead bodies of animals collected by the town servants are credited to the town fund. But even if those words stood alone this section can only mean that where the town area authorities are entitled to such things they then have the power to collect them, and to sell them, and to enjoy the sale-proceeds. But the words do not stand alone. The legislature has been careful to explain in this section that such sale-proceeds do not include sale-proceeds of things of this nature to which a private person is entitled. So the town area authorities can found nothing on the provisions of that section. The case then stands that the action of the town area authorities is without any justification.

An attempt was made to show that the Court had no jurisdiction because orders under S. 26, cannot be questioned at all if passed by the District Magistrate, and if passed by a town Magistrate can only be questioned by appeal to the District Magistrate. But the order in question is not an order under S. 26. It is not an order under any section of the Act. It is most extraordinary assumption of authority for which there is no justifica-

tion whatever. It was further argued that the plaintiffs in one case were estopped by the admission of their servant. We do not find that there was any admission of any value. As a result we set aside the decrees of the learned District Judge and restore the decrees of the trial Courts in all cases. The defendant, the town area authority, will pay his own costs and those of all the appellants in all Courts.

N.K. *Decrees set aside.*

A. I. R. 1928 Oudh 273

WAZIR HASAN AND RAZA, JJ.

Ram Ratan Lal and *others* — Defendants—Appellants.

v.

Aditya Prashad—Defendant—Respondent.

First Appeal No. 97 of 1927, Decided on 31st January 1928, from decree of Addl. Sub-Judge, Gonda, D/- 14th April 1927.

(a) *Mortgage—No contract to the contrary—Interest due is a charge on the estate.*

The general rule is that the mortgagee, in the absence of any contract to the contrary, is entitled to treat the interest due under the mortgage as a charge on the estate : *A. I. R.* 1924 *P. C.* 183, *Foll.* [P 275 C 2]

(b) *Mortgagee—Mortgagee not suing within limitation—Remedy by action only against the debtor barred — Remedy arising out of the possession of property of the debtor exists.*

A separate claim by the creditors on the mortgage may be barred but their right to the money due to them under that bond cannot be held to have been extinguished so long as their lien by possession lasts. [P 276 C 2]

There is in law no right without a remedy ; and, if all remedies for enforcing a right are gone, the right has in point of law ceased to exist. In the case of a debt the ordinary and universal remedy is by action against the debtor. There may, however, and sometimes does, exist another remedy, not by action against the debtor but arising out of the possession of property of the debtor which by law or contract may be detained by the creditor until the debt is paid. This latter remedy may exist, although the remedy by action is barred ; and in that case the debt continues to exist so far as is necessary for the enforcement of this right of lien but not for enforcing the remedy by action : *In re Hepburn Ex parte Smith*, 11 *Q. B. D.* 391, *Foll.* [P 276 C 2]

(c) *Transfer of Property Act, S.* 61—*Applicability.*

Section 61 enacts by implication the liability of the mortgagor to satisfy all mortgages on the property sought to be redeemed : *A. I R.* 1927 *P. C.* 32, *Foll.* [P 276 C 2]

(d) *Transfer of Property Act, S.* 62—*Scope.*

Where a mortgage is not a usufructuary mortgage pure and simple, the terms of S. 62 are inapplicable. [P 276 C 2, P 277 C 1]

Niamatullah and *Naimullah*—for Appellants.

Hyder Husein, J. N. Chak and *Ali Zaheer*—for Respondent.

Judgment.—This is the defendants' appeal from the decree of the Additional Subordinate Judge of Gonda, dated 14th April 1927. The appeal arises out of a claim for redemption of a 14 annas 6 pies share minus 20 bighas of *sir* land and a 3/4ths share in chak haqiat mutafarraqa of village Parsapur, pargana Nawabganj, in the district of Gonda. The remaining one anna six pies share of the said village now admittedly belongs to the defendants and there is no controversy in this suit in respect of it.

The mortgage sought to be redeemed is dated 11th July 1881 and relates to the entire village of Parsapur. It was executed by one Babu Raj Kishore for a consideration of Rs. 5,500, in favour of two persons Sheo Dial Sah and Ramphal: Ex. 10. It is agreed that the defendants are the representatives of the mortgagees in respect of the 14 annas 6 pies share in suit. The title to the said share has come to be vested in the plaintiff in the following manner :

Raj Kishore's son and sole heir, Mahabir Prasad, sold 11 annas proprietary share of the village of Parsapur to one Hanoman Sah by a deed of 23rd March 1887: Ex. 12. Again on 29th October 1888 Mahabir Prasad sold 3 annas 6 pies share of the same property to the same Hanoman Sah (Ex. 1), in whose favour the sale of 23rd March 1887 was made.

On 1st March 1893 Sheo Prasad Sah and his three brothers, all sons of Hanoman Sah, and other persons, representing the interest of Hanoman Sah sold the 14 annas 6 pies share of village Parsapur together with some other immovable property to one Babu Lal Sah Ex. 2.

On 22nd April 1904 Babu Lal Sah made a gift of a 4 annas 6 pies share out of the 14 annas 6 pies share of village Parsapur which he had purchased under the deed of 1st March 1893 in favour of Munshi Achambhit Lal: Ex. 4. On 25th April 1904 Babu Lal Sah sold the remaining 10 annas proprietary share

of village Parsapur to the same Munshi Achambhit Lal for a sum of Rs. 10,000: Ex. 5. It will thus be seen that Munshi Achambhit Lal became the owner of the 14 annas 6 pies share now in suit. Munshi Achambhit Lal is dead and the plaintiff is his son and heir. The transfers stated above are not disputed. It follows that the plaintiff has a title to the 14 annas 6 pies share of village Parsapur and this is the share which he desires to redeem in the suit, out of which this appeal arises unless his title is barred by any rule of law. The defendants pleaded this bar on two grounds: (1) that the sales of 22nd March 1887 and of 29th October 1888 were repudiated by the vendor Mahabir Prasad on the ground that the vendee Hanoman Sah did perform his part of the contract. It is alleged that the primary purpose of the sales was that Hanoman Sah would institute suits against the widows of Mahabir Prasad's brothers who had predeceased their father Raj Kishore, to establish title in favour of Mahabir Prasad alone, but Hanoman Sah did not institute such suits; and (2) that Hanoman Sah and his successors lost title by reason of adverse possession on the part of Mahabir Prasad.

We are of opinion that the trial Court has rightly decided the two matters mentioned above against the defendants. The facts bearing on the two pleas in bar of the plaintiff's title are as follows:

It appears that after the death of Raj Kishore the entries in the revenue registers in respect of the entire village of Parsapur were made in the names of Mahabir Prasad, Mt. Deo Kuar (widow of a predeceased son of Raj Kishore) and Avadh Kuar (widow of another [redacted] deceased son of Raj Kishore) in the year 1884 and it further appears that after the execution of the sale-deed of the 23rd March 1887 by Mahabir Prasad in favour of Hanoman Sah the name of the former was expunged and in place thereof the name of the latter was entered in respect of a 5 annas 4 pies share in pursuance of the aforementioned sale: Ex. A6. Subsequently when the revision of the settlement of the district took place in 1896-98 the name of Hanoman Sah disappeared from the khewat altogether (Ex. A7) and the name of Mahabir Prasad together with the name of Mt. Deo Kuar, one of his sisters-in-law, was restored, and when Mt. Deo Kuar died the names of her sons were entered in place of her name: Ex. A8. Babu Lal Sah's name never found a place in the village papers in respect of any interest in the village of Parsapur.

In the year 1888 Mahabir Prasad sought to redeem the mortgage effected by his father on 11th July 1881 from the hands of the mortgagees under the provisions of S. 83, T. P. Act, 1882. The mortgagees declined to redeem mainly on the ground that the term of the mortgage had not expired. Eventually Mahabir Prasad's attempt proved futile with the result that the mortgage remained unredeemed: Exs. 13, 14 and 15. In the year 1913 Munshi Achambhit Lal made an attempt to obtain entry of his name in the revenue registers but did not succeed. Mahabir Prasad seems to have intervened and to have attacked the sale made by him in favour of Hanoman Sah on the ground of non-payment of consideration and absence of "actual and legal "possession." He claimed ownership in himself: Exs. A4, A6, 18 and 41. Mahabir Prasad died on or about the year 1915. It is argued that adverse possession against the vendee and his successors began from the date of Mahabir Prasad's application just now mentioned and that was 2nd January 1913: Ex. A4.

We are of opinion that the facts stated above do not impair the plaintiff's title in the least. The outstanding fact which has subsisted all along is that the mortgagees and their successors have from the commencement of the mortgage remained in possession of the property in suit in the character of mortgagees. Mahabir Prasad, as before his father, Raj Kishore, has been out of possession from the date of the mortgage. In our opinion Mahabir Prasad's conduct and declarations subsequent to the sales in favour of Hanoman Sah are of no consequence whatsoever. Under the sales valid title passed to the vendee and Mahabir Prasad could not extinguish that title either by adverse possession because the possession was with the mortgagees or by mere repudiation. In the case of *Ihtisham Ali* v. *Jamna Prasad* (1), which is similar to the case before us, Lord Phillimore said:

> As to the alleged subsequent dealings by Ehsan Ali Khan with he property, they could

(1) A. I. R. 1922 P. C. 56=24 O. C. 272=48 I. A. 365 (P. C.).

not, if regarded as declarations in his own favour, be received in evidence on behalf of those claiming under him, any more than they could be received if he were himself the defendant. They could not be regarded as acts of ownership so as to prove adverse possession, because he never was in possession, the possession remaining in the mortgagee.

There is no evidence worth the name on the record that there was any agreement contemporaneous with the sales under which Hanoman Sah had bound himself to do an act which he failed to do and which failure gave a right to Mahabir Prasad of rescinding the sales.

The only other point which remains for decision in the appeal is as follows:

It appears that after the mortgage of 11th July 1881 Raj Kishore further borrowed a sum of Rs. 2,500 from the mortgagees in possession and executed a bond in respect of that debt on 10th November 1881. The debt was to carry interest at the rate of Re. 1-8-0 per cent. per mensem: Ex. 47. The plea in defence is that by the bond of 10th November 1881, the debt of Rs. 2,500, with interest and compound interest is made a charge on the entire village of Parsapur, and that the plaintiff must pay the amount due thereunder on the redemption of the earlier mortgage. The lower Court has held that the deed of 10th November 1881 does not create a charge on the property sought to be redeemed and the plaintiff is not liable to pay to the defendants any sum of money due under that bond in this claim for redemption.

We do not agree with the lower Court. In our opinion the bond of 10th November 1881 is clearly a deed of further charge. The mortgage of 11th July 1881 is a usufructuary mortgage and is for a period of 15 years, 1289 to 1303 fasli. It is recited in the first part of the deed under consideration. It is further stated in the same part of it that the

mortgagees have been in possession and occupation of the village of Parsapur of the aforesaid mortgage.

The deed proceeds:

I having borrowed Rs. 2,500 . . . . by way of additional debt bearing interest at Re. 1-8-0 per cent. per month, repayable within the period mentioned in the former mortgage-deed, from the aforesaid mortgagees . . . . appropriated the said amount to myself. I, therefore, stipulate and reduce it to writing that I shall repay without any excuse whatever, the entire amount of debt, principal and interest, in a lump sum within the aforesaid stipulated period. It is agreed upon that:

1. I shall at first pay up this debt including principal and interest and thereafter I can redeem the mortgaged village, having paid up the mortgage money. Without the payment of this debt of Rs. 2,500 principal and interest, I cannot redeem the mortgaged village.

2. I shall pay every year the interest on the amount mentioned in this bond from my pocket or from my other property in my possession. If (God forbid) I, the executant, fail to pay interest then I of my own accord shall execute, without any excuse whatsoever, separate bonds every year bearing Re. 1-8-0 per cent. per month as interest which may accrue due after accounting.

3. I cannot pay up the prior mortgage money until I pay off this debt, principal and interest and be it also known that if I make excuse or delay regarding the execution of bonds, bearing interest, the bankers shall have power to have the aforesaid conditions specifically fulfilled by means of a suit.

At the foot of this deed village Parsapur is described by its boundaries. Now it is admitted that the mortgagees were in possession of village Parsapur on the date of this deed. The fact is also recited in the preamble, as we have already said. Condition No. 1, therefore, clearly means that the mortgagees will continue to remain in possession also in consideration of this fresh loan, principal and interest both. The mortgagees have therefore a lien of possession on the mortgaged property of which they can only be deprived on the discharge of the lien. This conclusion is further strengthened by condition No. 3, which is to the effect that the prior mortgage cannot be redeemed without payment of the debt, principal and interest, that might be found due under the deed of 10th November 1881, and by the description of the village of Parsapur at the end of this deed. Nor do we see any justification in the language of the deed for accepting the argument addressed to us on behalf of the plaintiff-respondent that the charge or lien is restricted to the principal amount alone. The general rule is that the mortgagee, in the absence of any contract to the contrary, is entitled to treat the interest due under the mortgage as a charge on the estate. We are wholly unable to find anything in the deed in question which would bar the application of the general rule. On the contrary, the preamble, condition No. 1 and condition No. 3 all support the interpretation that the interest stands on the same footing as the principal itself: see the case of *Gobind Ram* v. *Natha Singh* (2) The

(2) A. I. R. 1924 P. C. 183=5 Lah. 425=51 I. A. 377.

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provision in condition No. 2 for execution of bonds in consideration of interest in arrears is only, it seems to us, an additional remedy in favour of the creditor arising out of the personal liability of the debtor. It is agreed that bonds for the interest were executed for the first four years of the deed of 10th November 1881 and that suits were brought and decrees obtained on them. It is further admitted that since then neither any amount of interest was paid nor any bond executed in respect thereof. We, therefore, hold that the principal and interest both constitute a charge.

On behalf of the appellants compound interest is also claimed on two grounds: (1) That under condition No. 2 should a bond come to be executed for the arrears of interest that amount of interest becomes principal amount and is to cerry interest at the rate of Re. 1-8-0 per cent. per month. We do not think that the provision as to interest applicable to a bond which might be executed in compliance with condition No. 2 can justify a claim for compound interest when no bond has been executed and the claim rests on the deed of 10th November 1881, and when, as we have held, the charge for the unpaid interest subsists on the immovable property. The main stipulation as to the interest is given in the first part of the deed where it is stated that Rs. 2,500, bearing interest at Re. 1-8-0 per cent. per month was borrowed. The second ground is that the right to compound interest has already been adjudicated in favour of the mortgagees and therefore the matter is res judicata. There is no proof of any such adjudication before us. The only thing relied upon in this connexion is Ex. 44, which purports to be a copy of an extract from the register of the Court of the Subordinate Judge of Gonda, in respect of an original suit No. 160 of 1886, decided on 2nd October 1886, *in re: Sheo Dayal and Ramphal* v. *Mahabir Prasad*. In one of the columns of this exhibit the entry is as follows:

> Claim to recover Rs. 2,516, with interest and compound interest on the basis of the deed dated 10th November 1881.

Having regard to the admitted facts that the suit mentioned in this document was a suit for the interest of the first four years and might well have been founded on bond or bonds which the debtor might have executed for the interest in arrears for the first four years of the deed of 10th November 1881 as provided for by the same deed.

The next argument on behalf of the plaintiff-respondent against the enforcement of the charge arising out of the deed of 10th November 1881 is that the claim for the money due under that deed is barred both by the three years and, 12 years' rule of limitation and, therefore, it should not be allowed. We are unable to accept this argument. It might be that a separate claim by the defendants on the deed in question is barred, but their right to the money due to them under that bond cannot be held to have been extinguished so long as their lien by possession lasts. *In re Hepburn Ex parte Smith* (3) Cave, J., says:

> There is in law no right without a remedy; and, if all remedies for enforcing a right are gone, the right has in point of law ceased to exist. In the case of a debt the ordinary and universal remedy is by action against the debtor. There may, however, and sometimes does exist another remedy, not by action against the debtor, but arising out of the possession of property of the debtor which by law or contract may be detained by the creditor until the debt is paid. This latter remedy may exist, although the remedy by action is barred and in that case the debt continues to exist so far as is necessary for the enforcement of this right of lien, but not for enforcing the remedy by action.

The last argument on behalf of the plaintiff, respondent in this connexion is that the mortgage of 14th July 1881 being a purely usufructuary mortgage he is entitled to redeem it in spite of the contract contained in the deed of 10th November 1881 by force of the provisions of S. 62, T. P. Act, 1882. We think that this argument is wholly repelled by the recent decision of their Lordships of the Judicial Committee in the case of *Panaganti Ramarayanimgar* v. *Maharaja of Venkatagiri* (4). As pointed out in that case, S. 61 enacts by implication the liability of the mortgagor to satisfy all mortgages on the property sought to be redeemed. Further the deed of 10th November 1881 clearly by its terms consolidates the two debts. The terms of S. 62 are inapplicable to the facts of this case. This is not a case of redemption of property which has no mortgage

(3) [1885] 14 Q. B. D. 394=54 L. J. Q. B. 422.
(4) A. I. R. 1927 P. C. 32=50 Mad. 180=54. I. A. 68 (P. C.).

in relation to it except a usufructuary mortgage pure and simple. In the present case there is the usufructuary mortgage of 11th July 1881, and there is also a simple mortgage of 10th November 1881 as we interpret the last-mentioned deed. These were all the points that were urged at the hearing of the appeal. No other point was urged.

Before we take leave of this case we would like to mention a circumstance which arose at the time when the appeal first came to be heard by us. The learned counsel for the plaintiff-respondent drew our attention to an application of 11th April 1927 made by the plaintiff in the Court below. By that application the plaintiff wanted to raise certain issues, the burden of proving which would have lain on the defendants. The learned Additional Subordinate Judge rejected the application. We intimated to the learned counsel that in case he desired to press the application it would be only fair and just that the defendants should be given an opportunity to meet the case raised by the application and for that purpose we would make an order of remand to the lower Court. When the appeal came to be heard by us on the second and the last occasion the learned counsel for the plaintiff-respondent, in the presence of the plaintiff himself informed us that he did not desire a remand for opening an inquiry into the case set forth in the application of 11th April 1927 and that he did not press that application. He said that he would argue the appeal on the record as it stands. The plaintiff-respondent filed cross-objections, but at the hearing of the appeal they were not pressed.

The result is that we allow this appeal, set aside the decree of the Court below and in lieu thereof we direct that a decree in the following terms under O. 34, R. 7, Civil P. C., for redemption of 14 annas 6 pies share minus 20 bighas *sir* land and the share in chak haqiat mutafarraqa, the details of which are given in the decree of the Court below, of village Parsapur, pargana Nawabganj, district Gonda, be prepared in this Court.

A. The following sums of money shall be declared due at the date of the decree to the defendants:

(1) Rs. 5,500 under the deed of 11th July 1881.

(2) Rs. 2,500 principal under the deed of 10th November 1881 and simple interest thereon at the rate of Re. 1-8-0 per month from the 10th November 1881 to the date of the decree minus the interest for the first years. The total sum shown to be due to the defendants will be reduced by the amount in the same proportion that 14 annas 6 pies bear to 16 annas.

B. Six months' time for payment will be allowed to the plaintiff-respondent and the interest as directed in A (2) will further be added for the aforesaid period of six months and interest after six months till realization will be added at the rate of 6 per cent., per annum.

C. The defendants-appellants will be entitled to their costs in both Courts on the amount found due to them on the date of the decree. The cross-objections are dismissed with costs.

N.K. *Appeal allowed.*

A. I. R. 1928 Oudh 277

STUART, C. J., AND RAZA, J.

Mohammad Hadi Husain—Accused—Appellant.

v.

King-Emperor—Complainant— Opposite Party.

Criminal Misc. Appln. No. 9 of 1926, Decided on 25th February 1928, from order of Sess. Judge, Lucknow, D/- 24th January 1928.

(a) *Criminal Trial— Practice — Verdict of jury is generally upheld if reasonable.*

It is not the practice of the Lucknow Chief Court to interfere with a jury verdict if it is in any way a reasonable verdict, but if the verdict is both unreasonable and perverse it must be set aside. [P 280 C 2]

(b) *Penal Code, Ss. 120 B and 409—Accused having knowledge of valuables being handed over to another accused for safe custody in a bank and the latter not depositing but pawning the same and keeping the proceeds—Accused not telling the fact to the rightful owner—Both are guilty under 120 B/ 409.*

Where an accused was aware of the fact that a large amount of jewellery had been handed over to another accused in order that he might deposit it for safe custody in a bank and of the fact that the latter had pawned the jewellery and kept the proceeds, and he did not inform the person, whose property had been misappropriated, of the fact, but told her deliberate untruths upon the subject.

Held : that both accused were engaged in a criminal conspiracy in committing an offence under S. 409. [P 281 C 2]

(c) *Criminal P. C., S. 517—Property in respect of which criminal breach has been committed should be returned to its rightful owner.*

Property in respect of which criminal breach of trust has been committed is as much stolen property as property the possession whereof has been transferred by theft according to the provisions of S. 410, Penal Code. Such property should be handed over by the Criminal Court back to the possession of the real owner unconditionally. Where there is a bona fide dispute as to title the procedure may be different. [P 282 C 1]

St. G. Jackson and *Iqbal Narain*—for Appellant.

H. K. Ghose, Brij Nath Shargha and *Md. Zafar-ul-Hasan*—for the Crown.

Judgment.—The circumstances which have given rise to these appeals, reference and application are as follows: Nawab Qudsia Begam is a lady directly connected with the ex-Royal family of Oudh. She is a daughter of the late Prince Suleman Qadr, who was the younger brother of King Wajid Ali Shah. She is a very old lady, more than seventy years of age. She resides in Molviganj, Lucknow City, but has of late years spent a considerable portion of her time in visiting sacred places. She is possessed of considerable property. Amongst her numerous relations is the appellant Mirza Mohammad Hadi Husain, who is married to one of her granddaughters. He has lived with her or near her for a considerable number of years. We have it in evidence (and the fact is admitted both by Mirza Mohammad Hadi Husain and by the other appellant Anandi Prasad) that Anandi Prasad, who is a Kayasth apparently of no means, entered into a partnership in 1917 with Mohammad Hadi Husain and that they together opened a business in Lucknow for the sale of hosiery and wood. According to the lady's deposition she was not acquainted with the fact that her granddaughter's husband, Mohammad Hadi Husain, who is himself a member of the ex-Royal family, was engaged in a partnership with Anandi Prasad. In 1921 the lady took Anandi Prasad into her employment as her confidential servant and manager on a salary of Rs. 15 a month, which was subsequently raised to Rs. 30 a month. The partnership business admittedly was not successful after 1919. The business has now come to an end and there has been a considerable loss over it. According to the evidence, which is admitted as correct, the lady proceeded in July 1924 from Lucknow first on a pilgrimage to Meshed to which she went via Lahore. She returned from Meshed to Lahore and thence went to Karachi whence she proceeded to Karbala. She returned to Lucknow in July 1925. During her travels Mohammad Hadi Husain was usually with her. Anandi Prasad was occasionally with her. The case against these two men is as follows:

According to the lady when she left Lucknow she handed over to Anandi Prasad through the hands of Mohammad Hadi Husain a box containing clothes and a box containing a large amount of jewellery. Anandi Prasad was instructed through Mohammad Hadi Husain to deposit the boxes for safe custody in a bank. On the same day, according to the lady, she handed over to Anandi Prasad through Mohammad Hadi Husain thirty thousand rupees in Government currency notes with instructions that he was to retain the money at her disposal and dispatch her such sums as she might require while she was on her travels. Admittedly a considerable portion of this jewellery was pawned with the firm of Khem Chand Gayan Chand in Sondhi Tola, Lucknow. Some jewellery was pawned on the 6th March 1925 for Rs. 17,000; some more was pawned on the 31st May 1925, for Rs. 3,500 and some more was pawned on the 13th June 1925 for Rs. 6,000. Thus a total amount of Rs. 26,500 was raised upon this jewellery. It is admitted that Anandi Prasad pawned the jewellery and received the money. In the accounts of Khem Chand and Gayan Chand the transaction is entered as having been with Anandi Prasad personally, and it is further to be noted that as the interest on the advance fell due Anandi Prasad executed on more than one occasion promissory notes in favour of the firm representing the amount so due. In respect of the thirty thousand rupees alleged to have been deposited with Anandi Prasad the case for the prosecution is that Anandi Prasad remitted to the lady while she was on her travels some ten thousand rupees and that he has to this day not accounted for the balance. The lady returned to Lucknow, as we have said, in July 1925, but she did not at once make inquiries in respect of the clothes or jewellery and she seeme

to have been equally remiss in obtaining an acconnt from Anandi Prasad as to what had become of the balance of the thirty thousand. She got the clothes back at a comparatively early date ; but, according to her deposition, she did not ask for the jewellery that had been deposited with the Bank for safe custody until April 1927, when she required it. When Anandi Prasad was taxed in respect of the jewellery he admitedly wrote to the lady a letter (Ex. A), dated the 23rd April 1927, in which he said that during the lady's absence he had been implicated in a serious criminal case, that in that case he had to spend a large amount and that in order to save his life he had pawned her ornaments, and used the money for his own purposes. He asked to be forgiven. As a result criminal proceedings followed. The lady directed these proceedings against Anandi Prasad, but in the course of the proceedings Mohammad Hadi Husain was also prosecuted. We have it that the lady, although she gave damaging evidence against Mohammad Hadi Husain in the course of the proceedings, has shown herself averse to his prosecution. In fact she has tried to shield him.

In the result Anandi Prasad and Mohammad Hadi Husain were committed to Sessions at Lucknow jointly on a charge of conspiracy under sections 120B and 409, I. P. C. Anandi Prasad was tried separately on exactly similar charges under S. 409, I. P. C. According to the procedure which prevails in Lucknow, Anandi Prasad was tried by a jury in the case against him alone and he and Mohammad Hadi Husain were tried by assessors in the case against them. The jury acquitted Anandi Prasad by a majority of 3 to 2 and the same jurymen, sitting as assessors gave a verdict of not guilty as against the two men in the other case. The learned Sessions Judge has convicted them both in the case which was jointly against them and has referred the verdict of the jury to us under the provisions of S. 307, Criminal P. C. The hearing of the case in the Sessions Court was very protracted and we are constrained to observe that the counsel who appeared for the defence devoted an altogether unnecessary amount of time to their cross-examination of witnesses. There was a most unnecessary delay caused by their action, for the most part of the cross-examination was valueless. In the case of the cross-examination of Nawab Qudsia Begam there is in addition the fact that it was protracted to a merciless extent, considering the fact that Nawab Qudsia Begam is a very old lady whose feelings the learned counsel might have been expected to consider. As, according to the defence, she was a person who should have been commiserated, their action in subjecting her to such a cross-examination stands out as unjustified. The defence was as follows : Both the learned counsel representing Anandi Prasad and the learned counsel representing Mohammad Hadi Husain admitted that the lady had lost a large quantity of property owing to the shameless dishonesty of some person in whom she had every right to repose her confidence. Anandi Prasad, however, maintained that that person was Mohammad Hadi Husain and that he was an innocent victim. Mohammad Hadi Husain maintained that the person was Anandi Prasad and that he was a victim of a false charge. On each side the defence endevoured to show that its particular client was a simple unsophisticated person, unspotted by the world, who had been made the victim of the other man accused who in each case was represented to be a designing villain.

On this general point it is sufficient to say that both men are between thirty and forty years of age, that on their own showing they were engaged together in conducting a business established in Lucknow, and that they were both well acquainted with money matters, the procedure in banks and the like. The first question to decide is the amount of credence to be attached to the evidence of Nawab Qudsia Begam. We have been taken at length through portions of her deposition. We are satisfied that the old lady is by no means unintelligent. Though she is very old, her mind is clearly well preserved. She appears to us to be truthful on all main points. She undoubtedly is a woman of very little capability of looking after herself, and inclined to place implicit reliance in her servants and relations. We see no reason to doubt the absolute accuracy of her statement that she handed over this box of jewellery to Mohammad Hadi Husain in order that he should give is

to Anandi Prasad and that she handed over thirty thousand rupees to Mohammad Hadi Husain also to deliver to Anandi Prasad with certain instructions. The first responsibility was thus with Mohammad Hadi Husain, but the guilt of Anandi Prasad in respect of the jewellery is established absolutely by the admissions which he made in Ex. A. There, as we have said, he stated that he had pledged the jewellery and utilized the money for his own purpose; but while admitting this he made a statement which was false. He said that he had been implicated in a serious railway criminal case and had used the money for his defence. It is now admitted that, although he was suspected of having been a participant in some elaborate frauds, which were perpetrated upon a railway company in Lucknow and formed the subject of a somewhat sensational case, which was decided a few years ago, he was never actually prosecuted. The fact remains that, although he gave a false account as to how he had expended the money obtained by pawning the ornaments, he admitted that he did pawn the ornaments and kept the proceeds.

Further in respect of the thirty thousand rupees there is on the record a memorandum (Ex. C), dated 24th July 1925, in Anandi Prasad's handwriting and signed by him. This is not exactly a receipt and does not require a stamp. It is an acknowledgment that he has received thirty thousand rupees from the lady for the purpose of utilizing the amount in making remittances to her while she was on her travels. Unless Ex. A and Ex. C can be explained away, it is difficult to see how the case as against Anandi Prasad of having committed criminal breach of trust is not proved absolutely. According to him he never received the jewellery and he never received thirty thousand rupees. He says that the jewellery was handed over to him by Mohammad Hadi Husain with instructions that he was to pawn it and dispatch, out of the proceeds, money which the lady required. It is to be noted that this was not what he said to the lady in Ex. A. Further it is admitted now that if he received thirty thousand rupees from the lady on 24th July 1925 he certainly has not been able to account for the whole of that amount. He says he sent her more than ten thousand rupees. We find upon the facts that he did not do so, but on his own showing he did not send as much as thirty thousand. What is his explanation? The explanation which he advances is that he was so much under the domination of Mohammad Hadi Husain that he was ready to sign anything or to do anything which Mohammad Hadi Husain directed him to do and that he accordingly wrote and signed Ex. A, which he admits is in his handwriting, to oblige Mohammad Hadi Husain.

According to him he was ready to incriminate himself because he was terrified of Mohammad Hadi Husain. In respect to Ex. C he says that he also wrote that, but not till 1927, because he was terrified and under the domination of Mohammad Hadi Husain. There is no evidence to support the statements. We have only Anandi Prasad's bare word upon the subject. His statements throughout the case appear to us to be completely false. It would be difficult in our opinion to find a more untruthful man than he is. We find that he has been completely unable to explain away his admissions in Ex. A and Ex. C, and that the case is fully proved against him.

It is not the practice of this Court to interfere with a jury verdict, if it is in any way a reasonable verdict but the verdict of the majority in this case was both unreasonable and perverse and we have not the slightest hesitation in setting it aside. This conclusion disposes of the reference. But in order to bring the case of conspiracy home against Anandi Prasad it is necessary to prove the guilt of Mohammad Hadi Husain, for if the case against Mohammad Hadi Husain is not made out there could have been no conspiracy. As against Mohammad Hadi Husain we have the following facts:

On our finding Anandi Prasad committed criminal breach of trust as an agent in respect both of the jewellery and of the money. It was a gross case of breach of trust. Anandi Prasad was so much in the confidence of Mohammad Hadi Husain that Mohammad Hadi Husain had taken him into partnership in 1917. There are letters proved between the parties which show that Mohammad Hadi Husain and Anandi Prasad were on the terms of greatest intimacy. On our finding both the jewellery and

the money passed to Anandi Prasad through the hands of Mohammad Hadi Husain. We have it that on 26th June 1926, Mohammad Hadi Husain wrote to Anandi Prasad a letter (Ex. P) which was produced from the custody of Anandi Prasad.

We agree with the learned trial Judge that this letter was written to Anandi Prasad. In it Hadi Husain said that he had promised to get the jewellery, which had been pawned through Anandi Prasad, redeemed in the beginning of July 1926, that. he could not raise the money to redeem it and that the best thing to do would be to let the jewellery be sold. On this letter alone we find that the two men had conspired in respect of the jewellery. There is further a letter sent from Karbala by Mohammad Hadi Husain to Anandi Prasad. This is dated 30th April 1925. The letter is a very long one. It contains some remarkable admissions. This letter was also found from Anandi Prasad. It is proved to have been written and was admittedly written by Mohammad Hadi Husain. We must consider the circumstances prevailing at the time that it was written. The hosiery and wood business was at the time practically bankrupt and there was no income accruing from it. Anandi Prasad had, however, received from Nawab Qudsia Begam a considerable amount of valuable jewellery and thirty thousand rupees. In this letter Hadi Husain tells Anandi Prasad to bring two thousand rupees for him while he is in Karachi. He also informs Anandi Prasad that out of four thousand rupees which Anandi Prasad had remitted to Nawab Qudsia Begam he (Hadi Husain) had abstracted one thousand for himself and had altered the figures in the letter sent by Anandi Prasad from four thousand to three thousand. There are other incriminating passages. This letter considerably strengthens the case against Mohammad Husain. When Nawab Qudsia Begam was trying to get the jewellery back she asked Hadi Husain as to what had happened to it, Hadi Husain told her that Anandi Prasad had deposited the jewellery in a bank. It is perfectly clear from Ex. P. that Hadi Husain knew perfectly well that the jewellery had been pawned by Anandi Prasad; and we have further the evidence of Gayan Chand that after Hadi Husain had returned to Lucknow he saw Hadi Husain with Anandi Prasad and that Hadi Husain had told him not to trouble himself as to the return of his money as the matter was all right. As against this the learned counsel, who has represented Hadi Husain, has pointed out that the jewellery was actually pawned on dates when Hadi Husain was not in India. That is so, but that circumstance does not materially alter the case. The learned Sessions Judge has tried the case with very great care. He has weighed the evidence most carefully and his conclusions are well reasoned. In respect of such a charge as this one of conspiracy direct evidence is naturally difficult to obtain and such a charge must depend largely, as it does here, on circumstantial evidence. We find that in this case a man of high family and position has joined in business partnership a man of no family or position and that they have conducted a business together which has ended in a total loss. Hadi Husain has since become an insolvent. We find that the smaller man has undoubtedly committed criminal breach of trust in respect of money entrusted to him by his principal who is the grandmother of his partner's wife and that out of the same money entrusted to the smaller man the high-born man has embezzled a portion.

We further find that although Hadi Husain was aware of the fact that this large amount of jewellery had been handed over to Anandi Prasad in order that he might deposit it for safe custody in a bank and of the fact that Anandi Prasad had pawned that jewellery and kept the proceeds we find not only did he not inform the lady, whose property had been misappropriated, of the fact, although he is married to her granddaughter, but that he told her deliberate untruths upon the subject. In these circumstances we consider that the learned Judge has arrived at a correct finding when he has determined that both these men were engaged in a criminal conspiracy. We accordingly set aside the verdict of the jury and convict Anandi Prasad on charges under S. 409. We sentence him on each charge to a sentence of five years' rigorous imprisonment. The sentences will run concurrently. As he has already been convicted on the same charges in the other case his sentences in this case

will run concurrentlywith his sentences in the other case. Thus in setting aside the jury reference we are not inflicting any further punishment on Anandi Prasad. We merely correct a perverse verdict. With regard to the sentences which have already been pronounced on Anandi Prasad and Hadi Husain by the learned Sessions Judge, we see no reason to reduce them. The sentences are heavy, but they are deservedly heavy. It would be difficult to find a more deliberate, cruel or ungrateful instance of criminal breach of trust. Nawab Qudsia Begam is a very old lady. She appears to have treated Anandi Prasad with unfailing consideration and kindness and she appears to have treated Hadi Husain with generosity. They have combined together to try and obtain dishonestly as much as they could possibly from a defenceless old lady, whom they were under an obligation to protect, and we are not disposed to reduce their sentences.

It is of course a matter for regret that a man, such as Hadi Husain of high position should sink, as he has sunk, and has been found capable of committing such a dastardly offence. We sympathize with his family for the disgrace which he has brought on them, but we do not sympathize with him. We consider that in the interests of the public his sentence should be carried out as it stands and that no consideration of his high birth or his previous position should operate for its reduction. We accordingly dismiss these appeals. We have still to determine one matter. The learned Sessions Judge has directed that such jewellery as was recovered from the possession of the firm Khem Chand and Gayan Chand should be restored to Nawab Qudsia Begam and the firm in the application, which we are now deciding, have asked us to set aside that order. We see no reason to set it aside. Property in respect of which criminal breach of trust has been committed is as much stolen property as property the possession whereof has been transferred by theft according to the provisions of S. 410, I. P. C. The learned Sessions Judge has applied the rule which governs a case such as this. Such property should be handed by the criminal Court back to the possession of the real owner unconditionally. Where there is a bona fide dispute as to title the procedure may be different, but here there is no doubt as to the fact that the jewellery in question is the property of Nawab Qudsia Begam. She handed it over through Hadi Husain to Anandi Prasad in order that Anandi Prasad might deposit it for safe custody with a bank. Instead of so doing he retained it himself and committed criminal breach of trust in respect of it. It has been rightly restored to her. We dismiss Criminal Miscellaneons Application No 9 of 1928. This concludes the matters before us.

Verdict set aside.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 282

STUART, C. J., AND RAZA, J.

Amarnath Singh and *another*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 107 of 1928, Decided on 15th March 1928, against order of Sess.-Judge, Fyzabad, D/- 20th January 1928.

(*a*) *Penal Code, S. 300—A zamindar ordering a tenant, though not entitled to so order, to work in the field—Latter refusing to come that day but promising to come a day later—Zamindar thrashing tenant and striking blows on his head causing his death—Zamindar was held to have committed murder.*

A zamindar ordered *A*, a tenant, to proceed and plough gratuitously a field belonging to him and his brother. *A* demurred saying that he had his own work to attend to and that he could not come that day, but he promised to come and work for the two brothers on the following day. The services of *A* were to be taken gratuitously though the zamindar was not entitled in any way to exact these services. When *A* refused to come, the zamindar seized *A* and commenced thrashing him with an ox-goad, which he had in his hand. He struck *A* with lathi a blow over the head which felled him to the ground. After he had struck him this blow on the head the zamindar hit him again more than one blow which caused the death of *A*.

Held : that the zamindar had been rightly convicted of murder, [P 284 C 2]

(*b*) *Penal Code, S. 319—Serious form of simple hurt explained.*

Where a man of thirty, even though he had been dazed by a blow on the head inflicted by somebody else, approached the prostrate body of a dying man, kicked him on neck and then pressed with his foot the dying man's head into the ground so that it became buried in the earth,

Held : the man was guilty of the most seri-

ous form of simple hurt and maximum sentence should be awarded. [P 284 C 2]

Jagat Narayan—for Appellants.

G. H. Thomas—for the Crown.

Judgment.— Amarnath Singh, a Thakur of 25 years of age, and Mangru Singh, his brother, who is 30 years of age, have been convicted by the learned Sessions Judge of Fyzabad in the same trial. Amarnath Singh has been convicted of murder under S. 302, I. P. C., and sentenced to transportation for life. Mangru Singh has been convicted of causing simple hurt and sentenced to a year's imprisonment under S. 323. They both appeal. Their appeal has been argued before us by a leading counsel, who has brought out all the points which could be brought out in favour of his clients. The facts are these : It is admitted that the two appellants are zamindars in the village of Kaithapur in the Sultanpur District. In this village there resided a Kurmi called Algu, who was a tenant of the coparcenary body owning the village. The appellants are members of this coparcenary body. On 3rd November 1927, at about 11 a. m. the two appellants were returning from their fields towards the inhabited portion of the village.

On their way they passed close to a field where Algu Kurmi, who was a man of about 55 years of age, was engaged in agricultural labour together with his nephew Noor, a young man of about 22. They stopped and addressed Algu. Amarnath Singh, the younger brother, conducted the conversation. He ordered Algu to proceed the same day and plough gratuitously a field belonging to the two brothers. Algu demurred, saying that he had his own work to attend to and that he could not come that day, but he promised to come and work for the two brothers on the following day. The services of Algu were to be taken gratuitously, as we have said, and the work was of the nature known as begar. The appellants were of course not entitled in any way to exact these services, but it would appear that Algu was ready to obey their commands provided he was not taken away from his work that day. When Algu refused to come, it is in evidence that Amarnath Singh seized Algu and commenced thrashing him with an ox-goad, which he had in his hand. He also thrashed Noor. Algu and Noor also had ox-goads and they appear to have defended themselves with their ox-goads. Up to this point there is no doubt as to the facts. These facts were clearly proved by the prosecution witnesses and their truth was admitted by the appellants themselves. The first point upon which there is a dispute is as to the attitude of Mangru Singh. Both sides agree that Mangru Singh did not take part in the thrashing of Algu and Noor. He was standing by, watching the occurrence. According to the prosecution he had a lathi. According to the defence he had only an ox-goad There is some contest as to what occurred next. Dargahi is a son of Algu, aged 20. His father and Noor were shouting for help. The place where they were was on the edge of the inhabited area. Dargahi, who was not far away, hearing their cries, ran to their assistance. According to him he was met by Mangru Singh, who threatened him with a lathi. He says that he then picked up a lathi which he found lying at the door of the house of a Pasi and that he warded off the blows which Mangru Singh was directing against him and that he struck Mangru Singh a blow on the head which felled him to the ground. Here there is a considerable difference of opinion.

The learned counsel for the appellants has argued that the prosecution witnesses should be disbelieved when they state that Mangru Singh had a lathi. He asks us to draw an inference from the first report to the effect that Mangru Singh had no lathi, but, as we read the first report we consider that the writer intended it to be believed that Mangru Singh had a lathi. There is nothing in the first report to discredit the prosecution evidence. We find that the prosecution evidence upon the point has been believed by the learned Sessions Judge and by the majority of the assessors. We find that the defence evidence upon the point has not been believed ; and after considering the question we are of opinion that Mangru Singh had a lathi, but that owing to Dargahi's superior skill he gained no advantage from its use, Dargahi felling him to the ground with a blow on the head which dazed Mangru Singh. We now come to the most serious part of the story.

As we have seen, Amarnath Singh was engaged in thrashing Algu and Noor, who were endeavouring to protect them-

selves and retaliate. Amarnath Singh saw Mangru Singh felled by Dargahi. He left Algu and Noor, rushed towards Dargahi and snatched his lathi away from Dargahi and he struck Algu with this lathi a blow over the head which felled him to the ground. After he had struck him this blow on the head Amarnath Singh hit him again more than one blow. Mangru Singh, on the evidence which we believe, dragged himself to his face, came to the prostrate body of Algu and, according to the evidence, he kicked Algu, as he lay on the ground, twice on the neck and placing his foot on the neck of Algu pressed it so hard that Algu's face was buried in the earth. The lathi blow which Amarnath Singh had inflicted on Algu's head caused the death of Algu or shortly after he received it. The medical evidence shows that the skull was smashed like an egg shell. The blow delivered must have been delivered with the greatest force that Amarnath Singh was capable of inflicting. Algu was, however, still alive when Mangru kicked him. These are the facts as we find them. It remains to consider the arguments in appeal as to the offences committed.

The learned counsel for the appellants has argued that in no circumstances did the act of Amarnath Singh amount to murder. He argues that in the first place Amarnath Singh was acting in exercise of private defence and he argues that, even if he were not acting in exercise of private defence, the act was removed from the category of murder under the provisions of S. 300, Expl. 4, as having been committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage acting in a cruel or unusual manner ; but on the evidence of fact, which we have already stated, there is in our opinion no force in these arguments. As we have shown, Amarnath Singh was engaged in beating Algu Kurmi, a man of 55, and this Kurmi's nephew. He was in no way engaged with Dargahi and cannot be said to have protected himself in any way against Dargahi. If it is argued that he was protecting his brother Mangru Singh against Dargahi, it is sufficient to say that he had rescued Mangru Singh effectively from Dargahi after he snatched away Dargahi's lathi, and in any circumstances he had no right to touch Algu, who was not attacking Mangru Singh and who had been getting very much the worst of the encounter. There can be no question of private defence. It is true that there had been a sudden fight, that the fight was upon a sudden quarrel, and that there was considerable heat of passion, but there was no justification of any kind for Amarnath Singh's action in striking this terribly violent blow upon Algu's head. Algu had caused no injuries worth the name and in our opinion Amarnath Singh undoubtedly took undue advantage and acted not only in a cruel, but in a brutal, manner. In these circumstances we find that he has been rightly convicted of murder. The learned Sessions Judge has sentenced him to the minimum sentence allowed by the law.

We do not see our way to suggest to the Crown a reduction of this sentence as a matter of clemency, for we consider the behaviour of Amarnath Singh in this case to have been the behaviour of a brutal tyrant. In respect to Mangru Singh who has been convicted of simple hurt for having kicked Algu on the neck and forced his face into the ground, he has certainly been rightly convicted of simple hurt in respect of these acts. We are asked to reduce his sentence and the learned counsel for the appellant has pointed out with force that unless we consider the simple hurt caused as bad a case of simple hurt as could be caused we should not inflict the maximum sentence. This is a perfectly good argument, but we are of opinion that the act does come in that category. The action of a man of 30, even though he had been dazed by a blow on the head inflicted by somebody else, who approaches the prostrate body of a dying man, kicks him on the neck and then presses with his foot the dying man's head into the ground so that it becomes buried in the earth, appears to us to be the most serious form of simple hurt and we see no reason to reduce the sentences. For the above reasons we dismiss this appeal.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 285

STUART, C. J., AND RAZA, J.

Emperor—Appellant.

v.

Durga Datt—Respondent.

Criminal Appeal No. 46 of 1928, Decided on 17th February 1928, against order of 1st Addl. Sess. Judge, Lucknow, D/- 13th December 1927.

Police Act (5 *of* 1861), *S.* 29—*Police Officer carried into a building by men whom he was protecting from the rioters is not guilty of cowardice when he tries to come out but is not allowed to do so by persons inside.*

A man doing his best to keep rioters out and who is carried into a building by a rush of the very men whom he is trying to protect, is clearly showing no cowardice up to the time that he enters the building, and if after entering the building the persons inside refuse to let him go out, he is not guilty of cowardice. [P 286 C 1]

G. H. Thomas—for the Crown.

Jagat Narayan Mulla—for Respondent.

Judgment.—This is an appeal by the Local Government under S. 417, Criminal P. C., against the acquittal on appeal of Sub-Inspector Durga Datt who was convicted by a Magistrate of the 1st Class in the Bara Banki district of an offence of having, as a police officer, been guilty of cowardice, an offence punishable under S. 29, Act 5, 1861, and sentenced to two month's simple imprisonment.

The charge against the Sub-Inspector arose in connexion with a small communal disturbance which took place in the village of Ichauli in the Bara Banki District on 21st August 1927, the day following the Janam Ashtmi. On that day the Hindus of Ichauli were carrying in procession what is known as the Ram Dols, that is, earthen jars and wooden structures upon which are placed idols connected with the worship of Sri Krishna.

There had been an apprehension that a riot might take place in the village and that there might be an attack on the procession by the Mahomedans of the village and Sheikh Laiq Ali, Sub-Divisional Magistrate, Sub-Inspector Durga Datt, and three police constables were sent down to preserve order. There is no doubt as to the fact that shortly before sunset, that is to say, at about 6 p. m. the procession was coming down a lane from north to south. Sheikh Laiq Ali and Sub-Inspector Durga Datt had previously been with the procession, but they had left it for a time and were waiting for it as it was coming down the lane. Sheikh Laiq Ali took up a position on the roof of the house of a man called Maddo as he found that a large number or brickbats had been stocked there and being on the roof he was in a good position to prevent their use. Sub-Inspector Durga Datt accompanied the procession. He was in the front of the procession. This much is clear. The procession proceeded peaceably until it had passed a mosque. It then came to where a pakar tree more or less obstructed the lane. There was some sort of stoppage at the pakar tree, either because the processionists had to push the boughs on one side to get Ram Dol under them, or because they were possibly breaking the boughs, and Sub-Divisional Magistrate, Sheikh Laiq Ali, called to Sub-Inspector Durga Datt to keep the procession moving and not allow it to stop. He apparently did his best to do so, but there was a stop fairly soon opposite the house of a man called Ganesh. Some sort of religious ceremony was performed and the Hindus commenced clapping and then proceeded again. In the meanwhile a considerable number of brickbats had been thrown by the Mahomedans at the Hindus and by the Hindus at the Mahomedans and when the procession reached the house of a man called Surajbali a lathi fight began. The Ram Dols were put on the ground and it is in evidence that they were smashed by the Mahomedans. It is in connexion with what happened close to Surajbali's house that the charge of cowardice has been brought against the Sub-Inspector Durga Datt.

A telegram had been sent to Bara Banki to summon assistance and at 7 p. m. the District Magistrate and the Superintendent of Police arrived in motor cars bringing assistance. By that time the whole of the trouble had come to an end. Nothing was left except the broken jars. Apparently very few injuries had been done on either side for we do not hear anyone having been sent to hospital. When the District Magistrate and the Superintendent of Police arrived Sub-Inspector Durga Datt was found inside Surajbali's house. He was there according to the original report of the Superintendent of Police with 20 or 30 men It is not proved in evidence exactly how many men were there. The charge of

cowardice against him is to the effect that when the lathi fight commenced in front of Surajbali's house he deliberately ran away and locked himself in the house. His reply is that he did nothing of the kind, that he was doing his best to keep the Mahomedans back, that the Mahomedans were endeavouring to force their way into Surajbali's house and other places, that the door of Surajbali's house was opened, that certain number of Hindus rushed in, that they carried him with them, that they closed the door and that they refused to let him go outside as they were afraid that if the door were opened the Mahomedans would rush in. Now if the story which he tells is true, we fail to see that he can possibly be convicted of cowardice. A man doing his best to keep rioters out, who is carried into a building by a rush of the very men whom he is trying to protect, is certainly showing no cowardice up to the time that he enters the building, and if after entering the building the persons inside refuse to let him go out, we do not consider that he is guilty of cowardice. The question was how to get outside. He had a revolver, but it can hardly be suggested that he should have used his revolver to shoot Surajbali and other members of the house when he was there to protect them, in order to get outside for the purpose of shooting some of the Mahomedans. The whole question is what were the facts?

A very remarkable thing about the prosecution case is that there is no direct evidence of any person who says that he saw the Sub-Inspector, Durga Datt, run inside Surajbali's door and shut himself in. Sheikh Laiq Ali was not in a position to see what was happening at Surajbali's house. Police constable, Bajrang Singh, the second prosecution witness, was also not in a position to see what had happened at Surajbali's house for according to him he left before the Ram Dols were broken. The Superintendent of Police did not arrive till after the whole affair was over and the prosecution witnesses, who were present on the spot such as Surajbali, Dwarka, Suraj Prasad and Rambali, support Durga Datt's story. Surajbali who is the owner of the house has deposed clearly and distinctly that the Sub-Inspector Durga Datt was carried in by a rush which he could not prevent and they all depose to the Sub-Inspector having endeavoured to get out of the house and being prevented from so doing by the Hindus inside. Now even, if these witnesses were not to be relied on it is difficult to see how the prosecution can gain in any way by a finding that their own witnesses were not telling the truth. It appears, however, to us that there is no reason to suppose that these witnesses are not telling the truth. We note that two Mahomedans who were called for the defence have supported the same story. We have thus no hesitation in finding on the facts that the explanation given by the Sub-Inspector Durga Datt is true and that in these circumstances he was not in any way guilty of cowardice and we think it only fair for this officer, who is a man of 16 years' service and whose character has not been attacked in the past, to say that up till the time that he was forced by the rush into the house of Surajbali he seems to have behaved not only well but courageously. After he was forced into the house in a manner which he could not prevent, he was unable to get out of the house through no fault of his own. We accordingly dismiss this appeal.

N.K. *Appeal dismissed.*

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* A. I. R. 1928 Oudh 286

STUART, C. J., AND RAZA, J.

Irsahd Ahmad—Plaintiff—Appellant.

v.

Mt. Saidunnisa and *another*—Defendants—Respondents.

Second Appeal No. 24 of 1927, Decided on 22nd December 1927, against the order of 3rd Addl. District Judge, Lucknow, D/- 31st March 1927.

(*a*) * *Limitation Act, Art.* 182—*Suit for redemption—Compromise decree passed—Decree not directing sale of mortgaged property in case of default by mortgagor to pay—Decree should be treated as under S.* 375, *Act* 14 *of* 1882, *and not under S.* 92, *Transfer of Property Act and Art.* 182 *will apply.*

Certain persons instituted a suit for redemption of a certain mortgage against *A* and *S*. At that time, the procedure in respect of mortgage suits was governed by the provisions of certain sections of the Transfer of Property Act. The parties entered into an amicable arrangement and a decree was passed giving effect to the terms of that arrangement. The decree stated that if the plaintiffs, who represented the mortgagors paid a certain sum at any time

to the defendants, the representatives of the mortgagees, the defendants, were to restore to them the possession of the mortgaged property. *A* was then a minor. He was not a party to the compromise. The same *A* claiming that he was the representative of one of the mortgagors in 1926, applied to pay the money into Court and to redeem the property as against S.

Held: that the decree as it failed to give the mortgagee authority to sell the property was not a decree under S. 92, T. P. Act, and. therefore, must be treated as a decree under S. 375, Act 14, 1882, and so it was governed for the purpose of limitation by Art. 182. [P 289 C 1]

Niamat Ullah and *Rauf Ahmad*—for Appellant.

Hyder Husein—for Respondent.

Judgment.—The question raised in this second appeal can only be decided after examination of the facts. We have it that in the year 1905 Iltafat Ahmad, Maqbul Ahmad, Naushad Ahmad and Qabul Ahmad instituted a suit for redemption of a certain mortgage against Saidunnisa and Irshad Ahmad. At that time the procedure in respect of mortgage suits was governed by the provisions of certain sections of Act 4, 1882. The parties entered into an amicable arrangement and a decree was passed giving effect to the terms of that arrangement The deeree stated that if the plaintiffs, who represented the mortgagors, paid Rs. 1,700 at any time to the defendants the representatives of the mortgagees, the defendants, were to restore to them the possession of the mortgaged property. That was all. The facts are somewhat peculiar. Irshad Ahamad, as has been stated, was there representing the mortgagees. He was then a minor. He was not a party to the compromise. Now it is this very Irshad Ahmad who is applying to redeem the property claiming that he is the representative of one of the mortgagors. In 1926 he applied to pay the money into Court and to redeem the property as against Saidunnisa. The lower appellate Court has dismissed his application and he appeals here. The first question which we have to decide is what is the nature of the decree of which execution is sought. The first outstanding fact, which shows that it is not a decree under S. 92, Act 4, 1882, is that it gives no authority to the mortgagee to sell the property if the payment is not made on or before due date by the mortgagor. The second fact is that no date is fixed. As it is thus not a decree under S. 92 it can only be treated as a decree passed under the provisions of S. 375, Act 14, 1882. As it is such a decree, we have to find the period of limitation. The period of limitation is clearly the period provided by Art. 182 Sch. 1, Lim. Act (9 of 1908). As such the application is time barred, We, therefore, dismiss this appeal with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 287

WAZIR HASAN AND NANAVUTTY, JJ.

Ram Kishore—Defendant—Appellant.

v.

Baijnath—Plaintiff—Respondent.

Second Appel No. 289 of 1927, Decided on 1st March 1928, against decree of Dist. Judge, Rai Bareli, D/- 1st June 1927.

Hindu Law — Joint family — Mortgage by manager—Terms hard and unconscionable—Mortgagee must prove that mortgagor was pressed by legal necessity to borrow money on such terms [*cf. A.I. R.* 1928 *P. C*, 64—*Ed.*].

The covenants in a mortgage post-poning redemption for a period of 30 years certain and authorizing the mortgagee to spend as much money as he chose over new constructions of the mortgaged premises, which money may far exceed the value of the mortgaged property and entitling the mortgagee to claim interest on the money so spent at the rate of 24 per cent. per annum with the compelling obligation on the mortgagor to keep the interest running for a period of 30 years are on the face of them hard and unconscionable. In such a case it is the obvious duty of the mortgagee to satisfy the Court by the proof of the fact that the mortgagors were pressed by some necessity justifiable in the eyes of the Hindu law to borrow money on such terms: *A. I. R.* 1919 *P. C.* 12, and *A. I. R.* 1923 *P. C.*, 37, *Ref.* [P 289 C 1]

(*b*) *Hindu Law—Mortgage of joint family property—Purchaser of equity of redemption can raise pleas of want of legal necessity and unconscionable nature of terms in his redemption suit.*

A purchaser of the equity of redemption of a mortgage of the joint family property is entitled to raise in his suit for redemption of the mortgage, please that the terms the mortgage are onerous and unconscionable and that. there was no legal necessity for the mortgage on such terms. [P 289 C 1]

Hyder Husein for *Niamatullah* and *Naimullah*—for Appellant.

Biesheshwar Nath Srivastava—for Respondent.

Judgment.—This is the defendant's appeal from the decree of the District Judge of Rae Bareli, dated 1st June 1927, affirming the decree of the Subordinate

Judge of the same place dated 8th December 1926.

The appeal arises out of a suit brought by the plaintiff-respondent for redemption of a mortgage dated 22nd December 1917 executed by one Lallu and his son Mahabir, in favour of the defendant-appellant. The consideration for the transaction of the mortgage was a sum of Rs. 2,500 and the property mortgaged was a shop No. 37 situate in Bazar Lalganj, hamlet of Datauli, pargannah Dalmau, in the district of Rae Bareli. It is now agreed that the property in suit was the ancestral joint property of a Hindu family of which the members were Lallu, his son Mahabir, and Mahabir's son, Mahadeo. Mahabir has since died. On 31st August 1925 Lallu sold the premises mortgaged to the plaintiff-respondent under a deed of sale of that date. The deed was executed by Lallu on his own behalf and also in the capacity of a guardian of his minor grandson Mahadeo.

The Courts below have decreed redemption on payment of a sum of Rs. 1,099. As to the rest of the mortgage-money the same Courts have held that it was not proved by the defendant that it was borrowed by the mortgagors for any legal necessity which could have the effect of validating the alienation of joint family property.

On the terms of the mortgage the mortgagors were deprived of their right to redeem for a period of 30 years and on the expiry of that period the right was let out for a term of one year only. In the event of default on the expiry of the 31st year the mortgagee had the right to foreclose. Further the mortgagee obtained authority under the covenants contained in the deed of mortgage to spend money on new constructions of the mortgaged premises. The limits of the expenditure on the new constructions, if any, were not prescribed. The mortgagors undertook to repay the value of the new construction with 2 per cent. per mensem interest at the time of redemption. In respect of these conditions of the mortgage the objection taken by the plaintiff-respondent was two-fold: (1) that they constitute a clog on the equity of redemptiong and (2), having regard to the mortgaged property being a joint Hindu family property the mortgagors were not justified in borrowing money on such conditions. The rejoinder by the defendant was that the plaintiff being merely a purchaser of the equity of redemption was not entitled to raise these grounds of attack against the mortgage in suit and that in any case the terms of the mortgage do not amount to a fetter on the equity of redemption and that there was a presumption of the existence of legal necessity in the circumstances of this case.

Every one of the above points has been decided by the Court below in favour of the plaintiff-respondent and in the appeal before us the judgment of the lower appellate Court was challenged on three main grounds:

(1) that the plaintiff was not entitled to raise the pleas on which he has succeeded in the Courts below: (2) that there was no clog on the equity of redemption in the covenants contained in the mortgage in suit; and (3) the legal necessity for the consideration of the mortgage as well as for its terms should be presumed in the circumstances of the case.

We propose to dismiss this appeal by deciding the grounds 1 and 3 against the appellant.

As to ground 1: we have come to the conclusion that the covenants contained in the mortgage, on which the plaintiff relies in support of his case, are covenants running with the mortgaged property. Indeed they constitute the mortgagee's title to hold the land in possession in the character of a mortgagee. This being so, we see no ground why these pleas should not be open to the person such as the plaintiff who has lawfully acquired title by the conveyance in his favour to the mortgaged property.

As to ground 3: we are of opinion that there is no room left in the circumstances of the case for making any presumption in favour of the mortgagee as to the existence of legal necessity in respect of a portion of the mortgage-money and in respect of the terms of the mortgage. It is true that the mortgage in suit was effected by the only two adult members of the family, and if the matters had rested there, aid from presumption in favour of the mortgagee might have been invoked. But the mortgagee's positive case as disclosed in the evidence is that the sum of Rs. 1,400, which was paid in cash by the mortgagee to the mortgagors, was borrowed by the latter for the purpose of carrying on the busi-

ness of selling grain. This case of the mortgagee has been negatived by the Courts below as a false case and we in second appeal have no power to decide otherwise.

As to the covenants in the deed of mortgage: it is impossible again to raise any presumption of validity in respect of them. The prior mortgage, for the redemption of which over Rs. 1,000 was left with the mortgagee, had not matured for redemption. It had a period of seven years to run before a claim for redemption could be made. Obviously the pressure to borrow, therefore, could not be attributed to the fact that a prior mortgage was an incumbrance which the mortgagors reasonably intended to wipe off by borrowing afresh. The covenants in the mortgage in question postponing redemption for a period of 30 years certain and authorizing the mortgagee to spend as much money as he chose over new constructions of the mortgaged premises, which money may far exceed the value of the mortgaged property, and entitling the mortgagee to claim interest on the money so spent at the rate of 24 per cent. per annum with the compelling obligation on the mortgagor to keep the interest running for a period of 30 years are on the face of them hard and unconscionable. In these circumstances it was the obvious duty of the mortgagee to satisfy the Court by the proof of the fact that the mortgagors were pressed by some necessity justifiable in the eyes of the Hindu law to borrow money on such terms. This rule of onus on a mortgagee is a settled rule of law. In this connexion reference may be made to *Nazir Begam* v. *Raghunath Singh* (1) and *Ram Bujhawan Prasad Singh* v. *Nathu Ram* (2). There is no such proof forthcoming in the present case. The lower appellate Court very pertinently observes that the defendant mortgagee has not come into the witness-box to support the case of legal necessity.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

N.K.

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(1) A. I. R. 1919 P. C. 12=41 All. 571=46 I. A. 145 (P. C.).
(2) A. I. R. 1923 P. C. 37=2 Pat. 285=50 I. A. 14 (P. C.).

* A. I. R. 1928 Oudh 289

Full Bench

STUART, C. J., AND WAZIR HASAN AND GOKARAN NATH MISRA, JJ.

Ram Koer—Defendant—Appellant.

v.

Patraj Koer—Plaintiff—Respondent.

First Appeal No. 83 of 1927, Decided on 1st March 1928, against decree of Sub-Judge, Bahraich, D/- 15th February 1927.

Limitation Act, Art. 132—*Condition in the mortgage-deed to the effect that the mortgagor shall not be entitled to redeem and the mortgagee to bring the mortgage property to sale till a certain date—Limitation was held to begin from the date on which payment of money was to be made.*

Under a mortgage dated 19th June 1911 a mortgagor got a sum mortgaging certain immovable property. He agreed to pay interest every six months with the condition that if he did not do so interest should accumulate as compound interest and interest should be added to interest. The deed provided that this payment of interest was to take place until June 1920 and that then, and only then, the mortgagor should satisfy his full liability by payment of the principal. It also provided that the mortgagee was not to bring the property to sale on account of a default until June 1920. It further provided that, although the mortgagor was not in any circumstances entitled to pay up the principal and redeem the mortgage before June 1920, the mortgagee might recover at his wish either by mutual settlement or through a suit in Court, the entire principal with interest, compound interest and interest on interest in accordance with the conditions of the deed even before June 1920. The mortgagee brought the suit to recover his money in May 1926.

Held : that a suit to enforce payment of money charged upon immovable property in this suit could not have been instituted until June 1920, for the money, the payment of which was charged upon immovable property, did not become due till June 1920, and in these circumstances the suit was within time : *A. I. R.* 1923 *All.* 1 (*F.B.*). *Foll.* [P 290 C 2]

Moti Lal Saksena—for Appellant.

Niamat Ullah and *Naim Ullah*—for Respondent.

Opinion.

Stuart, C. J.—This is a reference made under S. 14, Act 4, 1925 (the Oudh Courts Act) by a Bench of Judges of the Chief Court to a Full Bench for decision on a specific question, the question being as to whether a certain suit was or was not barred by limitation. The circumstances are as follows : Thakur Sukhraj Singh executed, on the 19th June

1911, a registered deed, which in certain aspects is undoubtedly a deed of simple mortgage, in favour of Thakur Bisheshar Bakhsh Singh. The suit based upon this deed was not filed until the 19th May 1926. It has been decreed in favour of the mortgagee and it is against this decision that the appeal was filed in which the main argument taken (in fact the only argument taken) was that the suit was barred by limitation. I wish first to examine closely the terms of this deed. I understand that in the plaint relief was sought also in respect of a deed of further charge. But I need not discuss the terms of the latter deed as, if it be decided affirmatively that the suit is not barred by limitation in respect of the relief claimed on the deed of 19th June 1911, no question will arise as to the deed of further charge. Under the deed of the 19th June 1911, Thakur Sukhraj Singh received Rs. 12,000 in cash on which he agreed to pay 10½ per cent. simple interest per annum.

The deed commences by saying that he has charged certain immovable property for the repayment of the amount due from him. It continues with an undertaking of Sukhraj Singh to pay the interest regularly every six months, with the condition that if he does not do so, the interest shall accumulate as compound interest and that interest shall be added to the interest. The deed continues that this payment of interest is to take place until June 1920, and that then, and only then shall it be open to Thakur Sukhraj Singh to satisfy his full liability by payment of the principal. It is distinctly laid down that it is not until June 1920 that Thakur Sukhraj Singh is to be given an opportunity of redeeming the mortgage. To this limitation of the ordinary power of redemption is added a condition in favour of the mortgagor, to the effect that the mortgagee is not to bring the property to sale on account of a default until June 1920. So far the terms of the deed present no difficulty. It is clear that the mortgagor is ordinarily not permitted to complete his power of redemption until June 1920, and that the mortgagee is not entitled to proceed against the property until June 1920. But then comes a peculiar condition in para. 4 which is to the effect that, although the mortgagor is not in any circumstances entitled to pay up the principal and redeem the mortgage before June 1920, the mortgagee may recover at his wish, either by mutual settlement or through a suit in Court, the entire principal with interest, compound interest, and interest on interest in accordance with the conditions of this deed even before June 1920. To this is superadded in para. 5 a reiteration of the previous statement that it is not until after June 1920, that the mortgagee is to be entitled to sell up the property. In order to decide whether the suit was or was not within limitation it appears to me only necessary to consider under the provisions of Art. 132, Sch 1, Act 9, 1908, when the money sued for in the present suit became due. I do not wish here to go at length into the general question. I note generally that I am in accord with the views taken by a Full Bench of the Allahabad High Court in *Shib Dayal* v. *Mcharban* (1).

What I am mainly concerned with here is the construction to be placed upon the terms of the deed. The construction which I place upon the terms is this : Sukhraj Singh agreed to pay Rs. 630 as interest every six months ; Bisheshar Bakhsh Singh had no right to bring the property to sale until June 1920, but he was not debarred from making a private arrangement with Sukhraj Singh whereby Sukhraj Singh should repay him the principal and interest within that period. Sukhraj Singh could not compel Bisheshar Bakhsh to make such an arrangement, but Bisheshar Bakhsh could compel Sukhraj Singh to make the arrangement by instituting a suit against him to recover the principal and interest before June 1920. Only if he took this course he had to refrain from enforcing the charge created by mortgage upon the property and to proceed for the recovery of a money relief alone. According to my view a suit to enforce payment of money charged upon immovable property in this suit could not thus have been instituted until June 1920, for the money, the payment of which was charged upon immovable property, did not become due till June 1920, and in these circumstances the suit is within time. I answer the reference accordingly.

Wazir Hasan, J.—My answer to the question referred for decision to the Full

(1) A. I. R. 1923 All. 1=45 All. 27 (F.B.).

Bench is the same as that which has just been given by the Hon'ble the Chief Judge. On the general question of law presented before us at the hearing of the appeal in arguments by the learned counsel for both sides I adhere to the view taken in *Mt. Gaura* v. *Ram Charan* (2), a decision to which I was a party. In the present case the right answer to the question under consideration depends on the proper interpretation of para. 4 of the deed of mortgage dated the 19th June 1911. The general purport of the transaction evidenced by this deed is one of a simple mortgage as a security for the repayment of the mortgage money, principal and interest both, from the inception of the transaction till the realization of the mortgage money. The charge on the immovable property, according to my judgment, subsists all along. The mortgage is to last for nine years certain. In other words the mortgagor has no right to redeem within the said period and the corresponding liability of the mortgagee is that he has no right to recall the mortgage money within the said period. This is the general intention conveyed by the words employed in paras. 3, 4 and 5 of the deed of mortgage now being interpreted. The intention, which I have just now stated, is not to be gathered by any implication. To my mind these paragraphs expressly say so. Now within this ambit of the rights and liabilities of the mortgagor and the mortgagee inter se, we have a provision in para. 4 of the deed of mortgage. It will be desirable to reproduce the whole of this paragraph :

Para 4. That within the stipulated, i. e., 1327-F., I, the executant, cannot be entitled to pay the principal money, under any circumstances. Of course Thakur Saheb, the said mortgagee, is entitled to recover if he likes either by mutal settlement or through Court, the entire money, principal with interest, compound interest and interest on interest, etc., in accordance with the conditions of this deed even within the stipulated period ; if he chooses to recover only the interest etc., he can also do so within the stipulated period.

This paragraph debars the mortgagor from repayment of the principal money within the stipulated period. Why reference is made to the principal money alone is clear from the fact that in the preceding paragraph provision was made that the interest shall have been paid six monthly as it fell due by the mortgagor to the mortgagee, and para. 4 contemplates that the liability had been satisfied from time to time as it arose. Para. 4, therefore, begins by excluding the mortgagor's right to redeem within the period of nine years ; and yet it proceeds to give a right to the mortgagee within the said period to recover his money, both principal and interest from the mortgagor. Parenthetically it may be mentioned that in my opinion the personal liability of the mortgagor expressed by the words employed in para. 4 carry with it contractual liability of a charge on immovable property as is expressed in the preamble of the deed of mortgage and further it would follow as a matter of law ; but that is not the matter with which I am concerned at present. Now this right of the mortgagee to recover his money within the period of nine years is clearly made dependent upon arising of a contingency expressly stated in the paragraph itself, and that contingency is "either by mutual settlement or through Court." The contingency contemplated by the words just now quoted is alternative in its character. The first alternative is that the repayment of the loan shall be made by the mortgagor by means of mutual settlement. Obviously no mutual settlement can be reached unless the parties to it have expressed to each other the intention of reaching at such a settlement. The second alternative is by an action in Court. This alternative may be interpreted to mean either an action in which the Court will grant a decree for the recovery of the mortgage money, only in the event of a precedent failure of a mutual settlement, or it may mean that the mortgagee may express his intention to recover the mortgage money by means of an action in Court. If the last interpretation is correct, and I am inclined to think that it is, if I may say so, then the suit out of which this appeal has arisen is the first expression of the mortgagee's intention to claim his money, as it is agreed that there has been none before. In this view of the case there can be no question of limitation whatsoever.

Mirza, J.—I would also answer the reference in the way as answered by the Hon'ble the Chief Judge. I agree with him in his interpretation of the deed. In my opinion, reading paras. 3, 4 and 5 of the deed, the intention of the parties to

(2) A. I. R. 1927 Oudh 539.

this deed of mortgage appears to be that if the mortgagee was to claim his money by sale of the property mortgaged he could only do so after the expiry of the stipulated period. If he, however, wanted to claim his money before the expiry of the said period he could do so, but in that case he would not be able to enforce his claim against the property. In that view of the case it appears to me that the present suit being a suit for the enforcement of the charge must be considered to be one amply within limitation. Under Art. 132, Lim. Act, the period for a suit to enforce the payment of money charged upon an immovable property is a period of twelve years reckoned from the date when the money so charged becomes due. Under the terms of the mortgage-deed the money charged was only to fall due in 1920, that is, the end of Jeth 1327. The present suit was brought in 1926 and I am, therefore, of opinion that it was well amply within limitation.

N.K. *Reference answered.*

A. I. R. 1928 Oudh 292

WAZIR HASAN AND RAZA, JJ.

Sheo Saran Vaish—Applicants.

v.

Jitendra Nath Das—Opposite Party.

Criminal Misc. Appln. No. 5 of 1928, Decided on 17th March 1928.

(a) *Penal Code, S. 415—Cheating—Decree-holder given a cross cheque by judgment-debtor for being accommodated—Cheque dishonoured—Judgment-debtor was held not guilty as there was no dishonest intention.*

A the decree-holder made on 3rd February 1927 a settlement with the judgment-debtor by which *C* executed a surety bond for the latter and an application was made to the Court for the stay of execution proceedings. At the same time, a crossed cheque was given by the judgment-debtor to *A*. The cheque on presentation on 10th February 1927 was dishonoured and found its way back into the hands of *A*. On 11th February 1927 a sum of Rs. 350 was paid by the judgment-debtor to *A*'s pleader towards part realization of the decree. On the 16th February 1927 *A* renewed the execution of his decree with a prayer for attachment of the judgment-debtor's property. The judgment-debtor was prosecuted for the offence of cheating under S. 415, I. P. C. in respect of the dishonoured cheque.

Held: that the judgment-debtor could not be convicted of the offence of cheating because the cheque was not, to the knowledge of the decree-holder, issued in token of the immediate satisfaction of the decree as an accomplished fact but only as a security and as an accommodation to enable the judgment-debtors to provide means for the honouring of the cheque within a convenient period of time after issue or to otherwise satisfy the decree. Fraudulent or dishonest intention did not accompany the act of issuing the cheque. [P 294 C 2]

(b) *Criminal P. C., S. 561-A — Prosecution under S. 415, Penal Code — Sessions Court recommending to the High Court that proceedings be quashed—Judge of the Chief Court ordering the proceedings to continue—Subsequently accused praying, under S. 561-A, the Chief Court to quash proceedings—Previous decision of the Judge of the Chief Court does not constitute estoppel against powers of the Chief Court under S. 561 and S. 439.*

The Sessions Judge, under the provisions of S. 438 of the Code reported a case in which certain persons were being prosecuted under S. 415, I. P. C., to the Chief Court with recommendation that the proceedings in the Court of the Magistrate be quashed. A Judge of the Chief Court refused to accept the recommendation on the ground that he was unaware of any law by which the Sessions Judge could take up these proceedings at that stage and request the Chief Court to stop the trial and ordered the proceedings to continue. The proceedings continued and oral and documentary evidence was produced. Later the persons who were being prosecuted made an application under S. 561-A, Criminal P. C., praying for quashing criminal proceedings started against them.

Held: that the earlier decision of the Judge of the Chief Court did not constitute an estoppel against the exercise of the jurisdiction of the Chief Court under Ss. 439 and 561-A of Criminal P. C. [P 295 C 1]

Ali Zaheer and *Ram Prasad Varma* —for Applicants.

Jagat Narain, *Bisheshar Nath*, *R. N. Banerji* and *D. K. Bhattacharji* — for Opposite Party.

Judgment.—This is an application by Sheo Saran Vaish and Gauri Saran Vaish under S. 561-A, Criminal P. C., 1898. The applicants are being prosecuted in the Court of a Magistrate, 1st Class at Lucknow for the offence of cheating as defined under S. 415, I. P. C., by one Jitendra Nath Daw, agent for B. K. Paul & Co. of Calcutta. The prayer of the application is that the criminal proceedings mentioned above be quashed. We have heard arguments at some length and now proceed to record our judgment.

It may be mentioned that notice of the proceedings before us was given to

the Government Advocate of this Court and in response the learned Government Advocate appeared before us and stated that as the criminal prosecution is on a private complaint, he has received instructions to state that the District Magistrate of Lucknow does not desire to take part in the proceedings.

On a careful consideration of the merits of the case and the arguments addressed to us on both sides we have come to the conclusion that on the admitted facts and the inferences which may reasonably be drawn therefrom, there is no case of cheating against the applicants. Therefore with a view to prevent abuse of the jurisdiction of the Court in which the criminal proceedings are pending and with a view to secure the ends of justice, the said proceedings must be quashed.

There are two firms at Calautta, one bearing the name of B. K. Paul & Co. and the other of B. N. Paul & Bros., the former dealing in drugs and stores and the latter in wines. The proprietors of both the firms are, however, the same persons. The applicants are members of a firm of the name of Budree Das & Co., at Lucknow. The last-mentioned firm have had dealings with the firms in Calcutta for a considerable long period of time and fell into arrears for price of articles supplied to them by the two firms at Calcutta. The result was that on 5th August 1926, B. K. Paul & Co. instituted a suit in the High Court for recovery of the arrears from Budree Das & Co. On 2nd September 1926 the defendants paid a sum of Rs. 500 to B. K. Paul & Co. On the 6th November 1926 B. K. Paul & Co.'s suit was decreed in full for a sum of Rs. 1,946-13-0 including costs. The decree was made exparte and no credit was given for the payment of the aforementioned sum of Rs. 500. A similar suit was brought by the other firm of B. N. Paul & Bros., and a decree obtained.

In course of time the two decrees were transferred for execution to the Court of the Subordinate Judge of Lucknow and execution was being taken out when, on 3rd February 1927, the judgment-debtors approached Mr. Kewal Kishore, pleader for the decree-holders, for an amicable settlement of the two decrees. The settlement was made and is evidenced by a letter which the judgment-debtors wrote to Mr. Kewal Kishore on 3rd February 1927 (Ex. 1 on the file of the Magistrate's Court), by a surety bond executed by one Pyare Lal on the same date, and by an application made on the 3rd February to the Court seised of the execution proceedings (Ex. 9 on the execution file). On the same date a crossed cheque for a sum of Rs. 1,474-14-0 was given by Sheo Saran Vaish to B. K. Paul & Co. The cheque was issued on the Allahabad Bank, Ltd., Lucknow. Eventually the cheque reached the Bank on 10th February, but was dishonoured and found its way back into the hands of B. K. Paul & Co. On 11th February 1927 a sum of Rs. 350 was paid by the judgment-debtors to Kewal Kishore, pleader. On 16th February 1927 B. K. Paul & Co. renewed the execution of their decree with a prayer for attachment of the judgment-debtors' property. The attachment was sought to be made in respect of the full amount of the decree without credit being given either to the sum of Rs. 500 paid at Calcutta or to the sum of Rs. 350 paid to Kewal Kishore, pleader, at Lucknow. On the same date an order for attachment was passed and attachment effected by seizure of the judgment-debtors' property of the value equal to the full amount of the decree. It is admitted that the shop in which the attachment was made had on the premises property worth over Rs. 50,000.

The essence of the charge of cheating is alleged to lie in the fact that the cheque issued by the judgment-debtors on 3rd February 1927 for Rs. 1,474-14-0 was dishonoured on presentation.

The letter, Ex. 1, is as follows :

I agree to the following terms and promise to abide by them in lieu of which you will kindly stay the attachment against my firm in the Court of Sub-Judge, Lucknow.

(1) I shall satisfy the decree of Messrs. B. K. Paul & Co. in full by cheque on the Allahabad Bank Ltd. in which I have got an account.

(2) The amount of the decree of Messrs. B. N. Paul & Bros. will be satisfied within two months from this date.

(3) B. Pyare Lal, Munsarim, S. C. Court will stand surety for the decretal amount of Messrs. B. N. Paul & Bros., so long as the said decree is realizable from my firm.

(4) In case the money of B. N. Paul & Bros. is not paid up you will have an option of issuing the execution.

(5) As regards the costs of Mr. Jitendra Nath Daw's coming to Lucknow the matter is left solely on the discretion of Mr. H. S. Paul, the proprietor.

The letter bears the following endorsement by Mr. Kewal Kishore :

Mr. Daw, may I know your opinion?

There is a further endorsement of the same date by Mr. Daw and is as follows:

If you think that the money is safe and if you agree to the proposals I have no objection.

The substance of the security bond is that the surety holds himself liable for the satisfaction of B. N. Paul and Bros'. decree in the event of the inability of Messrs. Budree Das and Co. paying the said amount within two months. The liability of the surety arises after the expiry of the period of two months.

The application (Ex. 9), which was made to the Court in pursuance of the settlement, asked for one week's time to settle B. K. Paul and Co's decree and the time was allowed with the consent of the decree-holders. The fact that the application as originally prepared had made the prayer of altogether dropping the execution proceedings and that the said prayer was struck off and in lieu thereof a prayer for adjournment of proceedings for a week in order to enable the settlement of the claim was made is highly significant. The further fact that the cheque issued was a crossed cheque is also significant. The effect of the surety bond in relation to B. N. Paul and Bros.' decree and the Court's order granting two months' time with the consent of the decree-holder was to give a quietus for a period of two months to the execution of B. N. Paul's decree and the only decree alive and active on that date was the decree of B.K Paul and Co. The payment of the sum of Rs. 350 on 11th February may reasonbly, therefore, be presumed to have been made towards the latter decree.

We have before us the statement of Mr. Daw, the complainant, made before the Magistrate. This statement clearly shows that Mr. Daw had from the very beginning suspicions as to the bona fides of the settlement arrived at on 3rd February 1927. If the suspicions were well founded the prudent course for him was not to have accepted a crossed cheque and not to have agreed to the respite of one week in furtherance of execution proceedings. Mr. Daw should have asked for payment either in cash or by a cheque immediately payable, on presentation, by the bank at Lucknow. He did nothing of the sort. On the contrary the crossed cheque was accepted and the execution was suspended for a period of one week. Not only that, but the sum of Rs. 350 was also accepted even after the cheque had been dishonoured. These facts lead to the irresistible inference that the cheque was not, to the knowledge of the decree-holder, issued in token of the immediate satisfaction of the decree as an accomplished fact, but only as a security and as a measure of accommodation to enable the judgment-debtors to provide means for the honouring of the cheque within a convenient period of time after issue or to otherwise satisfy the decree. Fraudulent or dishonest intention did not accompany the act of issuing the cheque. This inference is clearly strengthened by the further fact that before any criminal prosecution was launched the decree-holders revived the execution proceedings and attached the judgment-debtors's property on 16th February 1927.

The offence of cheating is defined in S. 415, I. P. C., as follows :

Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property is said to "cheat."

On the facts stated above the element of fraud or dishonesty must be held to be absent in this case, nor can we find any trace of the further element of the person deceived delivering any property to another person or consenting that such other person shall retain any property. The second part of the definition is equally inapplicable to the circumstances of this case. It may be that the complainant's act of consenting to the suspension of the execution proceedings for a period of one week was induced by the applicant's act of delivering the cheque in question, but this has not caused any damage or harm to the complainant in body, mind, reputation or property. We have already stated that the execution proceedings were revived on 16th February 1927 and the judgment-debtors' property sufficient in value to cover the decree was attached.

On behalf of the complainants, Pandit Jagat Narain addressed an argument to

us that a certain order of Mr. Justice Pullan, dated 14th July 1927, operates as a bar to the exercise of our jurisdiction. We are unable to give effect to this argument. No rule exists in the Criminal Procedure Code which may be construed to operate as estoppel to the exercise of our undoubted jurisdiction in the present case. The argument is that S. 561-A should be so construed as not to bring it into conflict with other provisions of the Code. Broadly speaking, the argument is sound enough, but we can discover no such conflict. The circumstances are as follows :

Under the powers conferred on him by S. 435, Criminal P. C., 1898, the Sessions Judge of Lucknow, under the provisions of S. 438 of the Code, reported the case to the Chief Court with recommendation that the proceedings in the Court of the Magistrate be quashed. Mr. Justice Pullan refused to accept the recommendation on the ground that he was unaware of any law by which the Sessions Judge could take up these proceedings at the present stage and request this Court to stop the trial and ordered the proceedings to continue. The decision, therefore, amounts to, and no more than, this that the Sessions Judge's jurisdiction to make the reference at that stage was negatived.

That jurisdiction is not being re-invoked in contravention of Mr. Justice Pullan's order.

This decision cannot, we think, be held to constitute an estoppel against the exercise of our own jurisdiction under Ss. 439 and 561-A, Criminal P. C., 1898, in proceedings which have been initiated before us. Mr. Justice Pullan's order is not being set aside ; it has had its effect in the proceedings before the Magistrate having since continued, and both oral and documentary evidence having been produced.

We accordingly accept the prayer of the application and quash the proceedings against the applicants now pending in the Court of a Magistrate, 1st Class of Lucknow, on a complaint under S. 417, I. P. C.

N.K. *Proceedings quashed.*

A. I. R. 1928 Oudh 295

RAZA AND NANAVUTTY, JJ.

Jai Indar Bahadur Singh—Appellant.

v.

Baldeo Singh and *another*—Respondents.

Misc. Appeal No. 4 of 1928, Decided on 11th April 1928, from order of Sub-Judge, Kheri, D/- 16th January 1928.

Civil P. C., O. 40, R. 1—Property attached and Receiver appointed without objection from judgment-debtor—A stranger applying for appointing himself a Receiver alleging an agreement with judgment-debtor to pay the decretal amount and get the property transferred to him—The application is not maintainable.

The property of a judgment-debtor being attached, a Receiver was appointed by order of the Court. The judgment-debtor had never questioned the propriety of this order. A stranger made an application pointing out certain defects in the order appointing the Receiver alleging that the judgment-debtor had executed an agreement in his favour, under which the decretal amount was made payable from him and the judgment-debtor had promised to sell the property to him. He asked the Court to appoint himself the Receiver for the purpose of paying off the debt due to the decree-holder. He also prayed that the judgment-debtor might be given power to sell the property to him.

Held: that he had no locus standi to make such an application, and had no right to file an appeal from the order rejecting his application, as he was no party to the suit or the execution proceedings. He was a stranger to the proceedings and had no right to ask the Court to appoint him Receiver or to permit the judgment-debtor to transfer the property to him simply because he entered into the agreement with the judgment-debtor as alleged by him; 36 *Cal.* 713, *Dist.* [P 296 C 1]

St. George Jackson—for Appellant.

John Jackson and *N. L. Tandon*—for Respondent 1.

Judgment.—This is an appeal from an order passed by the Subordinate Judge, Kheri, on 16th January 1928.

Thakur Baldeo Singh holds a decree against Thakur Brij Inder Bahadur Singh, the legal representative of Thakur Narendra Bahadur Singh, for a sum exceeding Rs. 14,000. The decree was passed on 3rd February 1911. The decree-holder made many applications for execution of the decree, but a certain sum exceeding Rs. 13,000 is still due to him under the decree. The present application for execution was made on 5th July 1926. This is the last attempt of the decree-holder to realize the decretal amount still due to him. He applied for

attachment of the profits of the judgment-debtor's one-fourth share in some 18 villages in the Kheri District. The property was attached and then an application was made on 6th August 1927, for appointment of a Receiver. The Receiver was appointed by the Court on 12th September 1927. The judgment-debtor has not questioned the propriety of this order up to this time. He filed no appeal against that order within the time allowed by law. On 23rd December 1927, Thakur Jai Indar Bahadur Singh made an application pointing out certain defects in the order dated 12th September 1927, and alleging that the judgment-debtor had executed an agreement in his favour on 2nd December 1927 under which the decretal amount was made payable from him and the judgment-debtor had promised to sell the property to him. He stated in the application that he was ready to pay the decretal amount by instalments of Rs. 2,000 per annum and to furnish security for the payment of the whole amount due under the decree. He asked the Court to appoint him Receiver for the purpose of paying off the debt due to the decree-holder. He also prayed that the judgment-debtor might be given power to sell the property to him. The decree-holder filed a long objection on 16th January 1928. The result was that the application of Thakur Jai Inder Bahadur Singh was rejected by the learned Subordinate Judge on 16th January 1928. The appeal has been filed against that order.

We have heard the learned counsel on both sides at some length. In our opinion there is no substance in this appeal. We think the appellant had no locus standi to make the application mentioned above and he has no right to file the appeal. He is no party to the suit or the execution proceedings. He is a stranger to the proceedings and has no right to ask the Court to appoint him Receiver or to permit the judgment-debtor to transfer the property to him simply because he has entered into the agreement with the judgment-debtor as alleged by him.

The appellant's learned counsel has argued that he has filed the appeal under O. 43, R. 1 (s), Civil P. C. He contends that the order in question falls under O. 40, R. 1, Civil P. C. He says that as the appellant was not appointed Receiver so he filed this appeal in this Court. It is difficult to understand how he being a stranger could file the appeal against the order in question. It should be borne in mind that no appeal against that order has been filed by the parties concerned up'to this time. The appellant's learned counsel has referred to the case of *Hudson* v. *Morgan* (1). That case differs materially from the present case in its facts and the decision itself is not applicable. Hence we dismiss the appeal with costs.

N.K. *Appeal dismissed.*

(1) [1909] 36 Cal. 713=9 C. L. J. 563=1 I. C. 356=13 C. W. N. 654.

A. I. R. 1928 Oudh 296

PULLAN, J.

Abid Husain Khan—Defendant — Appellant.

v.

Sri Thakurji—Plaintiff—Respondent.

Second Appeal No. 318 of 1927, Decided on 16th December 1927, against judgment and decree of Sub-Judge, Mohanlalganj, Lucknow, in Regular Appeal No. 40/89 of 1927, D/- 28-7-1927.

Civil P. C., S. 11—Decision on an issue without jurisdiction does not operate as res judicata.

Where a decision has been passed by a Court on an issue which it was not competent to decide, such a finding must be regarded as an obiter dictum, and it cannot operate as res judicata: *A. I. R.* 1924 *P. C.* 144, *Dist.*

[P 297 C 1]

Radha Krishna for *Ali Zaheer*—for Appellant.

J. N. Misra and *Salig Ram*—for Respondent.

Judgment.—The plaintiff in this suit is an under-proprietor who has brought a suit for a nankar allowance of Rs. 50 against the zamindars. The lower Courts have decreed the claim and an appeal has been filed on many grounds. It is now, however, admitted that most of those grounds are ineffective, because it cannot be contended in view of the terms of the Oudh Rent Act that a suit for nankar cannot be brought in a civil Court. The learned counsel for the appellant, after conceding this point, urges that certain decisions of the revenue Courts should be held to operate as res judicata. It appears that the zamindar sued for arrears of rent and the defen-

dant in that suit, who is the present plaintiff, pleaded that he was entitled to a sum of Rs. 50 as a set-off on account of nankar. The revenue Courts have found that, as a suit for nankar does not lie in the civil Court, such a set-off cannot be awarded, but they also went out of their way to hold that the present plaintiff had no claim for nankar, because no such right was contained in the settlement decree. I have been asked to find on the authority of their Lordships of the Privy Council in *Mindnapur Zamindari Co. Ltd.* v. *Naresh Narayan Roy* (1) that this finding of the revenue Courts is binding, because it is an issue raised by the present plaintiff herself, but I am not prepared to find that that ruling is in any way applicable to a case where a decision has been passed by a Court on an issue which it was not competent to decide. In my opinion such a finding must be regarded as an obiter dictum, and it cannot operate as res judicata in the present suit. When the plea of res judicata is disposed of it only remains to be seen whether the plaintiff had valid claim for nankar as against the zamindar. The lower appellate Court has shown that, although the settlement decree was silent as to the right of nankar, the decree was itself based upon a report of the Assistant Commissioner which clearly asserted this right and in appeal the Commissioner passed an order showing that, as a matter of fact, the payment of nankar was confirmed by the Settlement Officer. It is also proved that this sum has continued to be recorded as due to the plaintiff in the revenue papers. There is, therefore, no ground to interfere with the decrees of the Courts below. The plaintiff has been proved to be entitled to this nankar and she can bring her case for it in the civil Court. I dismiss this appeal with costs.

N K. *Appeal dismissed.*

(1) A. I. R. 1924 P. C. 144=51 Cal. 631=51 I. A. 293 (P. C.).

A. I. R. 1928 Oudh 297

STUART, C. J., AND RAZA, J.

Mathura Prasad — Plaintiff — Appellant.

v.

Chairman, District Board, Sitapur — Defendant—Respondent.

Second Appeal No. 309 of 1927, Decided on 8th March 1928.

Limitation Act, Art. 56—Suit against a District Board by a contractor for the price of the work done by him—Notice under S. 192, U. P. Local Boards Act, is not necessary—Article applicable to such a suit is Art. 56—U. P. Local Boards Act (10 *of* 1922), *S.* 192.

A contractor entered on 30th September 1920 into a written contract with a District Board to make certain constructions on their behalf. These constructions were not completed and in April 1923, with the consent of the District Board, the plaintiff was relieved from his obligations under the contract, apparently on an understanding that account should be settled on the basis of the work done. He instituted a suit against the Board on 25th February 1926 for the price of the work done. The Board contended that as no notice required under S. 192, Local Boards Act, was received by them, the suit was not maintainable and further that the suit was time barred under S. 192 (1).

Held: that as the suit was not instituted against the Board in respect of an act done by them but in respect of an act done by the plaintiff, it was not governed by S. 192, U. P. Local Boards Act,

Held: further that Limitation Act Art. 56 would apply. [P 298 C 2]

S. C. Das—for Appellant.

H. K. Ghosh—for Respondent.

Judgment.—This appeal has arisen in the following manner: The plaintiff is a contractor. He entered on 30th September 1920, into a written contract with the District Board of Sitapur to make certain constructions on their behalf. These constructions were not completed in April 1923, and, with the consent of the District Board, the plaintiff was relieved from his obligations under the contract apparently on an understanding that account should be settled on the basis of the work done. The plaintiff's case is that he handed over to the District Board, which itself had undertaken to complete the constructions, certain materials, and that, after credit had been given to him for the work which he had done, and for the materials which he had supplied and after advances made to him had been debited to the account, there was a balance in his favour on 19th April 1923. According to him he was not in a position to discover the exact amount of this balance until later. He issued a notice on 5th October 1925, which was apparently intended to be issued to the Board, but it actually was issued to the Deputy Commissioner of Sitapur who in the year 1925, had no connexion with the Board and no responsibility in the matter. In this notice he also very foolishly, in addition to making his claim for the balance which

he alleged to be due, added a somewhat preposterous claim for damages for what he alleged had occurred as far back as 1920. This claim for damages has since been withdrawn. The Board did not settle his account. He instituted a suit against them on 25th February 1926. The Board in reply took two main defences. The first was that no suit could be instituted against them under the provisions of S. 192, Local Act 10 of 1922, in connexion with this matter until the expiration of two months next after notice had been left at its office, and that no notice had been received. They further took the position that the cause of action had accrued more than six months before the date of the institution of the suit and that, therefore, the suit was also barred under the provisions of S. 192. Both Courts have decided in favour of the Board on these points. It is quite clear to us that if the issue of a notice under S. 192 was required the plaintiff's suit must fail, for no notice had been left at the Board's office; but we are of opinion that no notice was necessary. S. 192, Cl. (1), says:

> No suit shall be instituted against a Board . . . . . in respect of an act done or purporting to have been done in its . . . . official capacity, until the expiry of two months next after notice in writing has been in the case of a Board left at its office . . . . . .

And Cl. (3) states:

> No action such as is described in sub-S. (1) shall, unless it is an action for the recovery of immovable property or a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the cause of action.

If this is not a suit instituted against a Board in respect of an act done or purporting to have been done in its official capacity the provisions of the section have no application and limitation will be decided by the provisions of Act 9 of 1908. We have examined the plaintiff's pleadings which are exceedingly bad and reflect very little credit on the person who drafted them. The pleadings on behalf of the Board leave also much to be desired. This much, however, appears certain to us: This was a suit for the price of work done by the plaintiff for the defendant at his request where no time had been fixed for payment and the ordinary period of limitation under Art. 56, Sch. 1, Act 9, 1908 was three years from the time that the work had been done. Now the plaintiff's work had been done on 19th April 1923, and the suit was filed on 25th February 1926, and was thus clearly within limitation unless S. 192, Local Act 10, 1922, has operation. The suit was for the price of work done and it certainly was not instituted against the Board in respect of an act done by them. It was instituted in respect of an act done by the plaintiff, namely, the work which he had done and he was asking for payment therefor. Whether the position would have been altered had there been a distinct act on the part of the Board by way of refusal of a definite nature to admit his claim is a question which does not arise here, for we cannot find that there was any such refusal on the part of the Board, whatever may have been the nature of the letters sent to the plaintiff by the officials of the Board. In these circumstances we do not find that the suit is time barred. As the suit has been dismissed on a preliminary point and we have reversed that decision on appeal we send the suit back to the learned Munsif in whose Court it was instituted or his successor under the provisions of O. 41, R. 23 to re-admit it under its original number in the register of suits and to try it upon the merits. Costs here and heretofore will follow the result.

N.K. *Case remanded.*

A. I. R. 1928 Oudh 298

STUART, C. J., AND RAZA, J.

Hasan Bandi—Defendant—Appellant.

v.

Barati Lal and *others*—Defendants—Respondents.

Second Appeal No. 281 of 1927, Decided on 22nd December 1927, against decree of Dist. Judge, Sitapur, in Civil Appeal No. 66 of 1926, D/- 30th April 1927.

Transfer of Property Act, S. 91—D undertaking to finance N's litigation regarding certain property—N promising to give half of anything that the Court awarded—D claiming to redeem 2-annas share in a village in which N had a right to redeem 4-annas share—Agreement was held to give no right to D to redeem.

N was claiming certain rights in a certain estate. He having no money with which to prosecute his claim executed an agreement in favour of *D*, whereby *D* undertook to finance his litigation and to recoup himself by retaining half of anything that the Courts awarded. On the strength of this agreement, *D* instituted a suit for redemption of a 2-annas share in a

village in which *N* had the right to redeem 4-annas.

Held: that *D* had no right to redeem, as the agreement was neither a sale nor a transfer: 14 *O. C.* 139, *Approved*. [P 300 C 1]

Judgment.—On 18th September 1908, Nawab Qasim Ali Khan executed a registered agreement on a 10-rupee stamped paper with a certain Damodar Das. On the strength of this agreement Barati Lal, son of Damodar Das, instituted a suit for a redemption of a 2-annas share in the village of Belahia on the ground that Nawab Qasim Ali Khan had the right to redeem 4-annas in that village. The mortgage, which it was sought to redeem, is held by Mt. Hasan Bandi. The trial Court decided that Barati Lal had no right to redeem and dismissed his suit. The lower appellate Court decided in his favour. Mt. Hasan Bandi appeals here. The point for our decision is plain. Does this deed of 18th December 1908 transfer to Damodar Das a right of equity of redemption in this village? Nawab Qasim Ali Khan was claiming certain rights in the Qutubnagar estate. He had no money with which to prosecute his claim. He, therefore, entered under this agreement, into an arrangement with Damodar Das, who undertook to finance his litigation and to recoup himself by retaining half of anything that the Courts awarded. The arrangement was an arrangement which is not prohibited by law in India. We have to see though exactly what it was. We have read the deed carefully. It is worded in a rather peculiar way. It commences by stating that Nawab Qasim Ali Khan has got no money and that Damodar Das has consented to help him. It then goes on to state that out of whatever property shall be acquired in litigation Damodar Das is to get half. It continuos that Damodar Das shall have the right to take possession of immovable property, and that he shall have the right to redeem the village of Belahia. So far every condition is in favour of Damodar Das. No condition is in favour of Nawab Qasim Ali Khan. Then follows the only condition in favour of Qasim Ali Khan which is that Damodar Das is to pay the whole of the Court expenses. Qasim Ali Khan in the rest of the deed continues to place restrictions upon himself. Can this deed be construed as transferring any vested interest in anything? We are of opinion that it transfers no vested interest of any kind in property. It is a contract that if Damodar Das pays all the expenses of litigation he shall take, in consideration of his agreeing to do so, one-half of the property which the Courts may award; but the litigation is clearly to be the litigation brought by Qasim Ali Khan, although there is a clause in the deed that, whenever Nawab Qasim Ali Khan appears as a litigant, the name of Damodar Das is to be joined with his name. We consider that the arrangement made here was very similar to the arrangement which was made in a case which was decided on appeal in the late Judicial Commissioner's Court in 1911. That was the case of *Indar Singh* v. *Kesri Singh* (1). There a man called Inderjit Singh, after certain rights in property had become vested in him, agreed with a man called Kesri Singh that if Kesri Singh paid the whole expenses of litigation he would hand over half the property, which he acquired in favour of Kesri Singh. The additional Judicial Commissioner decided that the transaction was not a sale, that it did not create a transfer, and that it was a contract which gave no vested rights. We consider that he approached the subject in the correct way.

Approaching the subject here in the same manner we find that there is no transfer and no sale, only a contract. The right to obtain redemption remained with Nawab Qasim Ali Khan and passed after his death to his heirs. If they brought a suit to redeem they would have under the terms of the agreement to join Damodar Das and after his death his heirs with them, and whatever they obtained they would have to divide in equal moities. But it is not the case here that the heirs of Nawab Qasim Ali Khan and the heirs of Damodar Das have instituted the suit for redemption jointly. The amount of the share to be redeemed was 4-annas. Barati Lal did not come in asking for a redemption of a 4-annas share, and joining with him the heirs of Nawab Qasim Ali Khan, or citing them as defendants because they had refused to join with him. He instituted this suit to redeem a 2-annas share for his sole benefit giving the heirs of Nawab Qasim Ali Khan nothing. This he obviously was not entitled to do. The learned counsel for the respon-

(1) [1910] 14 O. C. 139 = 10 I. C. 179.

dent Barati Lal has pointed out to us that in a previous litigation .a Bench of the late Judicial Commissioner's Court decided that Qasim Ali Khan and Damodar Das held half of the equity of redemption in the 8-annas share in Belahia. The learned counsel stated the facts correctly.

The decision in qustion will be found in *Qasim Ali Khan* v. *Ahmed Shah* (2). But this circumstance does not affect the present case. We have sent for the record of that appeal and we find that what happened there was that Nawab Qasim Ali Khan and Damodar Das sued jointly on an allegation that Damodar Das was a joint partner with Nawab Qasim Ali Khan in his rights. This statement was incorrect. But it was not challenged on the other side, and the Judicial Commissioner's Court naturally accepted a statement, which had not been challenged. The fact that they did accept the statement can in no way prejudice Mt. Hasan Bandi who was not a party to those proceedings. But apart from that the decision of the Judicial Commissioner's Court does not help Barati Lal. The part of the decision which affects this matter is a declaration that Qasim Ali Khan and Damodar Das hold a half-share in the equity of redemption of 8-annas in Belahia. There is nothing in that decision which states that Damodar Das alone can come into Court to redeem a quarter share. For the above reasons we consider that the trial Court was right and that the lower appellate Court has not construed the agreement in question correctly. The suit as framed was bound to fail and the dismissal of it should have been upheld. We accordingly allow this appeal and direct that Barati Lal's suit be dismissed. Barati Lal will pay his own costs and those of Mt. Hasan Bandi in all Courts.

N.K. *Appeal allowed.*

(2) [1916] 2 O. L. J. 758=32 I. C. 516.

A. I. R. 1928 Oudh 300

MISRA, J.

Lakshmi Dhar—Plaintiff—Appellant.

v.

Dhokhe Lal and *another*—Defendants—Respondents.

Second Rent Appeal No. 33 of 1927, Decided on 3rd December 1927, against decree of District Judge, Sitapur, D/- 23rd May 1927.

Cosharer—Suit for profits—Profits in respect of land should be allowed according to the boundary rate of the land.

Profits in respect of land should be allowed not on the basis of actual collections nor according to the gross rental as calculated for the entire village, nor should they be allowed according to the circle rate ; but should be allowed according to the boundary rate of the lands of the village in which it is situate.

[P 301 C 1]

Moti Lal Saksena—for Appellant.

Puttu Lal—for Respondents.

Judgment.—This is an appeal arising out of a suit for profits in respect of the Patti Dhokhe Lal, situate in village Birampur, Pargana Aurangabad, District Kheri. The said patti consists of two biswas, of which one third is owned by Lakshmi Dhar, plaintiff-appellant; one-third by Dhokhe Lal, defendant-respondent 1; and one-third by Jagannath Prasad, defendant-respondent 2. The share of each of them, therefore, amounts to 13⅓ biswansis.

The first Court decreed the plaintiff's claim for Rs. 119-12-6 against defendant 1 and for Rs. 1-14-4 against defendant 2. The calculation which was accepted by the trial Court was the calculation of the rent of the khudkasht land made on the basis of the circle rate. It considered it to be a fair and equitable rate for ascertaining the rent of the khudkasht land in the possession of the defendants. The figure had been arrived at after making a deduction of 30 per cent. from the actual rent, calculated according to circle rate.

On appeal by the plaintiff, the learned District Judge of Sitapur increased the amount decreed by the first Court to Rs. 157 by disallowing the deduction of 30 per cent. which amounted to Rs. 36.

The plaintiff-appellant has now come up to this Court in second appeal and the main contention urged on his behalf on the date of the hearing of the case before me was to the effect that the Courts below had erred in calculating the profits according to the circle rate. The argument was that either the plaintiff-appellant ought to have been given a decree for profits on the basis of the actual collections, according to which he would be entitled to Rs. 282-7-6 as shown in the statement prepared by the patwari in the trial Court (Ex. 1), or in any case according to the gross rental as calculated for the entire village Paikunwan as mentioned in Ex. 3. In my opinion the plaintiff-appellant should

not be allowed profits according to any of those calculations; nor should he be allowed according to the circle rate ; but he should be allowed according to the boundary rate of the lands of the hamlet of Birampur in which the land in dispute is situate. In order to find out these calculations I directed the plaintiff-appellant to summon the patwari for this date.

The patwari has appeared in Court and I have recorded his statement. He has also prepared a statement from which it appears that the average rate of rent of the lands which constitute the boundary of the lands in suit works out at Rs. 6 per acre ; and according to that calculation the profits to which the plaintiff-appellant would be entitled for the years in suit would be Rs. 189-10-8.

I, therefore, modify the decrees passed by the Courts below and in lieu thereof grant a decree for Rs. 189-10-8. Out of this amount a decree for Rs. 186-8-8 is passed against defendant-respondent 1, Dhokhe Lal, and a decree for Rs. 3-2 against defendant-respondent 2. Jagannath Prasad. The plaintiff will get his costs in the first Court on the amount which has now been decreed to him. In the lower appellate Court and in this Court the parties will receive and pay costs in proportion to their success and failure in this appeal.

N.K. *Appeal allowed in part.*

A. I. R. 1928 Oudh 301

RAZA AND NANAVUTTY, JJ.

Rama Nand and *another*—Plaintiffs—Appellants.

v.

Maharaji and *others*—Defendants—Respondents.

Second Appeal No. 397 of 1927, Decided on 20th March 1928, against decree, of Sub-Judge, Fazabad, D/- 20th September 1927,

Civil P. C., S. 100—*Decision whether a custom is established is a question of fact.*

The decision to the effect that no family or tribal custom has been established by reliable evidence is a finding of fact which cannot be disturbed in second appeal. The weight or value of evidence is not a subject for discussion in second appeal : *A. I. R.* 1928 *Oudh* 121, *Foll.* [P 301 C 2]

Niamat Ullah—for Appellants.

St. George Jackson and *R. D. Sinha*—for Respondents.

Judgment.—This is an appeal from a decree of the Subordinate Judge, Fyzabad, dated 20th September 1927, setting aside a decree of the Munsif, Akbarpur, dated 30th April 1927.

The plaintiffs sued for possession of the property in dispute alleging that they were entitled to the same as the reversionary heirs of one Bhawani Dehal. Bhawani Dehal died long ago leaving two widows, the last of whom, Mt. Jagdei alias Mt. Chhutka died in 1921. Defendant 1 is the widow of Ram Karan, the son of the daughter of Mt. Jagdei. The suit was resisted by defendant 1, Mt. Maharaji on various grounds. The plaintiff's claim was decreed by the learned Munsif, but on appeal the learned Subordinate Judge dismissed the suit, on the finding that the plaintiffs are not entitled to possession of the property in suit in the lifetime of Mt. Sartaji, the surviving daughter of Bhawani Dehal and Mt. Jagdei. It was contended on behalf of the plaintiffs that daughters are excluded from inheritance by custom. This point was decided against the plaintiffs by the learned Subordinate Judge.

The plaintiffs have now come to this Court in second appeal. It is contended on their behalf that the custom of exclusion of daughters from inheritance, as alleged by the appellants, is established in this case.

We have heard the appellants' learned counsel. We think this appeal is concluded by findings of fact. As pointed out by a Bench of this Court in the case of *Rampal Singh* v. *Jai Ram Singh* (1) the decision to the effect that no family or tribal custom has been established by reliable evidence is a finding of fact which cannot be disturbed in second appeal. The learned Subordinate Judge has considered the wajib-ul-arz in question carefully. He has come to the conclusion that the wajib-ul-arz does not help the plaintiff in this case. We think he was perfectly right in arriving at that conclusion. It should be borne in mind that the weight or value of evidence is not a subject for discussion in second appeal. The learned Judge has given good reasons for his finding on the point under consideration. We see no reason why his finding should not be accepted by this Court in second appeal. The result is that the appeal fails and must be dismissed. We

(1) A. I. R. 1928 Oudh. 121.

dismiss the appeal with costs. The decree of the appellate Court is confirmed in all respects.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 302

PULLAN, J,

Jamwanti Kuer Sahaba—Appellant.

v,

Ram Tirath and *another*—Respondent.

Second Rent Appeal No. 18 of 1927, Decided on 8th December 1927,

Landlord and Tenant — Person ceasing to be proprietor or under-proprietor but continuing in occupation—He cannot be presumed to be trespasser.

Where a person ceases to be a proprietor or under-proprietor but continues to be in occupation of the land, it is impossible to assume that he is a trespasser. On the contrary, presumption would be the other way. [P 302 C 2]

K. P. Misra—for Appellant.

Aditya Prasad—for Respondents.

Order (1-8-27).—This suit was filed along with another suit for arrears of rent under the Oudh Rent Act. The defendants were admittedly, up to the year 1895, under-proprietors. The plaintiff admitted that in one portion of the property the defendants had become tenants by means of a lease and in the suit relating to that portion of the property a decree was passed for arrears of rent. As to the other portion of the property, which is the subject-matter of this appeal, the plaintiff stated that after losing the under-proprietary title the defendants became occupancy tenants, but parted with half of their occupancy rights, and she went on to say that in this portion of the property the defendants were trespassers and she sued, therefore, for an equitable rent coupled with ejectment under S. 127, Oudh Rent Act. Now the plaintiff has never shown how the defendants surrendered their occupancy rights and in what portion of the holding, but the mere fact that the plaintiff has sued at the same time for rent in the other suit on the basis of lease indicates very clearly that that is the portion of the property in which the defendants surrendered their occupancy rights, and it would follow, unless there is some proof to the contrary that it is the property in suit before me in which the occupancy rights may still subsist. The Assistant Collector had this issue before him and he recorded a finding which is erroneous. He said that in a civil Court decision it has been held that the defendants have no proprietary or under-proprietary rights in the plots,

that means that they have no qabzadari rights, especially as it was proved in that civil Court case that the qabzadari rights of defendants' ancestors were sold in arrears of rent.

Now the very fact that these persons had lost their proprietary or under-pro; prietary rights would, of itself, prove that they had acquired qabzadari or occupancy rights and not the reverse, and the statement that their ancestors had sold the qabzadari rights is not borne out by the judgment of the civil Court to which the Assistant Collector referred. When the case went in appeal to the learned District Judge he appears to have been of opinion that the plaintiff had not proved that the defendants were trespassers, but he himself was unable to decide what rights they held and he, therefore, dismissed the suit. In this I consider that the learned District Judge was wrong. The suit was one in the Court of an Assistant Collector who has the authority to decide the right of the defendants, if, any, to be regarded as occupancy tenants. As the finding of the first Court on this point was clearly erroneous the learned District Judge should have pointed out this fact in his judgment and remanded the suit for determination as to the rights of the defendants, if any, as tenants. All that is proved is that they are no longer proprietors or under-proprietors and that they are still in occupation of the land. It is impossible to assume that they are trespassers. In fact the presumption is all the other way. I, therefore, remand the suit now to the Court of first instance for a clear finding, first as to what is the position of the defendants in regard to the plots in suit, namely, whether they are occupancy tenants and, if not, whether they have any other legal position; and secondly what is the amount of rent to which they are liable. The finding on these issues should be returned to this Court through the Court of the learned District Judge within three months. Parties to be allowed to produce further evidence both oral and documentry before the Assistant Collector. Costs will follow the final result, on the return of finding that the defendants were occupancy tenants therate of Rs. 21-7-6 was held approximately correct after deducting the two annas in the rupee to which the

defendants would be entitled as ex-proprietors.

N.K. *Appeal allowed.*

A. I. R. 1928 Oudh 303

RAZA AND NANAVUTTY, JJ.

Mansur—Defendant—Appellant.

v.

Mt. Azizul—Plaintiff—Respondent.

Second Appeal No. 367 of 1927, Decided on 2nd April 1928.

Mahomedan Law—A Mahomedan marrying two wives—Wives disagreeing and husband unable to provide separate apartments—Agreement in one wife's favour giving her maintenance though not residing with him is not against public policy—Contract Act, S. 23.

If a Mahomedan marries a second wife and finds that his first wife cannot pull on well with his second wife and if he does not or cannot provide a separate apartment or habitation for her exclusive use, and for the sake of preservation of the family peace executes an agreement in her favour giving her maintenance, even if she does not reside in the same house with him and second wife, that agreement is not against public policy. This arrangement does not necessarily result in separation between husband and wife. The husband may conveniently manage to visit her in the house which she occupies after leaving his house. By occupying another house she does not necessarily refuse "herself" to her husband: 37 *Bom.* 280, *Dist.* [P 302 C 2]

Ghulam Hasan—for Appellant.

Ali Jawad—for Respondent.

Judgment—This is an appeal from a decree of the Subordinate Judge, Partabgarh, dated 13th October 1927, affirming a decree of Munsif, Partabgarh, dated 20th July 1927. The facts of the case so far as it is necessary to state them for the purpose of disposing of this appeal are as follows: The plaintiff Mt. Azizul is the first wife of the defendant Mansur Ali. Mansur Ali married a second wife in September 1925. The two wives could not pull on well and the agreement Ex. 1 was then executed by Mansur Ali on 25th September 1925. It was executed about a week after Mansur Ali married his second wife. The plaintiff went to live in her father's house some time after the execution of the agreement. The plaintiff brought the present suit for recovery of Rs. 58-7-0 arrears of maintenance, against the defendant on the basis of the agreement dated 25th September 1925. The defendant admitted the execution of the agreement but denied his liability to give maintenance to the plaintiff on the ground that the agreement was without consideration and that the plaintiff was not living with him as his wife. The learned Munsif found that it was unsafe for the plaintiff to live in the same house with the defendant's second wife. He found also that the plaintiff had once gone to the defendant's house after the agreement was executed by the defendant, but she had to leave the place and to return to her father's house as she could not pull on well with the defendant's second wife. He held that the deed dated 25th September 1925 was not without consideration and that the plaintiff was entitled to the maintenance even if she did not reside in the defendant's house. He, therefore, decreed the claim. The defendant appealed, but his appeal was dismissed by the learned Subordinate Judge. It was contended before the learned Subordinate Judge that the agreement was without consideration and against public policy. The point that the agreement was against public policy was not expressly taken in the first Court. It was taken in appeal before the learned Subordinate Judge. The learned Subordinate Judge agreed with the learned Munsif that the agreement was not without consideration. He held also that the agreement was not opposed to public policy. He, therefore, dismissed the appeal. The defendant has now come to this Court in second appeal. We think there is no substance in this appeal. The contention that the agreement was without consideration cannot be supported. The defendant is bound to maintain his wife during the subsistence of marriage. So long as the right to maintenance lasts, the contract in question subsists and it cannot be treated as devoid of consideration. We should like to note also that this plea was not pressed before us by the appellant's learned counsel.

The appellant's learned counsel has contended before us that the agreement in question is opposed to public policy and the plaintiff is not entitled to maintenance from the defendant under the agreement. We are not prepared to accept this contention.

We have examined the agreement carefully. We are not prepared to hold that the lower Courts were wrong in construing the agreement. It was of course stated in the agreement that the defendant would provide his wife, plaintiff, with food and clothing if she would live with him in his house, but it was expressly provided by the agreement that

the plaintiff would be entitled to guzara at Rs. 5 per mensem even if she would not live with him in his house. It was stated at the end of the agreement that if the plaintiff would leave the defendant's house without any sufficient reason and without any fault of the defendant and others, the panches named in the agreement would manage to send her to his (defendant's) house. It has been found in this case that the plaintiff had not left the defendant's house without a sufficient reason. Besides, that statement in the agreement is not binding on the plaintiff. Having examined the whole document carefully we have come to the conclusion that the intention of the parties was that the plaintiff would be entitled to the guzara even if she did not reside in the defendant's house.

The appellant's learned counsel has referred to the ruling of the Bombay High Court in the case of *Bai Fatima* v. *Ali Mahomed Ayub* (1) in support of his argument that the agreement is opposed to public policy. It was held in that case that an agreement which provides for, and, therefore, encourages, future separation between the spouses (Mahomedans), is void as being against public policy. The agreement in that case was an agreement made between a Mahomdan husband and his wife providing for certain maintenance to be given to the wife in the event of a future separation between them. With great respect, we find great difficulty in following the view adopted in that case. Moreover, the point raised in that case is not similar to that which arises in this case. No question of separation between husband and wife really arises in this case.

Under the Mahomedan law the maintenance (nafkah) of a wife includes everything connected with her support and comfort, such as food, raiment, lodging etc., and must be provided in accordance with the social position of the parties. The wife is not entitled merely to maintenance in the English sense of the word, but has a right to claim a habitation for her own exclusive use to be provided consistently with the husband's means. It is incumbent on the husband to provide a separate apartment for his wife's habitation to be solely and exclusively appropriated by her, because this is essentially necessary to her and is, therefore, her due, the same as her maintenance, and the word of God appoints her a dwelling house as well as a subsistence: see Ameer Ali's Mahomedan Law, Vol. II, p. 449, 3rd edn.

It is incumbent upon a husband to provide a separate apartment for his wife's habitation to be solely and exclusively appropriated to her use, so that none of the husband's family, or others may enter without her permission and desire, because this is essentially necessary to her and is, therefore, her due the same as maintenance, and the word of God appoints her a dwelling house as well as a subsistence, and as it is incumbent upon a husband to provide a habitation for his wife, so he is not at liberty to admit any person to a share in it, as this would be injurious to her, by endangering her property, and obstructing her enjoyment of his society; but if she desire it, the husband may then lawfully admit a partner in the habitation as she by such a request voluntarily relinquishes her right; neither is the husband at liberty to intrude upon his wife, his child by another woman, for the same reason. If the husband appoints his wife an apartment within his own house giving her the lock and key, it is sufficient, as the end is by this means fully obtained: see Hamilton's Hedaya, Vol. I, pp. 401-2.

If a Mahomedan marries a second wife and finds that his first wife cannot pull on well with his second wife and if he does not or cannot provide a separate apartment or habitation for her exclusive use, and for the sake of preservation of the family peace executes an agreement in her favour giving her maintenance, even if she does not reside in the same house with him and his second wife that agreement is not in our opinion against public policy. This arrangement does not necessarily result in separation between husband and wife. The husband may conveniently manage to visit her in the house which she occupies after leaving his house. By occupying another house she does not necessarily refuse "herself" to her husband. We think the Courts should not lightly take upon themselves in such cases to declare agreements to be void on the ground of public policy. It should be borne in mind that it is the highest policy of the law that contracts should be enforced. The plaintiff in this case is residing in her father's house. The defendant may conveniently visit her there, if he cares for her. We are not, therefore, prepared to disagree with the finding of the learned Subordinate Judge on the point under consideration. The result is that the appeal fails and must be dismissed. We dismiss the appeal with costs. The decree of the lower appellate Court is confirmed in all respects.

N.K. *Appeal dismissed.*

(1) [1913] 37 Bom. 280=17 I. C. 946=14 Bom. L. R. 1178.

A. I. R. 1928 Oudh 305

RAZA AND NANAVUTTY, JJ.

Bhawani Prasad Singh — Plaintiff — Appellant.

v.

Mahabal Singh and *others*—Defendants —Respondents.

First Appeal No. 91 of 1927, Decided on 29th March 1928, from order of Addl. Sub-Judge, Sultanpur.

Civil P. C., O. 6, R. 17—Amendments not unjust to opposite party and necessary for deciding real point in dispute should be allowed—Amendment which would cause the opposite party injury which cannot be compensated in costs shall not be allowed.

The rules of procedure have no other aim than to facilitate the task of doing justice. Under O. 6, R 17, all amendments should be allowed at any stage of the proceedings which justify the two conditions : (a) of not working injustice to the other siding ; and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. [P 306 C 1]

Amendment should be refused, of course, when the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. An application to amend the plaint should not ordinarily be rejected and the loss, if any, caused to the other side by the delay should be compensated by a proper order as to costs made in his favour : *A. I. R.* 1925 *Oudh* 291, *Foll.* [P 306 C 1]

Hyder Husein—for Appellant.

Ishri Prasad and *M. H. Qidwai* for *P. A. Sen* and *S. C. Das*—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a partition suit. The plaintiff claims a 7/8ths share in the property detailed in list A attached to the plaint. He claims different shares in the grove lands detailed in list B attached to the plaint. The 7/8ths share claimed by the plaintiff in the property detailed in list A includes a one-fourth share which was held by one Mt. Mot Kuer who died in 1904. The plaintiff alleges that he is entitled to the said one-fourth share left by Mt. Mot Kuer as the next reversioner. He pleads in the alternative that if he is not found entitled to the said share as the next reversioner, he is entitled to a half-share out of that share under a deed of gift executed by her. The deed of gift is alleged to have been executed by her not only in favour of the, plaintiff, but also in favour of defendant 10. The plaintiff alleges that he is entitled to a one-eighth share under that deed and that he is entitled to the remaining one-eighth share also by right of adverse possession for more than 12 years, as defendant 10 never got possession over the gifted property.

The suit was brought against 14 persons. It was contested by several defendants. They resisted the claim on various grounds. The learned Additional Subordinate Judge dismissed the suit on the finding that the suit was bad for non-joiner of necessary parties. No other issue was tried in this case. The plaintiff has appealed to this Court.

It appears that defendant 10 has transferred the entire property which he got from Mt. Mot Kuer under the deed of gift mentioned above, to five persons, namely, Nageshar, Badri, Ram Baran, Parbhu and Mahesh. It is said that he has gifted the property to them. If this is true then defendant 10 has no interest left in the property in suit. The five porsons named above were not, however, impleaded in the suit. Four of them applied to be made parties to the suit, but the application was opposed by the plaintiff and the result was that it was dismissed by the Court. The learned Additional Subordinate Judge was of opinion that the said five persons were necessary parties to the suit and that they ought to have been impleaded as defendants. He held that omission was fatal to the suit as it is an inflexible ruls of law that in a partition suit it is necessary that all interested parties should be joined either as plaintiffs or as defendants. After the case was argued before the learned trial Judge, the plaintiff's pleader put in an application stating that the plaintiff had no knowledge of the transfers made by defendant 10 at the time when Nageshar and others (subsequent donees) had applied for being made parties to the suit and that he came to know of them by the evidence produced by defendant 10. He admitted in that application that they were necessary parties and prayed that they might oe added as defendants. This application was dismissed by the learned trial Judge.

We have heard the learned counsel on both sides. There is no doubt that the plaintiff is at fault, but, having regard to all the facts and circumstances of the case, we are of opinion that his applica-

tion for amendment should have been granted by the Court. In our opinion the learned trial Judge would have exercised a sounder discretion if he had granted the plaintiff's application. It should be borne in mind that the rules of procedure have no other aim than to facilitate the task of doing justice. Under O. 6, R. 17, Civil P. C., all amendments should be allowed at any stage of the proceedings which justify the two conditions : (a) of not working injustice to the other side ; and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendment should be refused, of course, when the other party cannot be placed in the same position, as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. As pointed out in the case of *Mohammad Ejaz Rasul Khan* v *Mubarak Husain* (1), an application to amend the plaint should not ordinarily be rejected and the loss, if any, caused to the other side by the delay should be compensated by a proper order as to costs made in his favour. We are not prepared to hold in this case that the plaintiff in applying for amendment of the plaint was acting mala fide.

The result is that we allow the appeal, and, setting aside the decree of the lower Court, grant the plaintiff's application for amendment dated 30th April 1927. Nageshar, Badri, Ram Baran, Parbhu and Mahesh will be added as defendants. The plaintiff is directed to amend his plaint so far as necessary. This will be done in the lower Court. The plaintiff is ordered to pay Rs. 200 as costs of adjournment to the contesting defendants. The plaintiff should pay this sum to the contesting defendants within two months hence. The case is remanded to the lower Court with direction to re-admit the suit under its original number in the register of suits and proceed to determine the suit as required by law after the plaint has been amended by the plaintiff as directed above. Costs will abide the result.

N.K. *Case remanded.*

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(1) A. I. R. 1925 Oudh 291=27 O. C. 231.

A. I. R 1928 Oudh 306

STUART, C. J.

Lachmi Nath and *another*—Accused—Applicant.

v.

Lucknow Municipal Board — Complainant—Opposite Party.

Criminal Ref. No. 6 of 1928, Decided on 4th April 1928 : case reported by Third Addl. Sess., Judge, Lucknow.

U. P. Municipalities Act (2 *of* 1916), *S.* 128 (*iv*) — *Motor vehicles brought within the Municipality by chance-visitors are not "kept"— Such visitors cannot be convicted under S.* 299.

Motor-cars brought by chance-visitors within the Municipality and not used in such Municipality for more than short periods are not vehicles " kept " within the Municipality under S. 128. Before it can be found that such a vehicle is kept within the Municipality it must be established that it is retained within the Municipality for more than short periods. Such visitors are not liable to be convicted under S. 299. [P 307 C 1]

G. H Thomas—for the Crown.

Daya Kishen Seth—for Appellants.

Judgment.—These are two references against convictions passed and fines imposed upon certain persons in respect of the following matters. The persons in question do not reside within the precincts of the Lucknow Mun cipality. They reside in a village in the Unao District. They visit Lucknow occasionally, but never reside there at one time for a consecutive period longer than seven days During some of these visits they have brought with them duly licensed and registered motor-cars and used those motor-cars at the time of their visits. The case against them was that, as they have not obtained licenses from the Lucknow Municipality and paid taxes in respect of the use of these motor-cars, they were liable to conviction and fine under the provisions of S 299 of Local Act 2 of 1916 and they were accordingly convicted and fined. It has to be seen what offences they are charged with having committed. I find that the Lucknow Municipal Board had, subject to the sanction of the Local Government, authority to impose a tax on vehicles and other conveyances " kept " within the Municipality. This authority is given in S. 128, Local Act 2, 1916, I find further that such a tax was levied under Government Notification No. 4354-XI—14E, dated 7th December 1917, on motor

vehicles at certain rates. Sanction was obtained from the Government for the imposing of the tax. Such motor vehicles have to be licensed within fifteen days from the date of their possession. This is the only section having application to the cases. It is quite clear to my mind that motor-cars brought by chance visitors into Lucknow and not used in Lucknow for more than short periods are not vehicles "kept" within the Municipality. Before it can be established that such a vehicle is kept within the Municipality it must be established that it is retained within the Municipality for more than short periods. There must be something in the nature of permanent retention. I do not propose to decide what the exact period of retention should be before a vehicle can be considered to have been kept within the Municipality, but I am certainly of opinion that in the present cases there has been no such keeping within the Municipality as to render the proprietors liable to the payment of a tax. I, therefore, accept these references and direct that the convictions and sentences in question be set aside and that the fines, if paid, be refunded.

N.K. *References accepted.*

A. I. R. 1928 Oudh 307

STUART, C. J., AND WAZIR HASAN, J.

Lal Harihar Pratap Bakhsh Singh—Defendant—Appellant.

v.

Bisheshwar Bakhsh Singh and *others*—Plaintiff and Defendants—Respondents.

First Appeal No. 19 of 1927, Decided on 15th December 1927, from decree of King, J., D/- 4th January 1927.

(a) *Oudh Estates Act* (1 *of* 1869), *S.* 8—*Taluqdar leaving a widow and half-brother—Dispute as to succession settled by a compromise—Half-brother declared absolute owner—Widow given certain villages by way of guzara—Upon the true construction of the compromise half-brother was held to have acquired as transferee from the widow and the devolution to the estate was still governed by the provisions of the Oudh Estates Act.*

A taluqdar, whose name was entered in lists 1 and 2 prepared according to the provisions of S. 1, Oudh Estates Act, died leaving surviving him his widow and half-brother. Accordingly the title to the estate devolved on the half-brother by virtue of Cl. (6), S. 22, Act 1, 1869. The name of the widow, however, was entered in respect of the estate in the revenue registers. This compelled the brother to institute a suit for the purpose of establishing his title to the estate against this widow. The dispute was amicably settled by a compromise; the brother was declared to be the absolute owner of the entire estate and the widow was allowed to remain in possession of the villages by way of guzara.

Held: that, under the compromise, the brother did not acquire the estate as a transferee from the widow. The true construction of the compromise was that thereby the widow recognized the pre-existing right of the brother in the inheritance, and any claim which the widow might have had to the estate on the basis of her husband's will was abandoned and that the provisions of the Oudh Estates Act still applied to the devolution of the estate. [P 311 C 2]

(b) *Oudh Estates Act* (1 *of* 1869), *Ss.* 3 *and* 10—*Entry in list* 1 *of a certain estate against the name of a certain person—It is conclusive evidence of the person possessing the estate as a taluqdar.*

If a person's name is entered in list 1 of the lists prescribed by S. 8, Oudh Estates Act, and a certain estate is entered against his name in the column "name of estate," then according to S 10, Oudh Estates Act, the entry is conclusive evidence not only of the fact that the taluqdar was a taluqdar within the meaning of the Act, but also of the fact that he was a taluqdar possessed of the estate. This is the significance which must be attached to the word "such" which precedes "taluqdar" in the last line of S. 10, and it follows that the estate possessed by him was held by him in the manner mentioned in S. 3 of the Act: 5 *I. A* 1, *Foll.* [P 312 C 1]

(c) *Oudh Estates Act*, S. 19—*Act will not affect wills made before the Act.*

The formalities required of the will of a taluqdar are stated in S. 10, Oudh Estates Act, 1869. The exception and the only exception provided for is "that nothing herein contained shall affect wills made before the passing of this Act." The enactment is imperative and must be given effect to. These formalities relate to the execution of the will of a taluqdar and have no relation whatsoever to the time when the will comes into effect: *A. I. R.* 1916 *P. C.* 89 and *A. I. R*, 1925 *P. C.* 272 *Foll.* [P 311 C 1]

(d) *Wajib-ul-arz—Entries in—Presumption about—Estate held in the manner mentioned in S.* 3—*Grant originally rent free—Village is an estate within Oudh Estates Act, S.* 3.

Entries in the wajib-ul-arz must be deemed to have been made by the Settlement Officer in the discharge of his official duties and, therefore, furnish strong evidence of the authenticity of the facts stated therein [P 312 C 2]

Where a wajib-ul-arz stated that since the date of the grant, that is 1858-1859, the village had continued to remain in the possession and occupation of the Raja, and, according to the terms of the grant, it was to be held revenue free for 20 years, and from November 1879 the Government revenue was chargeable,

Held: the inference was that at the time of the first regular settlement the village was held in proprietary right and the presumption was

that it must have been decreed to him at that settlement and the village must be held to be an "estate" by virtue of the second part of S. 3 : *A. I. R.* 1923 *P. C.* 70 ; *A. I. R.* 1927 *P C.* 113 ; and 27 *All.* 634; *Ref.* [P 313 C 2 ; P 314 C 1]

(e) *Evidence Act, Ss. 32 and 35—Statement of a qanungo about relationship between a taluqdar's branch and another taluqdar's branch is admissible.*

A qanungo of the taluqdar must be presumed to have special means of knowledge as to the relationship between the different branches of the taluqdar. In the character of a qanungo, it is his duty to furnish information to the settlement Court on questions relating to title and his statement is recorded by the Settlement Officer in the discharge of the official duty. The record of his statement is admissible in evidence of the question of relationship also under S. 35. [P 318 C 1]

(f) *Family Arrangement — Compromise — Bona fide compromise will bind the reversioner as much as a decree on contest.*

A compromise made bona fide for the benefit of the estate and not for the personal advantage of the limited owner will bind the reversioner quite as much as a decree on contest : 33 *All.* 356 (*P. C.*) ; *A. I. R.* 1922 *P. C.* 356 and *A.I.R.* 1925 *P. C.* 272; *Ref.* [P 325 C 1]

(g) *Oudh Estates Act* (1 *of* 1869 *as amended by Act* 3 *of* 1910), *S.* 22—*Applicability—Essentials indicated.*

To attract the application of Cl. 10, S. 22, Act 1, 1869, as amended by Act 3 of 1910, the plaintiff has to establish: (1) that the succession to the property was governed by the provisions of S. 22, Act 1, 1869; (2) that the property in dispute is an estate within the meaning of the Act; and (3) that the plaintiff is the nearest male agnate according to the rule of lineal primogeniture as required by Cl. 10, S. 22 of the Act.

Tej Bahadur Sapru, Ishri Prasad and *Girja Shankar Srivastava*—for Appellant.

Muhammad Hasan Imam, A. P. Sen, M. H. Qidwai and *S. N. Sen*—for Respondents.

Judgment.—These are defendants' appeals from the decree, dated 4th January 1927, of King, J., sitting as a Judge on the original side of the Chief Court of Oudh.

The plaintiff in the suit, out of which these appeals arise, is Bisheshar Bakhsh Singh, the chief respondent to the two appeals. There were three defendants to the suit: Dulhin Jadunath Kuar, defendant 1; Lal Harihar Partap Bakhsh Singh, defendant 2; and Mahabir Singh, defendant 3. Appeal No. 19 is by Lal Harihar Partap Bakhsh Singh. In the array of the respondents to his appeal are Bisheshar Bakhsh Singh, the plaintiff; Dulhin Jadunath Kuar, defendant 1 and; Mahabir Singh, defendant 3. Appeal No.24 was originally filed by Dulhin Jadunath Kuar and Mababir Singh together on the 10th February 1927. The sole respondent to this appeal is Bisheshar Bakhsh Singh. Subsequently, under an agreement between the plaintiff and Mahabir Singh, Mahabir Singh's appeal was dismissed on 15th March 1927. This fact, however, does not affect the merits of the case, but Dulhin Jadunath Kuar remains the sole appellant in Appeal No. 24.

The plaintiff claims title to the estate of Gangwal, situate within the district of Bahraich in the Province of Oudh. According to the plaintiff the villages comprised in the estate of Gangwal are 60 in number. They are mentioned in Sch. A of the plaint. The plaintiff also laid claim to other immovable and moveable property, but his claim in respect of this class of property has been dismissed by the trial Court and there is no appeal by the plaintiff from the dismissal of his claim before us. There is one other class of immovable property specified in Sch. D of the plaint, which requires special mention. This property is endowed property and the plaintiff's title in respect of it has been declared by the trial Court to be in the character of mutwalli. On behalf of the appellants no argument was addressed to us against this part of the decree of the trial Court.

It will be seen from what has been stated above that the controversy in appeal centres on the plaintiff's title to the estate of Gangwal as specified in Sch. A of the plaint. His title to this estate is founded on Cl. 10; S. 22, Act 1 1869 as amended by Act 3 of 1910 of the legislature of the United Provinces of Agra and Oudh. To attract the application of that section, and of the particular clause just now mentioned, the plaintiff has to establish the following essentials, each of which was traverred in defence :

(1) That the succession to the property in dispute was governed by the provisions of S. 22, Act 1, 1869.

(2) That the property in dispute is an "estate" within the meaning of the Act:

(3) That the plaintiff is the nearest male agnate "according to the rule of lineal primogeniture, as required by Cl. 10, S. 22 of the Act. Besides the defence men-

tioned above Dulhin Jadunath Kuar has also raised a plea in bar of the enforcement of the plaintiff's claim arising out of a family settlement of the year 1899. The three elements in plaintiff's title and the plea in bar are the matters for decision in these appeals. The facts no longer in controversy are as follows:

Raja Sitla Bakhsh Singh was the first taluqdar within the meaning of Act 1 of 1869, who held the estate of Gangwal in that character. His name was entered in lists I and II, prepared in accordance with the provisions of S. 8, Oudh Estates Act, 1869. Raja Sitla Bakhsh Singh died in 1885 leaving him surviving his widow, Rani Sukhraj Kuar, and his half brother, Narpat Singh. He had died intestate as the plaintiff's case is. Accordingly the title to the estate of Gangwal devolved on Narpat Singh by virtue of Cl. 6, S. 22. Act 1, 1869 as the clause then stood and as it was interpreted by their Lordships of the Judicial Committee in *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh* (1). The name of the widow Rani Sukhraj Kuar was, however, entered in respect of the Gangwal estate in the revenue registers of the district. This compelled Narpat Singh to institute a suit in the Court of the District Judge of Fyzabad on 18th November 1886 (Plaint Ex. 51), for the purpose of establishing his title to the estate of Gangwal. The sole defendant to the suit was Rani Sukhraj Kuar. Her statement of defence was filed on 8th March 1887 (Ex. 52). The only defence of any materiality raised by Rani Sukhraj Kuar was that Narpat Singh, being the half-brother of Raja Sitla Bakhsh Singh was not the "brother" of the latter within the meaning of Cl. 6, S. 22, of the Act of 1869. The dispute was amicably settled by a compromise which was incorporated in a document of 1st June 1887, registered on the same date (Ex. A-2). The decree following the compromise is not on the record but it is agreed that it was made in terms of the compromise. According to this compromise, Narpat Singh was declared to be the absolute owner of the entire estate of Gangwal and Rani Sukhraj Kuar was allowed to remain in possession of five villages by way of guzara besides some houses, jewellery and livestock. Narpat Singh thus became seised of the taluqa of Gangwal and held possession of the same until his death in the year 1892. His son, Raja Suraj Prakash Singh, succeeded him on intestacy. Raja Suraj Prakash Singh died in 1899. He had also a son, Mahesh Bakhsh Singh, who had died in the lifetime of his father in 1894. Mahesh Bakhsh Singh's widow is Dulhin Jadunath Kuar, the defendant-appellant in Appeal No. 24. Raja Suraj Prakash Singh left him surviving two widows: (1) Rani Itraj Kuar (senior widow), and (2) Rani Abhairaj Kuar (junior widow). His mother, Rani Achalraj Kuar, also survived him. There was also a daughter, Jagatpal Kuar, born of Rani Sukhraj Kuar, but that fact has no material bearing on the decision of the case except in so far that she was the heir to her mother's stridhan estate if the latter had any such estate.

It appears from the recitals contained in Ex. A 10 (dated 29th June 1899), to which detailed reference will be made hereafter, that, following the death of Raja Suraj Prakash Singh, a settlement to the succession as to the estate was made to which the two widows of Raja Suraj Prakash Singh and the widow of his predeceased son were parties. According to this settlement Rani Itraj Kuar, the senior widow, was to hold the estate first and on her death the junior widow, Rani Abhairaj Kuar, was to succeed her and on the death of the latter Dulhin Jadunath Kuar was to come into possession. While the two last-mentioned ladies were out of possession of the estate under their individual titles, they were to hold certain villages for their maintenance in which the mother of Raja Suraj Prakash Singh was to share equally. The junior widow, Rani Abhairaj Kuar, and the Raja's mother both died in the lifetime of Rani Itraj Kuar. Dulhin Jadunath Kuar has since remained in possession of the villages set apart for maintenance. She now pleads that she is entitled to remain in possession of the estate of Gangwal, or at least of the five villages during her life time by virtue of the settlement just now mentioned, and that the plaintiff has no right to dispossess her. This is the defence which we have described at the outset of the judgment as the plea in bar.

Rani Itraj Kuar died on 23rd March 1925. Controversy as to succession arose

(1) [1904] 26 All. 393=31 I. A. 132=7 Q. C. 248=1 A. L. J. 381=8 Sar. 639 (P. C.).

in the proceedings relating to the mutation of names in the revenue registers, to which the plaintiff and the three defendants were parties.

Under S. 145, Criminal P. C., the Deputy Commissioner of Bahraich took possession of the Gangwal estate and also of other property of which Rani Itraj Kuar had held possession. The five guzara villages, however, were left in the possession of Dulhin Jadunath Kuar. The decree under appeal awards possession of those villages also to the plaintiff-respondent. They are included within Sch. A attached to the plaint.

The first question which arises for decision is: Is the succession to the taluqa of Gangwal governed by the provisions of Act 1 of 1869 ? If it is not so governed, it is agreed that the plaintiff's claim fails as there is a nearer heir than the plaintiff entitled to succeed to the property of Raja Suraj Prakash Singh under the Hindu law. Prima facie, and on the facts stated above, this question must be answered in favour of the plaintiff, but the defence is that the succession by right of inheritance to the estate of Gangwal has ceased to be governed by Act 1 of 1869 for the reason that Narpat Singh did not hold the estate as an heir of his brother, Raja Sitla Bakhsh Singh, within the provision of S. 22, Act 1, 1869, but that he held it as a transferee from Rani Sukhraj Kuar (widow of Raja Sitla Bakhsh Singh), who had acquired the estate in full ownership under a bequest made in her favour by her husband on 30th April 1869 (Ex. A 1). The transfer relied upon in this connexion is the compromise of 1st June 1887 between Narpat Singh and Rani Sukhraj Kuar already referred to (Ex. A 2). In connexion with this part of the case it is agreed that Rani Sukhraj Kuar was a person mentioned in Cl. (2), S. 13 A, Amended Oudh Estates Act 1, 1869 and, therefore, S. 14 of the same Act applied to her as it has been given retrospective effect by Act 3 of 1910, and it is further agreed that, in case Narpat Singh be held, to be a transferee of Rani Sukhraj Kuar, he was a person succession to whose property will be governed by the provisions of S. 15 of the same Act and consequently the succession to the estate of Gangwal shall have, on the death of Narpat Singh, ceased to be governed by the provisions of Act 1, 1869. Conclusion is therefore, agreed to if the premises are correct, but, in agreement with the trial Court, we are of opinion that they are not correct.

It is not seriously disputed that the letter of 30th April 1869 (Ex. A-1), written by Raja Sitla Bakhsh Singh to the Deputy Commissioner of Bahraich in answer to the letter of the Deputy Commissioner, dated 14th April 1869 (Ex. 136), is of a testamentary character and constitutes a will in favour of the Rani of Raja Sitla Bakhsh Singh, that is Sukhraj Kuar. On the construction of this letter also there is no controversy. It confers complete ownership in the estate on the legatee. The will, however, has been found to be inoperative for two reasons :

(1) That it was not executed and attested in the manner required by Act 1 of 1869 ; and

(2) that in the litigation of 1887 Rani Sukhraj Kuar abandoned her claim as a legatee of her husband and recognized Narpat Singh's title as an heir-at-law on intestacy.

As against the first reason: the argument on behalf of the appellants is that, though this will was executed after the passing of Act 1 of 1869 (that is 12th January 1869), it was executed before the expiry of six months from the date of the passing of the Act, which was the period prescribed for the preparation of the lists by S. 8, Act 1, 1869 and, therefore, the formalities as to the execution of a will by a taluqdar required by Act 1, 1869 did not attach to the will in question. We are unable to accept this argument. The entry of a taluqdar's name in the lists prescribed by S. 8 is only evidence of his status of a taluqdar, as is clear from the provisions of S 10, Act 1, 1869. The taluqa of Gangwal became an estate within the meaning of the Act as soon as the Act was passed, and the holder of it became a "taluqdar" at the same moment, as is clear from the provisions of S. 3, Act 1, 1869. As a taluqdar the holder of the estate acquired rights and was subjected to disabilities from the date of the passing of the Act. This conclusion is not displaced by the definition of the word "taluqdar" as one of the persons whose names are entered in the first of the lists mentioned in S. 8. As already stated the definition, when read with the provisions of S. 10 of the Act, shows that the entry in the

lists is 'conclusive evidence of the fact that the persons whose names are entered in the said lists are taluqdars within the meaning of the Act. This effect of the entry was pointed out by their Lordships of the Judicial Committee in the case of *Murtaza Husain Khan* v. *Mohomed Yasin Ali Khan* (2). The formalities required of the will of a taluqdar are stated in S. 19. Oudh Estates Act, 1869. The exception, and the only exception, provided for is

> that nothing herein contained shall affect wills made before the passing of this Act.

The enactment is imperative and must be given effect to. These formalities relate to the execution of the will of a taluqdar and have no relation whatsoever to the time when the will comes into effect.

The conclusion which we have reached as to the invalidity of the will of 30th April 1869 (Ex. A-1) is directly supported by the decision of their Lordships of the Judicial Committee in the case of *Mata Prasad* v. *Nageshar Sahai* (3). In that case Raja Fateh Chand was a taluqdar whose name was entered in list 1, Act 1, 1869. The list was published in the Gazette of India of 31st July 1869 and was accompanied with the notification dated 20th July 1869. Raja Fateh Chand had made a will in March 1869, i. e., after the passing of the Act, but before the publication of the list. Raja Fateh Chand died in 1873. The will, which he had made in March 1869, was never registered. It was deemed to be invalid, having regard to the formality of registration required by the provisions of S. 13, Act 1, 1869. Further, the period of six months prescribed by S. 8 of the Act relates to such lists as the Chief Commissioner of Oudh shall cause to be prepared. The material point of time, therefore, is the time of the preparation of the list and not its publication in the Gazette of India. We are not satisfied that the defence has succeeded in establishing beyond any reasonable doubt that the will in question was made before the preparation of the list. Indeed, the only evidence on the record suggests the inference that the date of the will is subsequent to the preparation of the list. It will be remembered that the letter of Raja Sitla Bakhsh Singh, which constitutes the testamentary devise, was written in answer to the Deputy Commissioner's letter of 14th April 1869. Ex. 136. In this letter the Deputy Commissioner says :

> According to Act 1 of 1869, relating to the estates in Oudh, the "lists of the taluqdars being appendices 1, 2, 3, 4, 5 and 6, having been prepared under S. 8, have been sent for sanction and publication in the Gazette and your name has been shown in lists 1 and 2.

Then the Deputy Commissioner informs Raja Sitla Bakhsh Singh that, if he has any objection, the list could be corrected at any time before publication in the Gazette. The will of 30th April 1869 is, therefore, invalid on the first ground. It also ceased to be operative on the second ground. We have already stated that in the litigation of 1886 Narpat Singh had laid claim to the estate of Gangwal on the basis of his title as an heir-at-law under Cl. 6, S. 22, Act 1, 1869. In answer to this claim Rani Sukhraj Kuar did not contend that Narpat Singh's claim on intestacy was not maintainable because Raja Sitla Bakhsh Singh had left a will dated 30th April 1869 in her favour. Indeed it does not appear that the will was mentioned at all in the course of that litigation or even subsequently. In the compromise between the two it must be taken that any claim which Rani Sukhraj Kuar might have had in the estate on the basis of her husband's will was abandoned, and Narpat Singh's antecedent title as an heir-at-law was recognized. The argument that Narpat Singh acquired the estate of Gangwal as a transferee from Rani Sukhraj Kuar under the compromise of 1st June 1887 has no substance whatsoever.

Having abandoned her claim under the will of 30th April 1869 Rani Sukhraj Kuar had no title which she could transfer in favour of Narpat Singh, nor can the compromise be construed as an act of transfer of the estate of Gangwal by Rani Sukhraj Kuar to Narpat Singh. The true construction of the compromise, according to our judgment, is that the reby Rani Sukhraj Kuar recognizedthe preexisting right of Narpat Singh in the inheritance of his brother, Raja Sitla Bakhsh Singh. It must, therefore, be held that Act 1 of 1869 still applies to the devolution of the estate of Gangwal.

(2) A. I. R. 1916 P. C. 89=38 All. 552=43 I. A. 269 (P. C.).
(3) A. I. R. 1925 P. C. 272=47 All. 883=28 O. C. 352=52 I. A. 393 (P. C.).

The answer to the second question as to whether the 60 villages mentioned in Sch. A attached to the plaint constitute an "estate" within the meaning of Act 1 of 1869 or not must be given in the affirmative. Amongst the 60 villages there is a village at No. 49 called Rajapur grant, which stands on a somewhat different footing and will be dealt with separately. As regards the remaining 59 villages there can be no doubt whatsoever that they form an estate within the meaning of S. 3, Act 1, 1869. Raja Sitla Bakhsh Singh's name was entered at No. 152 of list 1 of the lists prescribed by S. 8 of the Act. One of the columns of this list describes the "name of estate." In this column, against the name of Raja Sitla Bakhsh Singh, the estate of Gangwal in the district of Bahraich is entered. According to S. 10 of the Act the entry is conclusive evidence, not only of the fact that Sitla Bakhsh Singh was a taluqdar within the meaning of the Act, but also of the fact that he was a taluqdar possessed of the estate of Gangwal in the district of Bahraich. This is the significance which must be attached to the word "such" which precedes "taluqdar" in the last line of of S 10. This word connotes all the legal characteristics of a taluqdar whose name finds place in list 1 of the lists prepared under the Act. "Estate" is defined in the Act as

> the taluqa or immovable property acquired or held by a taluqdar . . . in the manner mentioned in S. 3 of the Act.

It follows that the estate of Gangwal possessed by Raja Sitla Bakhsh Singh was held by him in the manner mentioned in S. 3 of the Act. It was so held by their Lordships of the Judicial Committee in the case of *Brij Indar Bahadur Singh* v. *Ranee Janki Kuar* (4) (penultimate paragraph at p 12).

If the above reasoning is correct, the only matter which requires to be proved is as to what immovable property constitutes the estate of Gangwal. This is amply proved by the wajib-ul-arz of village Gangwal: Ex. 63. Within this wajib-ul-arz is incorporated a list of villages forming the taluqa of Gangwal. 59 villages are named therein and included is the parent village Gangwal. The total number of villages comes to 60 and this is identical with the total in the schedule attached to the plaint. It may be mentioned here that the village Rajapur grant is also included in the list given in the wajib-ul-arz. We attach great importance to this entry in the wajib-ul-arz. The preparation of the wajib-ul-arz of a village is the last act in the operations of settlement of such village. It is prepared after questions of title have been inquired into and decided. The wajib-ul-arz under consideration was prepared under the directions contained in Settlement Circular No. 20 of 1863, issued on 6th March of the same year. According to Cl. 3 of that Circular the subjects to be regarded in the preparation of a wajib-ul-arz were divided into two main classes, viz.: first, those descriptive of the rights of the proprietor; and second, those descriptive or the privileges of the tenants. Within the first class of the subjects the history of the formation of a taluqa, the list of the villages comprised within it and also the basis of title of the holder of the taluqa are to be appropriately entered. As regards heading 1, history of the village, we find the following direction:

> The materials for this record generally have been brought together in the evidence placed on record during the investigations into the claims preferred for proprietary or other rights in the village.

In the entry under consideration we find the fact stated that the settlement of 1264 and 1266, Fasli, were made with Raja Sitla Bakhsh Singh, and that the taluqa, as such, is entered in his taluqdari sanad. The settlement of 1264, Fasli means the first summary settlement, that is to say, the settlement immediately following the annexation of Oudh, which took place on 13th February 1856, and the settlement of 1266, Fasli, means the second summary settlement which commenced on the first day of April 1859 and ended on 10th day of October 1859, and these are the two dates given in S. 3, Oudh Estates Act, 1869. These entries must be deemed to have been made by the Settlement Officer in the discharge of his official duties and, therefore, furnish strong evidence of the authenticity of the facts stated therein. The evidentiary value of the entries in wajib-ul-arz has been the subject-matter of several decisions of their Lordships of the Judicial Committee, the last two of which only may be here cited: *Balgobind* v.

(4) [1878] 5 I. A. 1=3 Sar. 763=3 Suther. 474 (P. C.).

Badri Prasad (5) and *Sheo Baran Singh* v. *Kulsum-un-nissa*(6). The original sanad granted by the British authorities to Raja Sitla Bakhsh Singh is also before us. It confers on him "the full proprietary right, title and possession of the estate of Gangwal in zilla Bahraich." The sanad is in the ordinary form as given at p. 385, App. E, of Mr. Sykes' well-known compendium of the Oudh Taluqdari Law. It is a matter of history that such sanads were granted after the first day of April 1858 and down to the end of the year 1859 and subsequently most of them were replaced by what is called the primogeniture sanad: see the observations of their Lordships of the Judicial Committee in the case of *Thakur Sheo Singh* v. *Rani Raghubans Kunwar* (7). It must be held, therefore, that the sanad granted to Raja Sitla Bakhsh was granted before the passing of Act 1 of 1869 and subsequent to the first day of April 1858.

According to S. 3, Act 1, 1869 property which might have been decreed to Raja Sitla Bakhsh Singh by the officer engaged in making the first regular settlement of the Province of Oudh must also be deemed to be an "estate" for the purposes of the Act. The entry in the wajib-ul-arz of village Gangwal (Ex. 63) and similar entries in respect of other villages in the wajib-ul-arz of those villages lead to the fair presumption that every one of the 60 villages constituting the taluqa of Gangwal was decreed at the first regular settlement in favour of Raja Sitla Bakhsh Singh. The practice adopted in respect of taluqas by the officers engaged in making the first regular settlement of the Province of Oudh was to prepare a decree in respect of each village of a taluqa in favour of the taluqdar, the title being founded on the second summary settlement and the taluqdari sanad.

It is argued on behalf of the appellant that as the plaintiff has failed to produce the list of villages attached to the kabuliyat which must have been executed by Raja Sitla Bakhsh Singh, he has failed to prove that the 60 villages entered in Sch. A of the plaint formed the estate of Gangwal now in suit. In support of the argument reliance is placed upon S. 3, Act 1, 1869. We do not think that there is any force in this argument. There is no doubt that Raja Sitla Bakhsh Singh did execute the kabuliyat accepting the grant of the estate of Gangwal by the British authorities, and it is also beyond doubt that to the said kabuliyat was attached a list of villages which together formed the estate of Gangwal. This is clear from the recitals contained in the sanad Ex. A13. The list, therefore, would be the primary evidence as to what villages and lands comprise the estate of Gangwal, but the law nowhere says that the list and the list alone shall be the evidence of that fact. We think that the production of the primary evidence may well be dispensed with in this case and other evidence, to which reference has already been made; may be admitted in proof of the fact in controversy. As observed by the learned Judge in the trial Court, the plaintiff applied for copies of the kabuliyats and the list prepared at the second summary settlement, but was informed that the documents had all been destroyed. We think, therefore, that secondary evidence should be relied upon.

As regards the village Rajapur grant, the history relating to this village is mentioned in the wajib-ul-arz of the same: Ex. 166. We have already seen that this village is included within the list of sixty villages given in the wajib-ul-arz of Gangwal. Ex. 166 also recites that the Rajapur grant is included in the taluqa of Gangwal. It was the ancestral zamindari of the taluqdar of Gangwal and was a jungle during the year 1855. According to the statement in this wajib-ul-arz, the settlement of 1266 Fasli, that is the second summary settlement in respect of this village, was not made with Raja Sitla Bakhsh Singh for the reason that it was an "uninhabited jungle" and was then held by the Government. Subsequently, however, it was given by way of a grant to Raja Sitla Bakhsh Singh. The wajib-ul-arz also states that since the date of the grant, that is 1858-59, the village has continued to remain in the possession and occupation of the Raja, and, according to the terms of the grant, it was to be held revenue-free for 20 years, and from November 1879 the Government revenue was chargeable. The inference is that at the time of the first regular

(5) A. I. R. 1923 P. C. 70=45 All. 413=26 O. C 217=50 I. A. 196 (P. C.).
(6) A. I. R. 1927 P. C. 113=49 All. 367=54 I. A. 204 (P. C.).
(7) [1905] 27 All. 634=32 I. A. 203=8 O. C. 317 (P. C.).

settlement the village was held in proprietary right by Raja Sitla Bakhsh Singh, and the presumption is that it must have been decreed to him at that settlement. This being so, though the second summary settlement of the village was not made with the Raja the village still must be held to be an "estate" by virtue of the second part of S. 3, Act 1, 1869. That property decreed at the first regular settlement to a taluqdar, though there had been neither a second summary settlement in respect of it and though it had not been included in the taluqdari sanad, is an "estate" within the meaning of S. 3 of the Act, was decided by their Lordships of the Judicial Committee in the case of *Janki Pershad Singh* v. *Dwarka Pershad Singh* (8). We, therefore, in agreement with the trial Court, hold that the 60 villages entered in Sch. A of the plaint constitute the estate of Gangwal.

The third question for decision is as to whether the plaintiff "is the nearest male agnate according to the rule of lineal primogeniture" of Raja Suraj Prakash Singh. It will be convenient to divide this matter into two portions :

1. Agnatic relationship, and
2. Lineal primogeniture.

A complete pedigree is given at the end of the judgment of the trial Court and it will suffice for our purposes to state a short pedigree here: [*See page* 315.]

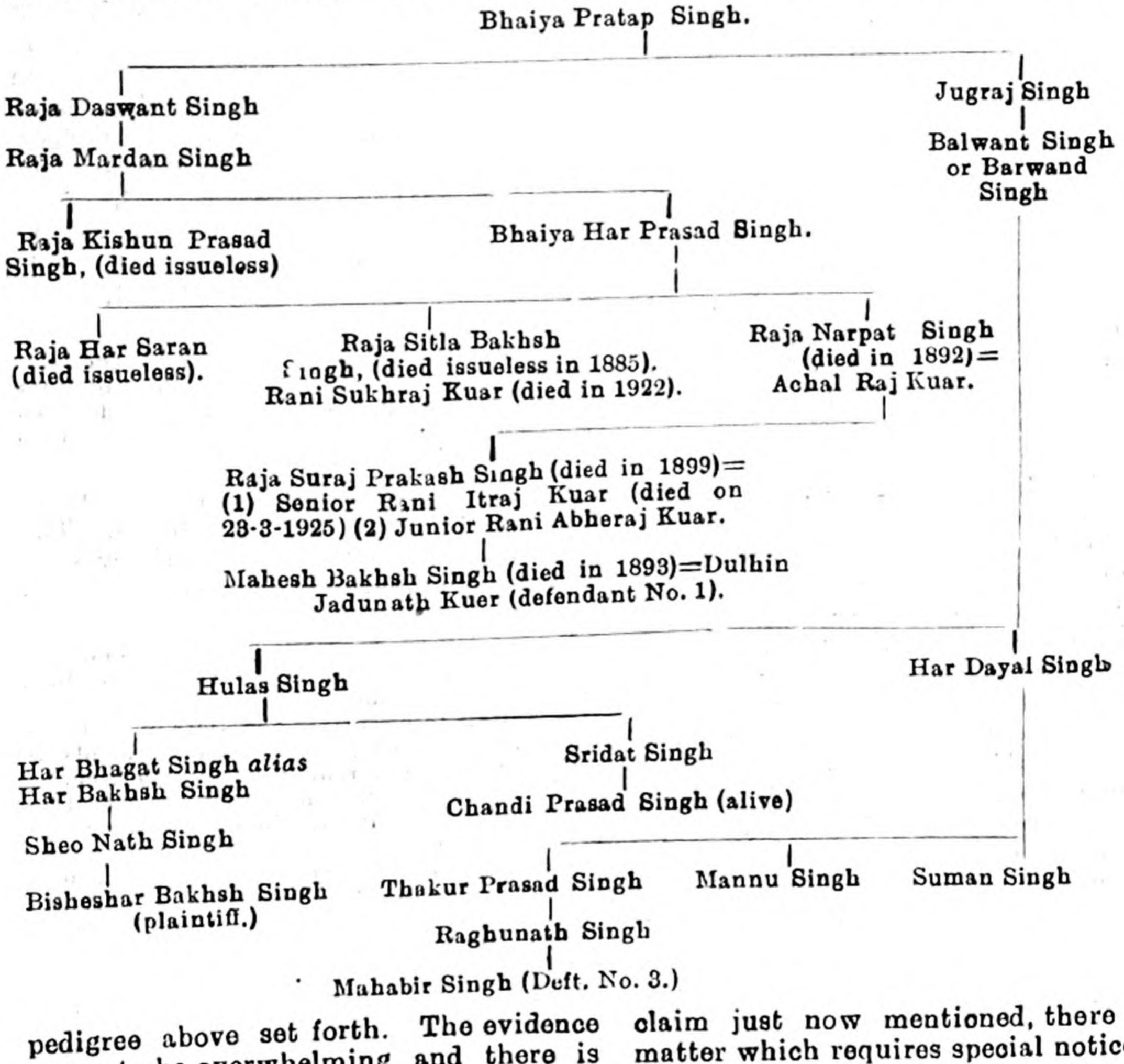
The earliest ancestor of the family of Gangwal known to tradition was one Raja Nainsukhdeo. His original home was in a country called Janwar. It is difficult at this date to identify Janwar with any existing geographical entity in India, but the tradition says that Nainsukhdeo became the owner of the estate of Janwar in the province of Gujrat. The descendants of Raja Nainsukhdeo, including the Gangwal and some other families in the district of Bahraich, now bear the appellation of Janwar Kshatriyas. Raja Nainsukhdeo was said to be a Sombansi Kshatriya, and this fact has significance in respect of a question which we shall notice later. One of the sons of RajaNainsukhdeo was Baryar Shah. About the middle of the 13th century Bahraich was under a separate government from that of Oudh. And during the regime of that government Baryar Shah seems to have first arrived in Bahraich. In the year 1374 A. D. Firoz Shah came to Bahraich on a visit to the tomb of Syed Sular Masud, who was killed in a battle by the Hindu chieftains of the place in 1034 A. D and was buried by his servants in the spot which he had chosen for his resting place. The tradition says that, with the help of Firoz Shah, Baryar Shah usurped the estate of Ikauna, and became Raja after slaying the previous holder in 1414 A. D. After Baryar Shah, his son Achaldeo succeeded to the gaddi of his father. In the sixth generation from Baryar Shah, Madho Singh became the ruler of the Ikauna Raj. Contemporaneously with Madho Singh the holder of the Gangwal estate was one Kesho, carpenter by caste His whole family was annihilated by Madho Singh and thus the estate came under the sway of the latter. Subsequently, under a partition between Madho Singh and his brother, Ganesh Singh, Ikauna fell to the share of the latter and Gangwal of the former. Madho Singh's line became soon extinct, and it appears that Chhattarpal Singh, the grandson of Ganesh Singh, held the two estates together.

Chattarpal Singh had two sons : Raja Chain Singh and Bhaiya Partap Singh. On a partition between the two brothers, Raja Chain Singh remained the owner of the Ikauna estate and Bhaiya Partap Singh obtained the taluqa of Gangwal. The descendants of Chain Singh were in possession of the Ikauna Raj at the annexation of Oudh in 1856, but the estate was forfeited after the Mutiny of 1857 to the British Government, and thus ended the importance of the senior line of Baryar Shah. Partap Singh and his descendants have continued to hold the estate of Gangwal, and at the time of annexation Raja Sitla Bakhsh Singh, fourth in descent from Partap Singh, was the taluqdar and, as we have already said, the second summary settlement of 1858-59 was made with him in respect of the Gangwal estate, and his name was subsequently entered in lists 1 and 2 of the lists prepared under S. 8 of Act 1, 1869 : vide the wajib-ul-arz of Gangwal, Ex. 63, and the District Gazetteer of Bahraich

On the question of the plaintiff's relationship with Raja Sitla Bakhsh Singh, the case put forward and argued before

(8) [1913] 35 All. 391=16 O.C. 216=20 I.C. 73=40 I.A. 170 (P.C.).

us on behalf of Lal Harihar Pratap Bakhsh Singh, the defendant-appellant in Appeal No. 19, is that Jugraj Singh, the second son of Pratap Singh, died issueless, or at least that the plaintiff has failed to prove that he is the descendant of Jugraj Singh. It was not disputed that Jugraj Singh was one of the two sons of Pratap Singh. We agree with the trial Court that the plaintiff has succeeded in establishing the fact that he is the descendant of Jugraj Singh according to the line of descent indicated in the



pedigree above set forth. The evidence seems to be overwhelming and there is no evidence worth the name in rebuttal.

The first regular settlement of the district of Bahraich commenced in the year 1865. On 19th October 1865 Sheonath Singh, father of the plaintiff, and Parab Sahai Singh, own cousin of Sheonath Singh, laid a claim for a decree for the proprietary title of 14 villages in the estate of Gangwal on the ground that the ancestors of the claimants and of the Raja of Gangwal were brothers and that consequently the taluqdar's ancestor had granted the 14 villages in suit to the ancestor of the claimants in the character of Bhayai-grant (grant for maintenance to cadet branches to the family). The claim for proprietary title was summarily rejected on 4th November 1865 on the ground that the title vested in the taluqdar of Gangwal. The claimants were directed to sue for under-proprietary rights in each village separately (Ex. A-20). The existing claim was treated to relate to the village of Gularia only. In the claim just now mentioned, there is one matter which requires special notice, and and it is this :

The right to proprietary title in the 14 villages was claimed on the ground that the villages were allotted to the plaintiffs' ancestor by the ancestor of the taluqdar by reason of the fact that they were members of the same family and descended from a common ancestor The suit remained in abeyance for about a period of two years and the inquiry into the claim for under-proprietary right

seems to have been started for the first time on 13th December 1867. On that date the Court recorded an order that notice should issue to the plaintiffs calling upon them to attend the Court with their documentary evidence. The invitation for the production of documentary evidence is significant. Notice was accordingly issued and, in pursuance thereof, on 16th December 1867, a pedigree was filed before the Court by Har Prasad, sadar qanungo of the time. This pedigree is exhibited in the present case and is marked as Ex. 1. On the proceedings of the case in the settlement Court the fact that the pedigree was filed on 16th December 1867 by Har Prasad there is a signature of Kanhaiya Lal Nazir by way of verification. This has been omitted in the printed translation Ex. A-24. In the Court's proceedings of 24th February 1868 it was recorded that the case had been put in the presence of all the plaintiffs mentioned in the pedigree attached to the file of village Jhuri Kuiyan. The pedigree bears the signature of Har Prasad Singh, Sadar Qanungo of Bahraich, in Urdu, of Bhaiya Sheonath Singh, as general agent of his father, Har Bakhsh Singh, and of Parab Sahai Singh, nephew of Har Bakhsh Singh, in Hindi. Further consideration of this pedigree will come hereafter. The next date on which the case was taken up was 17th December 1867 (Ex. A-20), when ten days' time was allowed to Sheonath Singh at his request. The next date on which the case was taken up was 4th February 1868, and 11th February 1868 was then fixed. The plaintiffs seem to have failed to appear, and, on 18th February 1868, the Court ordered that a process-server should go and bring the plaintiffs along with all the cosharers. Now the fact that there were cosharers of the plaintiffs was disclosed by the pedigree just now mentioned, and it appears that these cosharers were added as coplaintiffs to the claim originally made by Sheonath Singh and his cousin, Parab Sahai Singh. Accordingly we find the following persons as plaintiffs, and Raja Sitla Bakhsh Singh as the sole defendant :

1. Sheonath Singh.
2. Parab Sahai Singh.
3. Rudra Bakhsh.
4. Chandi Prasad.
5. Sukhdeo Singh.
6. Jaikaran Singh.
7. Sheokaran Singh.
8. Sheopaltan Singh.
9. Bir (or Mahabir) Singh.
10. Surat Singh.
11. Munnu Singh.
12. Suman Singh.

A glance at the pedigree will at once show that, having regard to the degree in which the ancestors of these two plaintiffs stood to each other, they all constituted the entire body of cosharers in the under-proprietary right claimed in that case. On 19th February 1868 Sheonath Singh filed 11 documents with a list attached to them. Har Prasad, sadar qanungo, verified the list Ex. 118 : On 24th February 1868 the parties came face to face before the Settlement Officer. All the plaintiffs, except 3, 8, 9, and 10, who were minors, appeared. The Raja defendant was represented by his mukhtar, whose name was Jagannath : vide Ex. 18. The plaintiffs stated their case. They said :

> Plaintiffs and defendant all belong to the same family. About 60 or 65 years ago the ancestors of the parties separated and the villages detailed below were then given as a Bhaiya's portion to the plaintiffs' ancestor : Ex. 42.

On 7th March 1868 the parties again appeared through their mukhtars. The defence on behalf of the Raja was recorded. The material portion of it is as follows :

> The plaintiffs do belong to the defendants' family, but these villages were not given to them as Bhaiya's portion. Defendant's ancestors gave Gularia to plaintiffs' ancestors in 1244 as Jagir (and that village only) because the plaintiff's family used to render services in time of need . . . In the minority of Raja Kishun Prasad Singh, Balwant Singh had these villages ; he had possession of the whole estate. He never had 12 villages separately. His possession of the estate was as naib. Balwant and Mardan did not divide the estate between them : The ilaqa was never divided. Ex. 13.

It will be seen from the pedigree that Mardan was the ancestor of the Raja and Balwant was the ancestor of Sheonath Singh and his coplaintiffs. On behalf of the Raja the plea of limitation was also raised. It also appears that the statement of the mukhtar of the Raja was made in the presence of Ishri Prasad, the Raja's Diwan. In the case relating to village Hardahi, Kalka Prasad, qanungo, was examined. He stated :

> Raja Sri Kishun Prasad Singh and Balwant Singh, the ancestor of the Gangwal taluqdar, had held this village as muafi since a very long time : Ex. 72.

Finally the Settlement Officer, Mr. Millet, delivered his judgment on 17th March 1868, dismissing the plaintiffs' claim as barred by limitation except as to the village Gularia for which he granted a decree for sub-settlement under Act 26 of 1866 : Ex. 16.

It appears that for some reason or another the claim for under-proprietary rights in one of the villages called Jhuri Kuiyan was subsequently revived by Sheonath Singh in the form of a claim for cash nankar to the extent of Rs. 350 and for two groves and 40 bighas odd land as rent-free nankar. In that claim Jagannath, the Raja's agent, was again examined. He stated that

the plaintiffs had claimed 12 villages and the claim was dismissed. An under-proprietary decree was passed in favour of the plaintiffs in respect of only one village, Gularia. The plaintiffs never got the nankar and cash to the extent of Rs. 350 per annum out of the land in suit nor was it fixed for him. Village Gularia was, however, from 1242, Fasli, given for maintenance to the plaintiff's family : Ex. 19.

The claim was disposed of by Munshi Har Prasad, Extra Assistant Commissioner, on 27th January 1870. The plaintiff's claim as to the Rs. 350 cash nankar was dismissed, but a decree in respect of certain groves was granted : Ex. 130. When the matter went before the Settlement Officer, Mr. Henry Boys, in appeal, that officer wrote a letter to Raja Sitla Bakhsh Singh which letter was to be delivered by Sheo Nath Singh. The Settlement Officer asked the Raja to satisfy Sheonath Singh out of Court : Ex. 71 dated 6th August 1870.

The Raja replied to this letter, Ex. B 73, dated 4th October 1870. Mr. Boys examined the Raja personally on 27th October 1870 before delivering the judgment in appeal. The Raja stated as follows :

The plaintiff used to get Gularia village rent-free except in 1254 and 1257, Fasli, when he paid something. I do not know what. He got nothing in right. It was by way of maintenance. The plaintiff never held Sultana and never any right in any other village. Gularia was not given in lieu of any other right. The plaintiff never received any cash allowance of any kind. Yes I admit this letter, document No. 8. This is my signature. I am unable to explain what I meant by the reference to the Rs. 300 and to Sultana. Plaintiff never had any rights in any of the 12 villages. I admit that up to the date of Mr. Millet's order the plaintiff used to hold the village of Gularia muafi : Ex. 69.

The letter No. 8, mentioned in the foregoing statement of the Raja, has been produced as an exhibit in this case. It is Ex. A-14. This is a letter which the Raja wrote to Sridat Singh. Sridat Singh was the brother of the plaintiff's grandfather. Har Bakhsh Singh and his sons were plaintiffs in the settlement suit. The letter is dated 13th January 1869. The Raja sends his compliments to Sridat Singh and addresses him as bhai (brother). He persuades him not to go to Court and to settle the matter of his rights amicably. The letter proceeds to say :

You need not file suit now. Come here. For your rights in all the 12 villages including Sultana nankar, you were given Gularia. If you do not like to have Gularia then you can have those very plots of land which had been separated for you in different places as well as Rs. 300 cash which you used to get. Time is not favourable. Country was in rebellion and the officers have a different tendency. If the suit is filed in these days, its fate lies in the hands of the officer. Who knows what he will do ? If there happens anything unfavourable the house will be ruined. If the matter be not settled as we desire, you can then file the suit. It is not proper just at present. It is needless to write now. Please come immediately.

The letter speaks for itself. The whole letter is full of the spirit in which the head of a family usually addresses a junior member of the same family. There is no doubt that the Raja regarded his and Sridat's house as one and the same house. On the same date on which Mr. Boys examined the Raja he delivered his judgment in appeal : Ex. 70. Mr. Millet had by his order of 17th March 1868 (Ex. 16) assessed Gularia with rent, and the Extra Assistant Commissioner, Munshi Har Prasad, had, by his order of 27th January 1870, refused to grant a decree for the claim of cash nankar of Rs. 350 : Ex. 130. Mr. Boys modified the order of the Extra Assistant Commissioner and granted a decree to Sheonath Singh for the nankar of Rs. 300 as against all the 12 villages. On second appeal Mr. Boys' judgment was affirmed by Mr. Reid, the Commissioner of the Fyzabad Division (Ex. 17). There is one important passage at the end of Mr. Reid's judgment in which reference is made to a ground of appeal made by the Raja. It is as follows : All the grounds of appeal refer to this letter except the last in which it is pleaded that the respondent (being a relative of appellant) should have brought his claim before the Taluqdars Association. The obvious answer to this is that the respondent's claim

was not for maintenance. This shows that the Raja once more admitted Sheonath Singh to be a relative of his. There are two more documents which require to be mentioned in this connexion. In the inquiry by the settlement Court as to the proprietary title of village Gularia the qanungo of pargana Ikauna said :

> Dakhle No. 1 (that is the hamlet Balanagar) the bhayai zamindari of this village, belonged to the ancestor of Parab Sahai Singh, a relative of the Raja, but they lost the possession from 1225 : F. Ex. 2.

The qanungo must be presumed to have had special means of knowledge as to the relationship between the taluqdar's branch and the cadet branch of Parab Sahai Singh. In the character of a qanungo, it was his duty to furnish information to the Settlement Court on questions relating to title and his statement was recorded by the Settlement Officer in the discharge of his official duty. We have no doubt that the record of his statement is admissible in evidence on the question of relationship also under S. 35, Evidence Act The second document is the wajib-ul-arz of village Gularia. It is not disputed that the entries in the wajib ul-arz are admissible in proof of the question in issue under S. 35, Evidence Act. The relevant entry in para. 1 relating to the history of the village is :

> The history in detail of the taluqa (that is Gangwal) including that of the family of the taluqdar as well as of the intermediary holder which is the same word for word as that of Raja Sitla Bakhsh Singh Taluqdar, would appear from the wajib-ul-arz of village Gangwal which after the taluqa takes its name : Ex. 7.

In our opinion this entry affirmatively proves that the under-proprietors of the village of Gularia and the taluqdar of the estate of Gangwal are descended from a common ancestor. The history of village Gangwal as entered in Ex 63, the wajib-ul-arz, begins by the statement as to how Baryar Shah acquired the estate of Ikauna, how his descendants, Madho Singh and Ganesh Singh, two brothers, took possession of the estate of Rajgarh Gori (that is the estate of Gangwal) and how, on a partition between the two brothers, Madho Singh became the owner of the Gangwal estate and how subsequently Partab Singh came into possession of the taluqa of Gangwal Downwards from Partap Singh the history brings the descent to Raja Sitla Bakhsh Singh who was the first taluqdar of the estate of Gangwal under the British rule. Partap Singh had two sons, Daswant Singh and Jugraj Singh Daswant Singh was the great-grandfather of Raja Sitla Bakhsh Singh and Jugraj Singh was the ancestor of the cadet branch represented by Sheonath Singh, the plaintiff's father, in the litigation before the Settlement Court. Leaving the pedigree (Ex. 1) filed by the sadar qanungo in the Court of Mr. Millet on 16th December 1867, and signed by Sheonath Singh and Parab Sahai Singh out of consideration for a moment in view of the argument that Sheonath Singh's and Parab Sahi's special means of knowledge within the meaning of Cl. (5), S 32, Evidence Act. 1872, should be proved aliunde of the pedigree, the evidence referred to and analyzed in the preceding portions of this judgment proves beyond anydoubt :

(1) That the first claim for superior proprietary title in 14 villages made by Sheonath Singh and Parab Sahai Singh was made on the basis of the right arising out of the relationship between their branch and the Raja's branch of the descendants of Partab Singh.

(2) That the claimants before Mr. Millet including Sheonath Singh, the present plaintiff's father, and the Raja were members of the same family.

(3) That the fact that the two parties were members of the same family was not only not disputed at any stage of the aforesaid litigation, but, on the contrary, was admitted all along by and on behalf of the Raja

(4) That antecedent to the litigation in the Settlement Court, the Raja admitted that he and plaintiff's ancestors were members of one and the same family.

The evidence as to the first fact is relevant and admissible under S. 13, Act 1, 1872 : vide the case of *Dinomoni Chawdhrani* v. *Brojo Mohini Chawdhrani* (9) The other facts establish that Sheonath Singh and Parab Sahai Singh had special means of knowledge and that the statements as to relationship were made before any controversy as to such relationship arose The statements are, therefore, admissible under Cl (5), S. 32, Act 1, 1872. The Raja's admissions are also clearly admissible in proof of relationship under S. 21 of the same Act.

(9) [190- 29 Cal. 187=29 I. A. 24=8 Sar. 224 (P. C.).

In the circumstances just now stated the pedigree (Ex. 1) must also be admitted in evidence under Cl. (5), S. 32, Evidence Act, as being the statement of Sheonath Singh and Parab Sahai Singh who, as members of the family, had special means of knowledge, and who made the said statement at a time when no dispute as to relationship had arisen. The pedigree proves the plaintiff's case with which he came into Court as to relationship between him and the late Raja Suraj Prakash Singh. In agreement with the trial Court, we, therefore, hold that the plaintiff has succeeded in establishing the fact that he is an agnate of the late Raja Suraj Prakash Singh. (The judgment then discussed the evidence as to whether the plaintiff was the nearest agnate according to the rule to lineal primogeniture and proceeded.) As to the admissibility of the pedigree filed by Sheonath Singh in the Court of the Deputy Collector, Munshi Muhammad Baqar Khan, on 30th May 1900, two objections are raised by the appellants:

(1) That it is not brought home to Sheonath Singh; and (2) that as a statement of relationship it was made after the question in dispute had arisen. We overrule both these objections. It is true that the hand which actually presented the pedigree to the Deputy Collector was the hand of Dwarka Singh and not the hand of Sheonath Singh, but Dwarka Singh was the general agent of Sheonath Singh as is proved by a certified copy of the mukhtarnama: Ex. 134. Dwarka Singh was also a relation of Sheonath Singh as is stated in the mukhtarnama. We know that the inquiry during the progress of which the pedigree was filed had arisen out of Sheonath Singh's application of 2nd December 1899. We also know that in this application he had described himself as a reversioner entitled to the estate of Gangwal on the death of the Rani. It is a natural presumption in the circumstances that the person primarily responsible for the statement as to relationship contained in the pedigree (Ex. 59) was Sheonath Singh. There is also direct evidence in support of the presumption This comes from the mouth of the plaintiff himself who gave evidence in the present suit. He states:

> I know Dwarka Singh, a relative of mine . . . Dwarka Singh was the mukhtar of my father. He also worked for a long time as mukhtar of Gangwal estate and afterwards he worked for my father. My father made an application for having the estate taken under the Court of Wards and in connexion with this application Dwarka Singh produced a pedigree on behalf of my father. He was the mukhtar of my father. The shajra (pedigree) was shown to my father. Dwarka Singh read it out to Sheonath Singh I also was present and heard it. Sheonath Singh said that it was all right and should be filed. Dwarka Singh is dead. I was not present when the shajra was filed in Court.

In cross-examination he stated:

> When Dwarka Singh read out the shajra to my father Sheonath Singh I was present, but no one else was present. I am sure that the same shajra was filed in Court as I saw the shajra afterwards. After the death of Rani Itraj Kuar I took a copy of the shajra which had been filed. I did not see the original. I remember the contents which had been read out, so I can say that the shajra filed was the same one.

Further he stated:

> Dwarka Singh prepared the pedigree in Bahraich and brought it and read it to my father.

The plaintiff is 64 years of age now. So at the time of the preparation of the pedigree (Ex. 59) he was 37 years old. He would presumably attend to the affairs of business of his father. The statement is very natural and had the plaintiff been disposed to lie he would not have said that he was the only person present when Dwarka Singh had read out the shajra to his father. He would have named and produced witnesses in support of his statement. This he has not done. We, therefore, hold that the pedigree (Ex. 59) is the statement of Sheonath Singh.

As regards the second objection that it was prepared at a time when the question in dispute had arisen: we do not accept it as correct. Previous to the year 1900 there is no trace of any dispute whatsoever on the question as to whether Hulas Singh or Har Dayal Singh was the elder of the two, nor can we find any such trace up to the date of the filing of the pedigee, that is 30th May 1900. In support of the objection reliance is placed upon Dulhin Jadunath Kuar's application of 30th June 1900 (Ex 61) already referred to We do not think that there is anything in this application which can be construed to mean that the question now in dispute had arisen then In the first place this application was made exactly 30 days after the filing of the pedigree and it was made also after the inquiry had concluded and the Deputy Collector had recorded and submitted his

report on 7th June 1900. In the second place the application nowhere suggests that Sheonath Singh had filed an incorrect pedigree or that he was not related to the Raja of Gangwal in the manner suggested by the pedigree. All that the application says at the end is that the applicant would be able to look after the management of the estate

> through the karindas of the Maharaja of Balrampur who is entitled to this estate after us.

This clearly is not a denial of Sheonath Singh's alleged relationship with the Raja of Gangwal, nor can we discover any necessary implication to the same effect. On what grounds and in what right, the Maharaja of Balrampur might be entitled, according to the opinion of the applicant, to the estate of Gangwal, is not stated in the application. From this statement we cannot infer that a controversy as to the seniority of Hulas Singh had been raised. As to the applicant's own right to succeed, this was clearly founded not on the denial of Sheonath Singh's relationship, but on the settlement of 29th June 1899 which was made a day before the application of Dulhin Jadunath Kuar was presented. As to what the "question in dispute" means in Cl. (5), S. 32, Evidence Act, 1872, was stated by their Lordships of the Judicial Committee in the case of *Kalka Prashad* v. *Mathura Prashad* (10). In the case before their Lordships a pedigree purported to have been filed by one Sheo Sahai in 1892 or 1894 in a civil suit, concerning lands other than and different from the lands claimed in the suit which went in appeal before their Lordships of the Judicial Committee, in which Sheo Sahai was the plaintiff. The pedigree was signed by Sheo Sahai by the pen of Sundar Lal, his special agent. In the year 1891, in a suit instituted by one Sundar Lal against one Mt. Parbati for cutting down trees in a certain grove, Mt. Parbati had stated:

> I have no kinship with him, nor am I on visiting or dining terms with him as a fellow casteman. He has no concern with my proprietary interest ... The plaintiff's (Sunder Lal's) father and his cosharers have vested their share in the hakiat.

On the ground of this statement of Mt. Parbati argument was raised against the admissibility of the pedigree in evidence; their Lordships said:

> But it is clear that the controversy to which this statement refers was not a controversy as to the heirship of Gur Sahai, but referred to an entirely different matter. In order to make the statement inadmissible on this ground the same thing must be in controversy before and after the statement is made: *Freeman* v. *Phillips* (11), *Sherewsbury Peerage, In re* (12); *Duke of Devonhire* v. *Neill* (13).

The precise controversy now under consideration is as to whether Hulas Singh was older than Har Dayal Singh. This was not the controversy at any time previous to the date of the death of Rani Itraj Kuar on 23rd March 1925. We are, therefore, of opinion that the pedigree (Ex. 59) is admissible in evidence under Cl. (5), S. 32, Evidence Act 1872. In this pedigree Bhaiya Hulas Singh is stated to be the eldest and Bhaiya Har Dayal Singh, the younger son, of Balwant Singh (alias Barwand Singh). We also think that the statement as to the seniority of Hulas Singh is true. According to the law, as it then stood, the succession to the estate of Gangwal on the death of Rani Itraj Kuar was governed by the provisions of Cl. (10), S, 22, Act 1, 1869 as it was previous to the amendment introduced by Act 3 of 1919. Prima facie the person entitled to the reversion under that clause would be the agnate nearest in degree to Rani Suraj Prakash Singh and this person, was Chandi Singh was still alive, and not Sheonath Singh. That this was the law then is clear from the decision of their Lordships of the Judicial Committee in the case of *Narindar Bahadur Singh* v. *Achel Ram* (14). It is the change in the law which has given the nearest agnate of the senior line a preferential title to the one nearest in degree. Sheonath Singh had therefore no motive in 1899 to make a false statement as to the seniority of his grandfather, Hulas Singh. If the pedigree (Ex. 59) is admissible in evidence and is also a true statement as to the seniority of Hulas Singh as we have held that it is, then it is proved beyond any doubt that Hulas Singh was the first born son of his father Balwant Singh. Apart from the pedigree there is also other evidence in proof of this fact, which we now preceed to state.

Little need be said about the seniority of Har Bakhsh Singh (father of Sheonath

(10) [1908] 30 All. 510=35 I. A. 166=1 I. C. 175=11 O. C. 362 (P. C.).

(11) [1816] 4 M. & S 486.
(12) [1857] 7 H. L. C. 1.
(13) [1876] 2 L. R. Ir. 1132.
(14) [1893] 20 Cal. 619=20 I. A. 77 (P. C.).

Singh) amongst his brother because that is a matter which was not disputed before us. But the evidence to which we shall presently refer proves on the whole that Sheonath Singh's line was the senior line all along the pedigree below Jugraj Singh. Each item of this class of evidence is not conclusive by itself but to use the language of Lord Hobhouse in the case of *Nitre Pal Singh* v. *Jai Pal Singh Pal* (15), all the lines of evidence here examined converge upon the same point. Perhaps no one of them would, if standing alone, be conclusive in favour of the plaintiff's case, but taken as a whole they are conclusive. (The judgment then discussed other evidence and concluding that the finding of the trial Court on the question of agnatic relationship and the seniority of the plaintiff's line should be maintained, proceeded.) Against the broader question of relationship, which we have decided in agreement with the trial Court in favour of the plaintiff, the only argument advanced on behalf of the defendants and particularly Lal Harihar Pratap Bakhsh Singh, defendant 2.is that the plaintiff and Raja Suraj Prakash Singh could not be held to be related to each other, in spite of all the evidence to the contrary on the ground that the two belonged to different gotras. On the face of it the argument is highly technical and its pursuit has landed us into the region of Hindu tradition. We briefly indicate the line of the argument and our opinion in respect thereof.

The first thing to be mentioned in this connexion is that no plea as to the difference of gotras was raised either in the written or in the oral pleadings of the case. Indeed as a plea it was not urged until the address of the arguments on behalf of the defendants commenced in the trial Court. The basis of the argument is a statement elicited from the plaintiffs' mouth in cross-examination. In answer to a question put to him he said:

> I do not know the name of the gotra of Sheonath's nana. My gotra is atri gotra. I do not know if the Raja of Piagpur belongs to the same gotra.

This is all. He was not asked as to the gotra of the line of the Raja of Gangwal and as to any explanation that he might have had to offer in case he had stated that the two gotras were different.

On the basis of the plaintiff's statement it is argued that his gotra being Atri and there being other oral evidence in the case that the gotra of the taluqdar of Gangwal was Vaiyaghra, the two cannot be held to be related to each other. Now Vaiyaghra gotra is not a primary gotra, but is a sub-division of Vasishtha. According to modern derivation, the word " gotra " may mean

> a cow-pen a place in which cows are kept or protected, it may be from the wild beasts, or from the plundering attacks of the Dasyus who surrouded the early Brahmanic settlements formed in the upper part of the Indus valley—Krishna Kaffial Bhattacharji' joint Hindu Family (Tagore Law Lectures 1884-85, 1st edn, pp. 112 and 113).

In a secondary sense the gotra of a person is the name of the sage (rishi) from whom he or his agnate is supposed to have descended in the male line. According to a text of Smriti cited by Raghunandana, there are eight rishis.

> The sages Jamadagni, Bharadvaja, Visvamitra, Atri, Goutama, Vasishtha, Kasyapa and Agustya—were progenitors of gotras those that were decendants of these, are known to be the gotra or founders of gotras—Sarkar Sastri's Hindu Law 6th edn. p. 88.

In *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (16) their Lordships of the Judicial Committee said:

> The Gentiles, or gatraja (from the gotra) are described as descending from one common stock, a male, and derived generally through males, as forming a family, though embracing possibly many families, and such original bond of union is regarded as necessary to the constitution of the gotra.

Technically and prima facie, therefore, if the plaintiff and the taluqdar of Gangwal are descended from a common ancestor they should have one and the same gotra.

The first question for consideration is as to what is the precise gotra of the taluqdar of Gangwal. As we have said before, the plaintiff should have been asked about it but he was not asked. On the statements of some of the defendants' witnesses, however, the learned Judge of the trial Court has held " that the Gangwal taluqdars were of the Vaiyaghra gotra." The learned Judge adds:

> Although this conclusion is weakened by the fact that this point was not put to the plaintiff or his witnesses in cross-examination.

According to our judgment the matter is not free from doubt. Sheo Prasad

(15) [1869] 19 All. 1=23 I. A. 147=7 Sar. 49 (P. C.).

(16) [1870] 13 M. I. A. 373=5 B. L. R. 293=2 Suth. 330=14 W. R. P. C. 1 (P.C.).

Singh (D. W. 14) is a Janwar Kshatriya and is a patnidar both of Gangwal and Gularia families. This being so, it must be taken that he and they are descended from a common ancestor. He stated at the end of his deposition that his gotra is kashib. Bhaiya Ram Kumar Singh (D. W. 27) also stated:

> There are three gotras among the Janwars . . . . . Vayagai, Atri and Kashyap.

In answer to a question by the Court he said:

> I cannot say whether it is possible for the descendants of one ancestor to belong to different gotras.

Jadunath Singh (D. W. 18) said:

> The descendants of one ancestor cannot belong to two gotras. I know three gotras of Janwars. There are other gotras also. There is one kasib gotra, one Viayagra gotra and one Atri gotra.

Hubdar Singh (D. W. 30) is also a Janwar Kshatriya. He says:

> There are two gotras among Janwars as far as I know Vayagra and Atri gotras. I do not know of any other gotra among Janwars. I know that the Atri gotra Janwars live in Gularia.

Now according to the notions of these witnesses the entire Janwar clan of Kshatriyas may have descended from several rishis, and one family within the clan may be possessed of one gotra while another family in the same clan may be possessed of another gotra. It follows that according to the witnesses, within whom we also include the plaintiff, the popular notion as to gotra or the identity of gotra is not the same as the technical connotation of gotra.

The strict Brahminical theory is that as the founders of gotras were Brahmans, the Kshatriyas and Vaihas can have no gotras of their own; Dattaka Mimansa, Ss. 2 and 84. The gotric title of these two classes is explained by the fact that they have adopted the gotras of the spiritual guides or family priests of their remote progenitors. This view is opposed by pointing out that Visnu Mitra, who was a Kshatriya by birth and Vasishtha who was not a pure Brahman by birth are admittedly founders of gotras or ancestors of many founders of gotras—Sarkar Sastri's Hindu Law, p. 83. In this conflict of opinion the safest course for us would be to accept the view taken by the authors of the Mitakshara. The text of Mitakshara, to which we allude here, is quoted in the case of *Ramchandra* v. *Gopal* (17). Within the text occurs the following passage:

> Though Kshtriyas and Vaishyas have no gotras of their own, the gotra bravara of their family priests should be considered (as belonging to them).

It may, therefore, be that Vyaghra gotra which is only a sub-division, and not a primary gotra in itself, was adopted by the Gangwal family after the name of a family priest in comparatively recent times, that is about 150 years ago, when the two branches of Gangwal and Gularia separated.

The "wajib-ul-araz" of Gangwal (Ex. 63) read with the "wajib-ul-araz" of Gularia (Ex. 7) shows that the remotest common ancestor of the two families known to tradition was Raja Nainsukhdeo. He was a Sombansi Kshatriya. Sombansi is equivalent to Chandrabansi which means descendants of the moon. Atri as a rishi or sage is supposed to be one of the seven sons of Brahma. In the Puranas, he is stated to have produced the moon from his eye while he was practising austere penance—Apte's practical Sanskrit English Dictionary. The descendants of Atri are, therefore, called Sombansis and they primarily belong to the Atri gotra. It is agreed that the Gangwal and the Gularia families are Sombansi Kshatriyas. We think, therefore, that it is in the foregoing sense that the plaintiff describes himself as a member of the Atri gotra. This view is supported by the following:

In Mahabharat (basha) printed at Benares in 1913, Chap. 19, p. 337, we find that the Rishi Kanva is made to address the son of Dushyant by the following verses: *som bans men janam tumhara Atra gotra jane sausara* (you were born in the Sombansi clan. The world knows that your gotra is Atra). On these grounds we are unable to give effect to this argument as sufficient to outweigh the direct and positive evidence as to the relationship of the two famlies. The last and the only point which remains for consideration is the effect of the settlement of 29th June 1899 (Ex. A-10 p. 309). The last full owner of the estate of Gangwal was Raja Suraj Prakash Singh. He died on 15th June 1899. At the time of his death there were only four members in the family, his two widows, Rani Itraj Kuar (senior), Rani

(17) [1905] 32 Bom. 619=10 Bom. L.R. 948.

Abhairaj Kuar (junior), his mother Achalraj Kuar and the widow of his predeceased son, Dulhin Jadunath Kuar. For the purposes of mutation of names in respect of taluqa of Gangwal the two Ranis and Dulhin Jadunath Kuar entered into a settlement as to the possession of the estate and provision for maintenance of the ladies other than the holder of the estate. The two Ranis were subsequently examined in the pending mutation proceedings on 23rd July 1899. Their depositions are Exs. A-4 and A-5 respectively. Dulhin Jadunath Kuar's defence on the basis of this settlement is twofold.

(1) That she is entitled to remain in possession of the entire estate for her lifetime and (2) failing it she is entitled to remain in possession of the villages set apart for her maintenance for the same period of time. As to the latter claim it appears that adopting a construction of the settlement dated 19th June 1899 the Dulhin's learned advocate stated in the Court below that his client did not claim to remain in possession of the guzara villages by virtue of the agreement of 1899. The construction which he placed on the agreement was that after the death of the last holder of the estate, that is Rani Itraj Kuar, his client would remain in possession not as guzaradar but as owner. The case was argued in the trial Court on behalf of Dulhin Jadunath Kuar on the same lines, but before us rights are claimed in the whole taluqa and in the alternative in the guzara villages on behalf of Dulhin Jadunath Kuar on the basis of the settlement of 1899.

The plaintiff-respondent does not suggest that there is any estoppel in the way of Dulhin Jadunath Kuar against her case set up in the way in which it is set up before us. The advocate's statement was clearly based on a construction of the deed of 19th June 1899 and the Dulhin's counsel before us who, we may say so, is another learned counsel, is not debarred from placing a different construction on that deed.

As to the first claim of Dulhin Jadunath Kuar, that is to say, the possession of the entire estate of Gangwal for her lifetime, there is no dispute as to the construction. Both sides agree and the learned Judge of the trial Court also agrees that, according to the terms of that agreement, Dulhin Jadunath Kuar, after the death of Rani Itraj Kuar is clearly entitled to the possession of the entire estate of Gangwal. But her claim has been rejected by the learned Judge in the trial Court on the ground that Rani Itraj Kuar, having a life-interest only, could not make an agreement which was to enure beyond her lifetime and be binding upon the reversioners. The learned Judge however, thinks that Ex. A-9 cannot be a family settlement binding on the reversioners for the reason that Dulhin Jadunath Kuar and Abhairaj Kuar did not set up any title to the whole or any specific part of the estate as against Rani Itraj Kuar. They merely claimed certain villages in lieu of maintenance. They did not set up or profess to surrender any claim to the estate itself. As to the second aspect of the defendants' case the learned Judge is of opinion that Rani Itraj Kuar, being a life-tenant only, was entitled to set-apart property by way of maintenance for the other three ladies of the family as long as this arrangement purported only to be operative during her lifetime and that, as a matter of fact, is what she actually did.

We are of opinion that the learned Judge has not taken a correct view of the settlement of 29th June 1899. He has placed the rights of the parties to it on an exact legal basis and drawn conclusions therefrom. In other words, he regards the settlement as if it were an alienation made by Rani Itraj Kuar, which according to law must come to an end on her death, she being merely a holder of life-interest in the estate.

Now on the date of the settlement the position was this: Rani Itraj Kuar, the senior widow of Raja Suraj Prakash Singh, was entitled to hold the estate of Gangwal for her lifetime under Cl. (7), S. 22, of Act 1 of 1869 as the clause stood previous to the recent amendment. There were no heirs under that section in any of the preceding clauses. On the death of Rani Itraj Kuar the estate would devolve on the junior widow Rani Abhairaj Kuar for her lifetime under Cl (9) of the same section, there being no heir under the intervening Cl. (8). The junior widow and the mother during the lifetime of Rani Itraj Kuar and during the incumbency of her possession of the estate were entitled in law to cer-

tain annuities by way of maintenance, under S. 25, Act 1, 1869, in each case for life only and similarly Dulhin Jadunath Kuar, the widow of a predeceased son of Raja Suraj Prakash Singh was entitled to an annuity under S. 27 of the same Act. Dulhin Jadunath Kuar could also claim, though not with much prospect of success, her recognition as a gotra sapinda through her deceased husband entitled to the estate of her father-in-law for her lifetime as a possible heir under Cl. 11, S. 11. Such a claim has been upheld under the law of the Mitakshara as administered in the Presidency of Bombay by their Lordships of the Judicial Committee in the case of *Lalloobhoy Bapoobhoy* v. *Cassibai* (18). No decision of the same tribunal to the contrary exists as regards the rule of the Mitakshara in the United Provinces of Agra and Oudh. The male reversioner, whosoever, he might have been on that date, under Cl. (11), S. 22, Act 1, 1869 had no higher status than that of an ordinary Hindu reversioner. We are of opinion that this is so under the decision of their Lordships of the Judicial Committee in the case of *Harnath Kuar* v. *Indar Bahadur Singh* (19). An heir under that clause must remain *ex-necessitate* unknown until the determination of the last life-interest.

The settlement of 29th June 1899 clearly indicates that it was arrived at for the purpose of settling controversies as to the mutation of names consequent on the death of Raja Suraj Prakash Singh. On 23rd July 1899 Rani Itraj Kuar and Rani Abhairaj Kuar were examined in the mutation proceedings and they both affirmed the terms of the compromise as to the order of succession to the estate and as to the allotment of property for maintenance : Exs. A-4 and A. 5). As under the settlement Rani Itraj Kuar was to be the first holder of the estate her name was entered in the revenue registers in place of her deceased husband, Raja Suraj Prakash Singh. It is necessary to produce here certain portions of the deed of settlement :

Whereas Raja Suraj Prakash Singh, Taluqdar of Gangwal, died childless and intestate, while we, i. e., Rani Itraj Kuar, the first widow. Rani Abhairaj Kuar, the second widow, Dulhin Saheba, viz., Jadunath Kuar, widow of Bachcha Mahesh Bakhsh Singh, the son of the late Raja, and Rani Achal Raj Kuar, the mother of the deceased Raja, are the heirs, and now we, by mutual consent, have decided that the mutation of taluqa Gangwal . . . . . be effected in favour of Rani Itraj Kuar and during her (Itraj Kuar's) lifetime. Rani Abhiraj Kuar, Mt. Dulhin Jadunath Kuar and Rani Acharaj Kuar, the mother of the deceased Raja, having received the following Bhaiyai village, which have always remained in the possession of the heirs to the estate and also were held for a long time by Raja Narpat Singh during the Shahi rule, should support themselves because this Bhaiyal right now belongs to Rani Abhairaj Kuar and Mt. Dulhin Jadunath Kuar, the heirs to the estate, who, after me, Rani Itraj Kuar, shall become the successors one after the other.

Before we proceed further two observations must be made. The first is that the villages set apart for maintenance appear to be the villages which were held as such in the preceding generations, and the second is that on the death of Rani Itraj Kuar the succession to the estate was to devolve first on Rani Abhairaj Kuar, and on the death of the latter on Dulhin Jadunath Kuar. In this scheme of things it was natural that when Rani Abhairaj Kuar and Dulhin Jadunath Kuar enter into the possession of the estate after the death of Rani Itraj Kuar their right to separate maintenance comes to be merged in the larger right. From this we cannot infer that they are to be divested of the maintenance in their lifetime even in the event of their not being held entitled to succeed to the estate in its entirety. We now quote certain portions from the second paragraph of the deed of settlement.

These villages (that is the villages set apart for maintainance) shall remain in the possession of the aforesaid guzara holders with all the proprietary powers without the power of transfer by sale, mortgage or gift . . . . . The revenue of these villages, amounting to Rs. 400, which Raja Narput Singh paid while he got the portion of a Bhaiya, shall continue to be paid by the guzara holders also . . . . We, Rani Abhairaj Kuar and Dulhin Jadunath Kuar, do hereby affirm that in the lifetime of Rani Itraj Kuar we shall have no concern with the taluqa with respect to any kind of expenses, excepting the following guzara viilages. We, the guzara holders, have decided that this guzara should be divided among us in this way that I, Rani Abhairaj Kuar, should get 4 annas per rupee more than Mt. Dulhin Jadunath Kuar and the mother of the Raja. We, Mt. Dulhin Jadunath Kuar and the mother of the Raja, should got 4 annas per rupee less than Rani Abhairaj Kuar. The net income of the guzara villages is about Rs. 6,500 per annum out of which I, Rani Abhairaj Kuar, shall get

(18) [1880] 5 Bom. 110=7 I. A. 212=4 Sar. 164 (P. C.).

(19) A. I. R. 1922 P. C. 409=45 All. 179=50 I. A. 69=26 O .C. 223 (P. C.).

Rs. 2,500, while Dulhin Jadunath Kuar and the mother of the Raja shall get Rs. 2,000 each annually. After the death of the mother of the late Raja Suraj Prakash Singh aforesaid, we, the two guzara holders, viz, Rani Abhairaj Kuar and Mt. Dulhin Jadunath Kuar, shall divide the entire guzara among ourselves at the aforesaid rate.

Prima facie a provision for maintenance must be deemed to be intended to enure for the lifetime of the grantee—*Raja Rameshar Bakhsh Singh* v. *Arjun Singh* (20). In the present case the provision was to cease earlier but only in the event of the grantee coming into possession of the estate. We are unable to discover anything in the document to justify the interpretation that it was to cease on the death of Rani Itraj Kuar, and during the lifetime of the grantee, when the succession to the estate is withheld from her on a ground not contemplated by the settlement. The interpretation which we have placed on the settlement of the 29th June 1899 is the interpretation which the plaintiff himself places upon it. The plaintiff further admits that the settlement was acted upon by the parties concerned : vide para 10 of the plaint.

The rule as to the construction of family settlements and compromises to which persons holding limited interest are parties has repeatedly been laid down by their Lordships of the Judicial Committee. The first decision to which we would refer is that of *Rani Mewa Kunwar* v. *Rani Hulas Kunwar* (21). The principle of that decision was affirmed by their Lordships of the Judicial Committee in respect of the same settlement in the case of *Khunni Lal* v. *Gobind Krishna Narain* (22). In this case their Lordships quoted with approval the following passage from the judgment of the High Court :

The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement.

Their Lordships added :

The true test to apply to a transaction, which is challenged by the reversioners as an alienation not binding on them, is, whether the alienee derives title from the holder of the limited interest or life-tenant. In the present case Khairati Lal acquired no right from the daughters of Daulat, for " the compromise," to use their Lordships' language in *Rani Mewa Kunwar* v. *Rani Hulas Kunwar* (21) at P. 166, is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is.

The learned Judge in the trial Court distinguishes the case just now referred to on the ground that the reversioner was a party to the compromise in that case.

We are of opinion that this cannot be a reason for distinction. In the first place, the estate in dispute was claimed to be in the right of succession to Daulat and not to his father Ratan, and Khairati Lal, who was a party to the compromise, was not the reversioner of Daulat. In the second place, the question in such cases is always as to the effect of a settlement by persons possessed of limited interest on the rights of the actual reversioners, that is to say, the person or the body of persons in whom the estate comes to vest on the determination of the limited interest. Such persons are bound, though they are no parties to the settlement, provided it is a genuine and real settlement and provided further that it is reasonable and prudent. In the case of *Ramsumran Prasad* v. *Shyam Kumari* (23), a compromise entered into by a Hindu widow in a litigation between her and her deceased husband's debtors was upheld by their Lordships of the Judicial Committee as binding upon the reversioner. With reference to the case of *Lala Khunni Lal* v. *Kunwar Gobind Krishna Narain* (22), above referred to, Lord Phillimore, in delivering the judgment of the Board in the case just now mentioned, said :

This Board held that the compromise on its true construction did not mean an alienation, and that it was not right to say that the heir-at-law or the derivative purchasers derived a title from the daughters. It is obvious that to put it as the respondents in that case did, that the purchasers derived title from the daughters, was begging the question. The property belonged to one or other, or possibly both of the parties to the dispute, and the compromise

(20) [1901] 23 All. 191=28 I. A. 1=7 Sar. 804 (P. C.).
(21) [1873] 1 I. A. 157=13 B. L. R. 312=3 Sar. 314 (P. C.).
(22) [1911] 33 All. 356=10 I. C. 477=38 I. A. 87 (P. C.).
(23) A. I. R. 1922 P. C. 353=1 Pat. 741=49 I. A. 312 (P. C.).

proceeded upon the footing that it was uncertain in which of them the title was. As their Lordships put it, it was based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledged and defined what that title was.

Firstly his Lordship stated the true doctrine to be :

A compromise made bona fide for the benefit of the estate and not for the personal advantage of the limited owner will bind the reversioner quite as much as a decree on contest.

The principle of this decision was again affirmed in *Mata Prasad* v. *Nageshar Sahai* (24). In that case a family settlement which was prudent and reasonable in the circumstances was held to be binding on the actual reversioners.

Some of the circumstances in which the settlement under consideration came to be effected we have already mentioned. Having regard to those circumstances we do not think that the provision as to the succession of the estate of Gangwal in favour of Dulhin Jadunath Kuar after the determination of the preceding life-estates was reasonable. That there were male reversioners who would claim title under Cl. (ii), S. 22, Act I, 1869 to the estate of Gangwal was well known to the ladies. In the circumstances, therefore, it was not reasonable on their part to have interfered with the line of inheritance as provided by law. We would, therefore, reject Dulhin Jadunath Kuar's defence, as to her right to succeed to the estate according to the terms of the settlement.

Dulhin Jadunath Kuar's case, however, in respect of the guzara property stands on a different footing. She had a possible claim to the whole estate ; she had a real claim to maintenance out of the estate, and the property set apart for maintenance both in valuation and in income is less than 1-20th part of the entire estate. She was the widow of the son of the last holder of the taluqa and she was the only other member of the family as it stood on the date of Raja Suraj Prakash Singh's death. On these grounds we think that the provision as to the maintenance of Dulhin Jadunath Kuar for her lifetime was a reasonable and prudent part of the settlement of 29th June 1899. We, therefore, uphold it to that extent. Besides the questions discussed and decided in this judgment no other questions were raised at the hearing of the appeals.

The result is that we dismiss appeal No. 19 and allow appeal No 24 only in so far that we modify the decree of the trial Court by dismissing the plaintiff's claim in respect of the guzara property as entered in the deed of settlement dated 29th June 1899. As to the costs : the appellant in Appeal No. 19 will bear his own costs and also pay the costs of the plaintiff-respondent in both Courts. Dulhin Jadunath Kuar in Appeal No. 24 will receive costs from plaintiff-respondent in proportion to her success and pay costs to him in proportion to her failure in both Courts.

N.K. *Decree modified.*

(24) A. I. R. 1925 P. C. 272=47 All. 883=52 I. A. 398=28 O. C. 352 (P. C.).

A. I. R. 1928 Oudh 326

STUART, C. J.

Des Raj Singh—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 162 of 1928, Decided on 18th April 1928, from order of Sess. Judge, Lucknow, D/- 15th February 1928.

Criminal P. C., S. 298 — Charge to jury — Mere expression of opinion by a Judge is no misdirection — It is not necessary for him to add, as a safeguard, a remark that it is only his opinion and that the jury are perfectly at liberty to form their own opinion.

A Judge has a right to express his opinion. If he expresses an opinion, which is an unfair opinion and which prejudices the accused, the superior Court can, and should, interfere to remove the ill consequences of such action by finding misdirection. If the Judge attempts to take the case out of jury's province by something in the nature of imposing his own view upon the jury, it is a case of misdirection ; but if a Judge simply states the opinion which the law allows him to state, in such a manner that intelligent jurymen should see for themselves that it is only his opinion and nothing else, it is not necessary for him to add, as a safeguard, a remark that it is only his opinion and that the jury are perfectly at liberty to form their own. On questions of fact the Judge's opinion in no way binds the jury, but the Judge has a right to express it so that the jury may know what it is. It is not a Judge's duty to conceal his opinion but to state it : *A. I. R.* 1914 *P. C.* 116, *Appl.*

[P 327 C 1 & 2, P 323 C 1]

R. F. Bahadurji—for Appellant.

H. K. Ghose—for the Crown.

Stuart, C. J. — This is an appeal against a conviction based on the

unanimous verdict of a jury, upon the grounds that the verdict has been vitiated by a misdirection of the Judge and that the sentence is too severe. I have not so far been required in this Court to make a pronouncement on the question of misdirection and as there are a variety of decisions upon the subject in other Courts many of which are conflicting, I think it advisable to state some of the principles which, in my opinion, should be applied in considering whether there has or has not been a misdirection.

Section 298 of the present Criminal Procedure Code does not lay down any principles on the question of misdirection, but it does lay down what are the duties of a Judge trying a criminal case with a jury both in the course of the trial and in the course of the summing up. It is laid down at the close of that section that the Judge may, if he thinks proper, in the course of his summing up express to the jury his opinion upon any question of fact or upon any question of mixed law and fact relevant to the proceeding. Many of the decisions of Indian Courts have laid down qualifications, which I consider are more of the nature of legislation than of interpretation to this clause. This clause lays down clearly that a Judge has a right to express his opinion. If he expresses an opinion, which is an unfair opinion and which prejudices the accused, the superior appellate Court can, and should, interfere to remove the ill consequences of such action by finding misdirection ; but to this clear and sound rule of law, some Courts have added the condition in effect that every word that a Judge says wherein he expresses his opinion should be qualified by most eaborate safeguards. It would almost appear that if a Judge in discussing evidence that the moon was visible at a certain hour stated that the almanack showed it was visible at that hour certain Courts would suggest that the charge was bad for misdirection, if he omitted to add to the jury "but of course it is for you to decide whether the moon was or was not visible at that hour." The question, I consider, is one of substance and not one of form. Fortunately there has been a comparatively recent decision of their Lordships of the Judicial Committee upon this very point which I trust will be sufficient to serve as a guide in future cases. This decision will be found in *Arnold* v. *King-Emperor* (1) and the words are at p. 168 :

> A charge to the jury must be read as a whole. If there are salient propositions in law in it these will, of course, be the subject of separate analysis. But in a protracted narrative of fact the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the view of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases, as cases of misdirection, if upon the general view taken, the case has been fairly left within the jury's province.

These words appear to me to lay down the main principles that have to be applied in such circumstances. The case must be fairly left within the jury's province. If the Judge attempts to take the case out of the jury's province by something in the nature of imposing his own view upon the jury, it is a case of misdirection, but if a Judge simply states the opinion, which the law allows him to state, in such a manner that intelligent jurymen should see for themselves that it is only his opinion and nothing else, it is not necessary for him to add as a safeguard a remark that it is only his opinion and that the jury are perfectly at liberty to form their own. It cannot and should not be presumed that jurymen are wanting in practical intelligence or possessed of no independence. If such a presumption were made the jury system would stand condemned. If the jury are not wanting in ordinary intelligence and are not servile, it is clear to me that a Judge, who expresses his opinion on a point of fact as his own opinion, does not require to add the qualification that the jury need not accept that opinion unless they wish, for it is obvious that, if it is his opinion and the jury has to decide on the facts, they need not accept it unless they so desire. It is their duty to accept his opinion upon questions of law. On questions of fact the Judge's opinion in no way binds the jury, but the Judge has a right to express it so that the jury may know what it is.

The principles underlying the rule by which a Judge in summing is permitted to give his opinion, and the manner in which that opinion should be given were discussed more than sixty years ago

(1) A. I. R. 1914 P. C. 116=41 Cal. 1023 = 41 I. A. 149 (P. C.).

by a leading jurist, Sir James Fitz James Stephens :

> After the evidence is concluded the Judge sums up ; his position from first to last is that of a moderator between two litigants. He permits or forbids certain things to be done ; but he originates nothing. His summing up may, and generally does, indicate his opinion, but it is an opinion which is the result of the evidence laid before him, and not of an independent enquiry.

It is necessary to add a modification to these words in the case of Judges in India who being permitted to call witnesses independently in cases in which they think it necessary do occasionally originate. To all intents and purposes, however, the fact remains that the opinion of a Judge in summing up in India is almost invariably the opinion upon the evidence which has been laid before him. At another place of the book from which this quotation has been taken (a General View of the Criminal Law of England) the writer says in reference to charges to juries in criminal cases :

> Facts submitted to a strong mind are naturally brought into their logical relation, and made to indicate the conclusion which ought to be drawn from them. Impartiality and indecision are totally different things. A Judge summing up is an advocate who chooses his side impartially and gives the jury as vigorous a statement as he can on the grounds on which his conclusion rests and of the view which he takes of the arguments against it. When this is well done it is the greatest possible assistance to the jury in the discharge of their duty. A strong-minded Judge and an intelligent jury —Lord Mansfield and twelve London merchants—form together the best possible tribunal, but in order to show their merits, the Judge must do his very best, and if he is merely to talk about and about a case, without indicating any conclusion, or putting the facts together, he does more harm than good.

This is of course in no way authoritative, but it expresses the opinion of an eminent lawyer on a subject will within his knowledge. I have given these quotations because they contain largely my own conclusions. I should not go so far as to say myself that a Judge summing up is an advocate who chooses his side impartially but I am strongly of opinion that it is not a Judge's duty to conceal his opinion but to state it.

I would, therefore, apply the principles which their Lordships of the Judicial Committee applied in *Arnold* v. *King-Emperor* (1) to the facts of the present case.

The main objections taken by the learned counsel, who has put up as good an argument as a counsel could be expected to put up on those grounds, are that his client was prejudiced because in the first place the learned Sessions Judge when referring to confessions made by accused persons other than his client, told the jury that in his opinion the confessions did not read as though they were tutored. The Judge went on to say that if the jury saw no reason to doubt that those confessions were made voluntarily and that they were true they would even then not be justified in regarding anything on these confessions against the appellant unless there was a reliable corroboration of that portion of the confessions against him. This appears to me an eminently fair and correct method of summing up upon this point.

The next point taken is as to the question of the identification made by a certain man called Sant Bakhsh Singh, who alleged that he had identified the appellant. The learned Sessions Judge told the jury that he considered that the alleged identification by Sant Bakhsh Singh was not of great value. He told them plainly though impliedly that they were to look at this evidence of identification closely and that they should scrutinize it before they accepted it. He added that the evidence was not altogether valueless. He finally stated that if it were of value against anyone it would be against the appellant. But he never told the jury to find that it was of value against the appellant. He left them to decide that point for themselves.

When it came to the question of the defence, the learned Judge discussed the defence of the appellant in great detail. He stated it fairly and carefully to the jury but it is urged that his summing up should be rejected and the verdict set aside because he did not say to them that it was entirely for them to accept or reject the defence. Because no such explicit words appear in the notes of the summing up, I am asked to set aside the verdict for that reason alone. Reading the charge in respect of Des Raj Singh as a whole I find that his defence was discussed very carefully by the Judge and put by him to the jury in a very fair manner. In these circumstances I do not consider that the learned counsel has been able to establish that there was any misdirection. I consider the learned Judge's charge to the jury a good charge.

I do not think many Judges would improve on it. I have only further to decide the question of sentence. It is sufficient to note upon that point that, in my opinion, the sentence is not excessive. I dismiss the appeal.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 329

RAZA, J.

Nilkanth—Judgment-debtor — Appellant.

v.

Rana Umanath Bakhsh Singh — Decree-holder—Respondent.

Second Execution Appeal No. 20 of 1928, Decided on 19th April 1928, from order of Sub-Judge, Rae Bareli, D. - 10th December 1927.

Civil P. C., S. 47—Execution consigned to record on decree-holder failing to point out property to be attached—Decree-holder applying for one more opportunity—Order rejecting the application is not appealable.

In an execution proceeding the property to be attached was not pointed out on behalf of the decree-holder and the execution case was consigned to records for want of prosecution. An application was made to the Court praying that the decree-holder might be given one more opportunity to have the property to be attached pointed out on the spot, but this application was rejected.

Held: that no appeal lay from this order.

[P 330 C 1]

P. N. Choudhri—for Appellant.

Ram Bharose Lal—for Respondent.

Judgment.—This is an appeal from an order of the Subordinate Judge, Rae Bareli, dated 10th December 1927, setting aside an order of the Munsif, Dalmau, at Rae Bareli, dated 7th September 1927. The decree-holder, Rana Uman Nath Bakhsh Singh, applied for execution of his decree against the judgment-debtors by attachment of the judgment-debtors' share in certain plots. The warrant of attachment was issued, but, as the property which was to be attached was not pointed out by the decree-holder's zilladar or any other person on his behalf, the warrant could not be executed. The case was taken up by the Court on 7th September 1927. The order of that date shows that, as the property to be attached was not pointed out on behalf of the decree-holder, the execution case was consigned to records for want of prosecution. The decree-holder was ordered to bear his own costs. An application was made to the learned Munsif on that very date praying that the decree-holder might be given one opportunity more to have the property to be attached pointed out on the spot, but this application was rejected. The learned Munsif passed the order in the following terms:

> The decree-holder should file a fresh application for execution. Further proceedings on this application for execution will not be taken as it has already been dismissed for default. The fresh application of the decree-holder praying this very relief will be deemed an application in continuance of this application for execution and hence it cannot be barred by time. The present application is hence rejected.

The decree-holder appealed from the order quoted above. The learned Subordinate Judge allowed the appeal and ordered that the execution case should proceed further. Nilkanth, judgment-debtor, has now come to this Court in second appeal. He has filed the appeal under O. 41, R. 4, Civil P. C. In my opinion this appeal should be allowed.

There is nothing on the record to show that the order quoted above was passed by the learned Munsif before he had dismissed the decree-holder's application for default, or that the decree-holder's application dated 7th September 1927, was before him at the time he passed the order dismissing the application for execution for default. The word "default" appears to have been used by the learned Munsif to mean "failure or want of prosecution." The order-sheet shows, of course, that the decree-holder's agent had appeared before the Courts, but there is nothing on the record to show that he had made the application in question just at the time the case was called on for hearing and the Court ordered that the execution case should be dismissed for the decree-holder's want of prosecution.

I have examined the record carefully. So far as I see, what happened is this: When the execution case was called on for hearing, the decree-holder's agent appeared before the Court. The judgment-debtors were absent. The learned Munsif found that no property had been pointed out on behalf of the decree-holder for attachment, and hence the warrant of attachment could not be executed by the process-server. He, therefore, passed the following order which was noted in the order-sheet:

Muqadma haza ba adam pairvi degreedar kharij ho, kharcha zimme degreedar rahe.

Some time after that order was passed by the learned Munsif the decree-holder's agent put in the application in question the same day, praying for one opportunity more to point out the property which was to be attached in execution of the decree. The learned Munsif then passed the order in English, quoted above. The order was recorded on the back of the application in question. It was clearly stated in that order that the application for execution had already been dismissed for default. Surely that fact was truly and correctly stated in the order. There is nothing to show that the fact was not correctly stated in the order. It is true that in the order-sheet, dated 7th September 1927, it was noted in continuation of the previous order in Urdu, mentioned above, that the decree-holder's application having been rejected, should form part of the record, but this does not show that the learned Munsif had improperly and incorrectly stated in his order in English, which was recorded on the back of the application in question, that the decree-holder's application for execution had already been dismissed for default. It appears that the Reader, instead of noting the order relating to the application in question as a separate order in the order-sheet, noted the same therein just after the order dismissing the application for failure of prosecution. I am not prepared to hold that the fact, which was so clearly noted in the order in English, quoted above, was noted there in improperly or incorrectly. The fact noted therein must be held to be true and correct until and unless the contrary is proved by reliable evidence. I find no such evidence in this case. I think no appeal could be preferred from the said order under S. 47 or any other section or rule of the Civil Procedure Code. It is not necessary to decide in this case whether the order noted in the order-sheet in Urdu was or was not appealable, as no appeal was filed from that order.

The appellant's contention that the lower appellate Court had no jurisdiction to hear the appeal from the order in English, quoted above, is, I think, well founded. I should like to note that the learned Munsif could not issue a second warrant of attachment on the decree-holder's application in question which was made by the decree-holder's agent on 7th September 1927: see note 1 to form 3, App. B, Vol. II, Oudh Civil Digest. I do not think that there was anything wrong or improper in the Munsif's order dated 7th September 1927 which was recorded on the back of the application in question so far as the order relating to the rejection of the application is concerned.

The view of the learned Munsif, that the next application of the decree-holder praying for the same relief will not be barred by time may or may not be correct. It is not necessary for me to decide that point in disposing of the present appeal. The respondent's learned counsel has stated in the course of his arguments that it is a hard case as the decree was passed more than 12 years ago. It may be a hard case, but hard cases should not be allowed to make bad law. In my opinion the learned Munsif was not wrong in rejecting the decree-holder's application, dated 7th September 1927, and no appeal could be preferred from the order. Hence I allow this appeal and, setting aside the order of the learned Subordinate Judge, restore that of the learned Munsif. Parties will bear their own costs in all the three Courts.

N.K. *Appeal allowed.*

A. I. R. 1928 Oudh 330

RAZA AND NANAVUTTY, JJ.

Suraj Bakhsh Singh—Defendant—Appellant.

v.

Ajudhiya Singh — Plaintiff—Respondent.

Second Appeal No. 342 of 1927, Decided on 26th March 1928, from decree of Dist. Judge, Sitapur, D/- 29th August 1927.

(a) *Civil P. C., O. 6, R, 4—Undue influence or fraud—Detailed particulars must be given in the pleadings—Where one kind of fraud is alleged another form of fraud cannot be set up subsequently.*

A case of undue influence which has not been stated in the pleadings and the details of which have not been given by the plaintiff should not be entertained. [P 332 C 2]

(b) *Practice—Pleading—New case cannot be set up in appeal either by parties or by Court.*

A party must not be allowed in appeal to make out a new case or a case inconsistent with

the case set up by him in the lower Court. Nor can an appellate Court make out a new case for him which he never made himself at any period of the trial. [P 332 C 2]

Where fraud or undue influence is alleged detailed particulars must be given in the pleadings and parties must be strictly confined to that state of facts. Where particulars of fraud or undue influence alleged are wholly rejected and evidence disbelieved and a vague and different kind of fraud or undue influence is held to have been probable on other circumstances and doubts and conjectures, there is a substantial error in procedure resulting in a finding not according to the pleadings and evidence and not sustainable in law. A charge of fraud must be substantially proved as laid, and where one kind of fraud is charged another kind of fraud cannot, upon failure of proof, be substituted for it. The same rule applies when undue influence is a species of fraud : 11 *Bom.* 620 (*P. C.*) and 22 *Cal.* 324 (*P. C.*), *Rel. on.* [P 333 C 1]

(c) *Contract Act, S.* 16—*Undue influence—Position to dominate the will must be proved—Urgent need on the part of borrower is no proof of lender's position to dominate borrower's will.*

Under S. 16, Contract Act, a party to a contract cannot avoid it on the ground of undue influence unless he proves that the other party was in a position to dominate his will. It is only when it has been so proved that the question arises whether that position has been used to obtain an unfair advantage, the onus being then on the other party only if the transaction appears unconscionable. Thus, although a mortgage for ample security provides for excessive and usurious interest, no presumption arises that it was induced by undue influence in the absence of proof by the mortgagor that the mortgagee was in a position to dominate his will. An urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of S. 16 : 70 *L. J.* 389 ; *A. I. R.* 1924 *P. C.* 60 ; 34 *Cal.* 150 ; and *A. I. R.* 1927 *P. C.* 84, *Rel. on.* [P 333 C 1]

(d) *Transfer of Property Act, S.* 60—*Mere stipulation for high interest is not clog.*

In the absence of undue influence or unfair dealing no case of clog can be put forward merely upon the ground that a high rate of interest has been stipulated for in the mortgage-deed. [P 333 C 1]

Bisheshar Nath—for Appellant.

Niamat Ullah and *Naim Ullah* — for Respondent.

Judgment.—This is an appeal from a decree of the District Judge, Sitapur, dated 29th August 1927, modifying a decree of the Additional Subordinate Judge, Sitapur, dated 13th December 1926.

The appeal arises out of a redemption suit. We are relieved of the necessity of narrating at length the facts of this litigation as the judgments of the lower Courts (specially the judgment of the first Court) summarizes clearly the history of the transaction in debate. The plaintiff is the legal representative of one Kali Singh. The defendant is the legal representative of Thakur Jawahir Singh.

The mortgage in suit was executed by Kali Singh in favour of Thakur Jawahir Singh for Rs. 3,000 in respect of a two annas eight pies share in village Patti Newada on 2nd May 1896. The term of the mortgage was thirty years. Half of the property was held by Khan Singh and Subha Lal as mortgagees from Kali Singh under a mortgage of 1899. The sum of Rs. 1,350 out of Rs. 3,000 was left with Thakur Jawahir Singh for redemption of that prior mortgage. It was provided by the mortgage in suit that on redeeming the said half-share from Khan Singh and Subha Lal, the mortgagee (Thakur Jawahir Singh) might take possession of it in lieu of Rs. 850 and the balance of Rs. 500 should carry interest at Re. 1 per cent. per mensem with yearly rests. The mortgagee (Thakur Jawahir Singh) was put in possession of the remaining half of the mortgaged property from the date of the mortgage with this condition : that he might enjoy the usufruct of the said property in lieu of interest on Rs. 850 and the balance of Rs. 800 should carry interest at Re. 1 per cent per mensem with yearly rests. The prior mortgage was redeemed by Thakur Jawahir Singh. He obtained some deeds of further charge also from Kali Singh. In the present suit we are concerned with the mortgage-deed Ex. A-1 and the deeds of further charge Exs. A-2 and A-3.

The plaintiff alleged that the terms of the mortgage-deed as well as of the deeds of further charge were very hard and unconscionable and operated as a clog on the equity of redemption. It was further alleged that Thakur Jawahir Singh got improper terms entered in the deeds in question, as Kali Singh was under his undue influence. The plaintiff alleged also that the mortgage-money was satisfied from the usufruct of the mortgaged property and a surplus was left in the hands of the mortgagee. He, therefore, prayed for redemption of the property without payment of any money and prayed further for recovery of Rs. 183 as surplus profits.

The suit was resisted by the defendant on various grounds. He claimed Rupees

88,000 on account of the mortgage-money.

The learned Additional Subordinate Judge gave the plaintiff a decree for redemption on payment of certain amount the detail of which is given in his finding on the twelfth issue. It appears that the total redemption price decreed by the first Court comes to Rs. 30,837-3. The learned trial Judge found that the mortgage-deed in suit was not executed by Kali Singh under undue influence as alleged by the plaintiff and that the terms of that deed were not improper, unconscionable and hard and did not operate as a clog on the equity of redemption. He was of opinion that the deeds of further charge which were executed by Kali Singh subsequently were executed by him under undue influence and the terms of those deeds were improper, unconscionable and hard. He reduced the rate of interest only so far as these two deeds were concerned. The plaintiff appealed and the result was that the decree of the first Court was modified by the learned District Judge in respect of only two items (i. e., items C and D) of the details contained in the decree of the first Court. The defendant has now come to this Court in second appeal. He challenges the findings of the learned District Judge on the points decided against him.

We are not concerned with the deeds of further charge in this appeal. We are concerned only with the mortgage-deed dated 2nd May 1896. The two items in question are as follows :

(c) Interest on Rs. 800 from the date of the execution of Ex. A-1 up to the date of payment at the contractual rate, i. e., 1 per cent per mensem compoundable annually.

(d) Interest on Rs. 500 as above from 10th May 1915.

The learned District Judge has allowed simple interest only on these two items.

The only point for determination in this appeal is whether or not the defendant is entitled to compound interest on the two items mentioned above as provided by the deed in suit. The learned District Judge has agreed with the learned trial Judge that no undue influence was proved as alleged by the plaintiff. He agreed with the learned trial Judge in rejecting the evidence which was produced to show that the mortgagor was practically a dependant of the mortgagee, that he lived at the mortgagee's house and was fed and clothed by him and that he was a very old man and his senses were enfeebled by excessive consumption of noxious drugs. Though the learned District Judge agreed with the finding of the learned trial Judge on that point he was of opinion that by the terms of the mortgage taken as a whole and in the particular circumstances in which the parties were, a most effective clog was put upon redemption. He then made the following observation in his judgment:

In the circumstances of this particular case it is the compounding of interest which constitutes the clog, and which, coupled with the 30 years' period, makes it quite impossible that the mortgage should ever be redeemed.

We should like to note that the judgment of the learned District Judge, as we understand it, shows that he did not disagree with the finding of the learned trial Judge that the terms of the mortgage were not hard and unconscionable.

We have heard the learned counsel on both sides at some length.

We are of opinion that this appeal should be allowed. We have examined the plaint in this case carefully. We think the learned District Judge has found for the plaintiff a case which he (plaintiff) never set up in his plaint. Under O. 6, R. 4, Sch. 1, Civil P. C., the plaintiff had to state in his plaint the particulars of undue influence which he wanted to set up. He stated those particulars in paras. 4 to 6 of his plaint. The finding of the learned trial Judge was against the plaintiffs on the issue relating to undue influence as alleged in the plaint and this finding was accepted by the learned District Judge entirely. It was never alleged by the plaintiff in his pleading that the mortgagor was in urgent need of money to pay certain debts and the taqavi money and the Government revenue, and so Thakur Jawahir Singh was in a position to dominate the will of the mortgagor. A case of undue influence which has not been stated in the pleadings and the details of which have not been given by the plaintiff should not have been entertained by the learned District Judge. The appellant must not be allowed in appeal to make out a new case or a case inconsistent with the case set up by him in the lower Court. Nor can an appellate Court make out a new case for a plaintiff which he never made him-

self at any period of the trial. Where fraud or undue influence is alleged detailed particulars must be given in the pleadings and parties must be strictly confined to that state of facts. Where particulars of fraud or undue influence alleged are wholly rejected and evidence disbelieved and a vague and different kind of fraud or undue influence is held to have been probable on other circumstances and doubts and conjectures, there is a substantial error in procedure resulting in a finding not according to the pleadings and evidence and not sustainable in law. As pointed out by their Lordships of the Privy Council in the case of *Abdul Husain Zenail Abadin* v. *Charle Agnew Turner* (1), a charge of fraud must be substantially proved as laid down and where one kind of fraud is charged another kind of fraud cannot upon failure of proof be substituted for it. The same rule applies when undue influence is charged in the plaint. Undue influence is a species of fraud: see *Syed Mohammad* v. *Fatteh Mohammad* (2).

The plaintiff having failed to make out the case of undue influence set up by him in his pleadings the defendant is entitled to claim interest at the rate provided by the deed. In the absence of undue influence or unfair dealing no case of clog can be put forward merely upon the ground that a high rate of interest has been stipulated for in the mortgage deed—see *Saheb Bakhsh Singh* v *Mohammad Ali Mohammad Khan* (3). As pointed out by their Lordships of the Privy Council in the case of *Raghunath Prasad* v. *Sarju Prasad* (4):

Under the Indian Contract Act, 1872, S. 16 (as amended by Act 6 of 1899) a party to a contract cannot avoid it on the ground of undue influence unless he proves that the other party was in a position to dominate his will. It is only when it has been so proved that the question arises whether that position has been used to obtain an unfair advantage, the onus being then on the other party only if the transaction appears unconscionable. Thus, although a mortgage for ample security provides for excessive and usurious interest, no presumption arises that it was induced by undue influence in the absence of proof by the mortgagor that the mortgagee was in a position to dominate his will.

We should like to note also that an urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of S. 16, Contract Act—see *Rani Sunder* v. *Rani Sham Kishan* (5) and *Barkatunnissa Begam* v. *Debi Bakhsh* (6). The period of thirty years referred to by the learned District Judge in his judgment had already expired when the present suit was filed by the plaintiff. No question of clog is to be considered with reference to this period of thirty years in disposing of this case.

Nothing more remains to be decided in this appeal.

The result is that the appeal is allowed, the decree of the lower appellate Court is set aside and that of the Court of first instance restored. The defendant will get his costs from the plaintiff in all the Courts.

N.K. *Appeal allowed.*

(1) [1887] 11 Bom. 620=14 I. A. 111=5 Sar. 25 (P. C.).
(2) [1895] 22 Cal. 324=22 I. A. 4 (P. C.).
(3) [1920] 7 O. L. J. 389=58 I. C. 115.
(4) A. I. R. 1924 P. C. 60=3 Pat. 279=51 I.A. 101 (P. C.).
(5) [1907] 34 Cal. 150=34 I. A. 9=11 C.W.N. 249=5 C. L. J. 106 (P. C.).
(6) A. I. R. 1927 P. C. 84.

A. I. R. 1928 Oudh 333

PULLAN, J.

Bhagwan Bakhsh Singh—Plaintiff—Appellant.

v.

Thakur Din—Defendant—Respondent.

Second Rent Appeal No. 5 of 1927, decided on 13th December 1927, from decree of Dist. Judge, Fyzabad, D/- 23rd October 1926.

Civil P. C., S. 100—*Second Appeal—Decision in lower appellate Court on supposed admission by plaintiff—Decision can be challenged in second appeal.*

Where in a suit for rent the finding of the lower appellate Court was based on the supposed admission by the plaintiff as regards the amount of rent to be paid by the defendant, but there was no such admission, *Held*, the finding of the Court below can be challenged in second appeal because the lower Court is deemed to have made a mistake in law. [P 334 C 1]

R. D. Sinha and *G. C. Sinha*—for Appellant.

Haider Husain—for Respondent.

Judgment.—This is a second appeal from an order of the learned District Judge of Fyzabad upholding the decree of an Assistant Collector in a suit for arrears of rent. The learned District Judge has stated in his judgment that the sole point

for determination in the appeal is : What is the annual rental of the land in suit. Now if this were so it would appear prima facie that this is a pure question of fact which cannot be challenged in second appeal. But a perusal of the judgment of the learned District Judge shows that it is not the case. No doubt, the question before the Court was whether the rent of this holding was Rs. 105 as settled in a lease of the year 1866 granted by the taluqdar or Rs. 193-8-0 as entered in the revenue papers from the year 1898 to the present. time, but the decision of the Court below did not turn on the evidence as to whether the defendant was holding on the lease of 1866 or the alleged agreement of 1898, but on the view taken by the learned Judge as to the effect of certain proceedings which were conducted simultaneously with this suit in the revenue Courts. The learned Judge held, following the Assistant Collector, that the present plaintiff had made an admission in the parallel suit that the rent of the holding was Rs. 105 and the judgment of the Court below contains the following conclusions :

As the evidence on the record stands at present I am bound to hold upon the admission of the parties themselves in the ejectment suit that the rent of the holding is Rs. 105 and not Rs. 193 8-0.

If it can be shown in appeal that there was no such admission it appears to me that the finding of the Court below can be challenged in second appeal because the learned lower Court has made a mistake in law. I cannot find in any part of the judgment that the Court has considered the comparative value of the evidence given by the parties as apart from this so-called admission.

This case has a long history. On 13th November 1922 the present plaintiff as taluqdar issued a notice of ejectment on the defendant describing him as a thekadar. No amount of rent is stated in the notice and this was not necessary as no Court-fee is charged on such a notice. On the 9th December 1922 the defendant filed a suit to contest the notice of ejectment in which he stated that the rent as stated in the village papers was Rs. 193-8-0 and he paid Court-fees on that amount, but he added that he, as a matter of fact, only paid Rs. 105 as a shankalapdar under the lease of 1866. On 3rd February 1923 the present suit was filed in which the plaintiff claimed that the rent was Rs. 193-8-0 and that he had been paid for the year 1329 Fasli Rs. 145 and nothing for the half-year of 1330 Fasli. He sued, therefore, after including a small sum of interest, Rs. 149-1-0. On 14th May 1923 the tenant's suit to contest notice of ejectment was dismissed by the Assistant Collector who held that he was not a shankalapdar holding under a patta, but that he was holding under the new lease of 1898. On 17th May 1923, the defendant filed his written statement in the present suit in which he did not admit any payment, but stated that he was a shankalapdar and prepared to pay rent for a year and a half at Rs. 105 per annum and thus was virtually ready to pay the whole amount sued for. This suit was decreed on 9th June 1923. After this both cases went on appeal. The present suit was remanded by the District Judge on application made by the plaintiff and it remained pending until July 1926 owing to the proceedings in the suit to contest notice of ejectment. The revenue Courts held conflicting views as to that case. The Commissioner allowed the appeal on the ground that it was a case in which no notice of ejectment could be given. The two members of the Board of Revenue wrote conflicting judgments, but ultimately took up the case again on review and remanded it to the Assistant Collector for further decision.

The Assistant Collector took the view of the Commissioner, and without waiting for a final decision by the Board of Revenue proceeded to decide the present suit on the basis of his finding which was that the defendant was a shankalapdar holding on a patta of the year 1866. Subsequently the Board of Revenue reversed the decision of the Commissioner in the suit to contest notice of ejectment and restored the order of the Assistant Collector of 14th May 1923. There is, therefore, a final finding of the revenue Courts that the defendant is not a shankalapdar but a thekadar and that he holds in virtue of an agreement of the year 1898. This means that he was liable to ejectment and that he was holding in the manner stated by the taluqdar and not in the manner stated by himself. The valuation of the suit given in the decree of the Board of

Revenue is Rs. 193 and this indicates that the Board of Revenue at least held that the rent of the holding was Rs. 193 or to be more accurate Rs. 193-8-0 as alleged by the present plaintiff. In this connexion it is worthy of notice that the defendant himself made an application for the stay of proceedings in this case on 12th July 1924, on the ground that the Board of Revenue would decide the status of the parties and the amount of rent.

The first error made by the Courts below was a very serious mistake made by the Assistant Collector in his judgment. He stated :

> Plaintiff has also filed certified copy of judgment and decree, Exs. 1 and 2, which show that the plaintiff issued notice of ejectment giving rent as Rs. 105 only, that is in 1922 A. D. This shows that the plaintiff did not sue on a rent of Rs. 195 or Rs. 193-8-0, but on the rent of Rs. 105 only.

As a matter of fact the notice of ejectment shows no amount of rent and this passage is entirely incorrect. In appeal the learned District Judge appears to have seen that it was not the plaintiff who stated that the rent was Rs 105, but the defendant who had filed the suit to contest notice of ejectment. The learned Judge, however, took the curious view that the plaintiff in some manner admitted this plea. He also blames him for not making an objection in the revenue Court and pointing out that the tenant was defrauding Government in the matter of Court-fees. I find that the Court-fee were correctly assessed on the valuation of Rs 193 and no such objection could have been taken by the present plaintiff-appellant. The only point that may be held to be in favour of the view taken by the learned Judge is that in his written statement in the suit to contest notice of ejecment the present plaintiff did not clearly meet the allegation of the tenant that he was paying a rent of Rs 105 a year. This statement is contained in para 10 of the plaint and in para. 10 of the written statement the present plaintiff only stated that he had no objection on the score of Court-fees. It is true that every allegation in a plaint should be met by the defendant, but in this case the amount of rent was not actually a matter of any importance. The taluqdar pleaded in that case, in reply to the allegation in the plaint, that the present defendant was not a shankalapdar, but that on the contrary he was a thekadar. The pleadings in the revenue Courts are frequently meagre and that is the case in the suit in question. But it is evident that not only in the first Court which gave a definite finding that the present defendant was not a shankalapdar under the patta, but was holding under the lease of 1898, but in subsequent proceedings which lasted for over three years, this matter was always in issue and the present plaintiff has always stoutly denied the defendant's plea that he is a shankalapdar under the patta of 1866 and as stoutly asserted that he was a thekadar under the kabuliyat of the year 1898 on a rent of Rs. 193-8-0. I may remark that the rent stated in the kabuliyat which is before me is Rs. 195, but it appears that the amount was reduced for some unknown reason and has always been recorded as Rs. 193-8-0 in the revenue papers and it is on this account that the plaintiff stated the rent to be Rs 193-8-0 in his plaint.

I have shown, therefore, that there was no admission on behalf of the plaintiff that this rent was Rs. 105 and I am of opinion that but for this finding of the lower Courts their decision would not have been that which is before me on appeal. The lower appellate Court mentions the kabuliyat of 1898 and he also mentions the patta of 1866. He gives no opinion as to the value of either document, but after mentioning the kabuliyat without comment he says "the judgment and decree of 1922 A. D. are binding on the parties," and it is on this account and the supposed admission of the plaintiff that he has upheld the view taken by the first Court which is based on an entirely erroneous finding that the plaintiff actually issued a notice of ejectment in which he gave the rent as Rs. 105.

It has been urged on behalf of the respondent that my proper course now would be to remand this case to the Court of the learned District Judge to obtain the missing finding on the facts, but I do not think such a course is necessary. All the facts are before me and I find that the final Court of appeal on the revenue side has decided that the defendant held on an agreement of 1898 and not on a previous patta of 1866. As the defendant himself urged in the lower

Court it was the Board who would decide the status of the parties and the amount of rent and I have no doubt that the decision of the Board of Revenue on such a point should ordinarily be accepted in the civil Court. Once the document of 1898 has been preferred to the document of 1866 there is no evidence on which to hold that the defendant pays a rent of Rs. 105. The revenue papers are entirely against him and the receipts which he produced in the first Court have not been accepted in evidence. The defendant did not even admit the payment which he is alleged by the plaintiff to have made and I doubt whether the lower Courts were justified on the pleadings in passing a decree for only Rs. 12. But be this as it may, I have no doubt that the rent is established to be Rs. 193-8-0 and as the defendant never asserted that he paid more than the amount credited to him by the plaintiff, he is clearly bound to pay the whole amount for which the suit was brought. I, therefore, allow this appeal with costs, set aside the decrees of the Courts below and order that a decree be passed in favour of the plaintiff for Rs. 144-1-0 plus costs with future interest at 6 per cent. per annum as the appellant did not appeal for the full amount due.

S.J. *Appeal allowed.*

A. I. R. 1928 Oudh 336

STUART, C. J., AND RAZA, J.

Shyam Manohar and *another*—Defendants—Appellants.

v.

Beni Madho and *another* — Plaintiff and Defendant—Respondents.

Second Appeal No. 366 of 1927, Decided on 23rd February 1928, from decree of Sub-Judge, Unao, D/- 23rd August 1927.

Landlord and Tenant—Mortgagor of muafi land cannot assert against the mortgagee whom he has ejected his own want of title—Evidence Act, S. 116.

A muafidar who has mortgaged his muafi plots cannot assert against the mortgagee, whom he has ejected, his own want of title. The case might be different if the legislature had expressly enacted that in no circumstance would a transfer of muafi land be recognized.

[P 336 C 2]

D. K. Seth—for Appellants.

Radha Krishna—for Respondents.

Judgment. — The defendants-appellants are the representatives-in-interest of the original holders of two muafi plots, Nos. 274 and 285. No. 274 is now represented by No. 306 and No 285 is now represented by No. 337. Their predecessors-in-interest mortgaged these two plots with possession to the predecessors-in-interest of the plaintiff-respondent. It has been found as a fact that the mortgagees lost possession after 4th September 1924. They instituted the suit for possession in March 1926. This suit was clearly not time barred. We need not go into any question of acknowledgment or the like as the suit was brought within 12 years. The lower appellate Court has decided in favour of the plaintiff-respondent and awarded them possession over the plots from which he finds that the defendants-appellants have ejected them. His decision is contested on the ground that the suit was barred by limitation and on the ground that the transfer by mortgage of muafi plots was void ab initio. We have already determined on the first point that the suit is not barred by limitation.

In respect of the second point we know of no decision in the Judicial Commissioner's Court or this Court which has ever laid the proposition that a muafidar who has mortgaged his muafi plots can assert against the mortgagee whom, he has ejected, his own want of title. The case here is that the mortgagors, after ejecting the mortgagees are putting forward an alleged defect in the title to justify their action. The position is an impossible position It is true that the remedy of the superior proprietor remains, whatever the muafidar may have chosen to do by way of transfer. In this particular case the superior proprietors have no remedy in respect of No. 337 as they have subsequently admitted that the former muafidars had under-proprietary rights in the same. But as between the muafidars and their mortgagees such a plea, as is asserted by the appellants in this suit, cannot be accepted. The case might be different if the legislature had expressly enacted that in no circumstance would a transfer of muafi land be recognized, but the legislature has made no enactment of this character in respect to muafi land in Oudh. For the above reasons this appeal fails and is dismissed with costs.

N.K. *Appeal dismissed.*

A. I. R. 1928 Oudh 337

STUART, C. J., AND RAZA, J.

Mt. Ruqaya Bibi—Judgment-debtor—Appellant.

v.

Prag Tewrai — Decree-holder — Respondent.

Execution of Decree Appeal No. 65 of 1927, Decided on 2nd March 1928, from decree of Sub-Judge, Gonda, D/- 5th December 1927.

(a) *Limitation Act, Art.* 182 (5)—*Words "application in accordance with law to the proper Court for execution" do not refer to anything more than what they state.*

In placing a construction on the words of Art. 182, a Court should look at the words themselves and nothing else and not endeavour to introduce extraneous considerations. The words "application in accordance with law to the proper Court in execution" do not refer to anything more than what they state. [P 338 C 1]

(b) *Limitation Act, Art.* 182 (5) — *The circumstance that a man does not really wish to obtain the execution for which he has asked is not a mala fide act which renders an application made in accordance with law unlawful.*

Litigants in the proceedings must act in good faith, but it is nowhere laid down that a man acts in bad faith if he in his heart is not really anxious to secure the remedy to which he is entitled under the law and for which he has applied. Malafides may stand in the way of a litigant being granted relief, but the circumstance that a man does not really wish to obtain the execution for which he has asked, is not an act of bad faith which would render an application made by an applicant, who did not really wish the relief sought, an application which is not in accordance with law: *A. I. R.* 1926 *All.* 95, *Appr.* [P 338 C 2]

Naimullah for *Hyder Husein* — for Appellant.

H. D. Chandra—for Respondent.

Judgment —These two appeals will be decided by the same judgment. Two decrees on the basis of separate deeds of mortgage were obtained by Prag Tiwari against Mt. Ruqqaya Bibi. One was obtained on 5th May 1922 and the other was obtained on 16th May 1922. Decrees absolute for the sale of the mortgaged property concerned were passed on 6th April 1923. On 26th January 1924, the decree-holder applied for the sale of the mortgaged property under both decrees. His applications were not supported and were dismissed for default on 28th February 1924. The applications with which we are concerned were made by him on 15th January 1927. They have been allowed by the Court of execution. An argument was taken before the Court of execution that the applications were time barred. That argument was repelled. It is raised again before us.

The question for our decision is a very simple one. Were the applications for execution made on 26th January 1924, applications made in accordance with law to the proper Court for execution? It is not a question of taking a step-in-aid of execution for these were applications for the actual execution of the decrees. We are asked to hold that the present applications are not within limitation on the ground that on the facts the decree-holder, when he presented the applications of 26th January 1924, had no intention of executing the decrees at the time, but that he merely wished to gain an extension of the period within which he might wish to execute the decrees. The reply on the merits which was accepted by the Court below was that the decree-holder had very little, if anything, to gain by not executing the decrees at the time, that as a matter of fact he wished to execute them and that he was restrained from so executing by the fact that before he could proceed with these applications, he was placed under trial in a criminal Court on a charge of which he was subsequently convicted. We find that the judgment-debtor-appellant has been unable to support on the merits her plea that these applications were not honest and genuine applications and we agree with the finding of the Court below that they were honest and genuine applications and that decision disposes of the matter.

But we have been referred to a recent decision of a Bench of the Allahabad High Court in *Sheo Prasad* v. *Naraini Bai* (1) and consider we should express an opinion on the principles enunciated therein. The learned Judges, who composed that Bench laid down the principles that a Court should take into consideration, before it decided, whether an application was in accordance with law, the question as to whether the application was made in good faith to secure execution or to take a step-in-aid of execution, and was not merely colourable with a view to give a fresh starting point for the period of limitation, and

(1) A. I. R. 1926 All. 95=43 All. 465.

that if the Court found that such an application was not made in good faith to secure execution or to take a step-in-aid of execution and was colourable with a view to give a fresh starting point for the period of limitation, it should hold that it was not an application made in accordance with law. We are unable to agree with these views as we do not find that there is any justification in reading into the words of Art. 182 (5), Sch. 1 Act 9 of 1908, the restrictions which the learned Judges considered should be applied. We have already decided how the words of the clause should be construed in a decision in *Ram Lal* v. *Udit Narain Singh* (2). That decision was not upon this point, but we consider that the principles which were applied there should be applied here. We are, therefore, of opinion that in placing a construction on the words of this section a Court should look at the words themselves and nothing else and not endeavour to introduce extraneous considerations.

It is to be remembered that Art. 182 imposes restrictions upon the rights of a decree-holder to obtain the remedy awarded to him by the decree. On the face of it such restrictions can only be justified by general policy. Ordinarily when a Court has awarded a man a certain remedy that remedy should be granted to him. His procedure in obtaining that remedy may be and should be regulated in a manner conducive to the interests of the general public and the interests of the judgment-debtor. The person who is to provide the remedy should be safeguarded. The nature of these safeguards presumably will be found in the enactment itself and nowhere else. We are unable to understand that the words "application in accordance with law to the proper Court for execution" can be held to refer to anything more than what they state. In this case, the decree-holder certainly made the applications. He made them to the proper Court. He made them for execution of the decrees. The applications were in proper form and demanded the remedy to which he was entitled. We fail to understand why the Court should examine the decree-holder's mind to know whether he really wished in his heart to obtain the satisfaction for which he asked or whether he did not so wish. All the authorities of their Lordships of the Judicial Committee which have been quoted in the decision to which reference is made by the learned Judges who decided *Sheo Prasad* v. *Naraini Bibi* (1) are to the effect that litigants in the proceedings must act in good faith, but it is nowhere laid down that a man acts in bad faith if he in his heart is not really anxious to secure the remedy to which he is entitled under the law and for which he has applied. Malafides may stand in the way of a litigant being granted relief, but we are not convinced that the circumstance that a man does not really wish to obtain the execution for which he has asked, is an act of bad faith which would render an application made by an applicant, who did not really wish the relief sought, an application which is not in accordance with law. For the above reasons we dismiss these appeals with costs.

N.K. *Appeal dismissed.*

(2) A. I. R. 1927 Oudh 134=2 Luck 419.

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* A. I. R 1928 Oudh 338

RAZA AND NANAVUTTY, JJ.

Ram Lall—Defendant—Appellant.

v.

Mt. Jawala and *others*—Plaintiffs—Respondents.

Second Appeal No. 215 of 1927, Decided on 10th April 1928, against decree of Sub-Judge, Unao, D/- 24th Feb. 1927.

* *Hindu Widows Remarriage Act* (15 *of* 1856), *S.* 2—*Widow permitted by custom to remarry—She does not forfeit property inherited from her first husband—Hindu Law—Widow.*

Hindu Widows Remarriage Act is inapplicable in the case of a widow who is permitted by the custom of her caste to remarry and she does not forfeit the property inherited by her from her first husband. 31 *All.* 161 ; 32 *All.* 489 ; *A.I.R.* 1921 *Oudh* 233; *Rel. on.* [P 339 C 2]

Moti Lal Saksena—for Appellant.

M. A. Khan—for Respondent 1.

Judgment.—This is an appeal from a decree of the Subordinate Judge, Unao, dated 24th February 1927, affirming a decree of Munsif, Purwa at Unao, dated 22nd May 1926.

The facts of the case so far as it is necessary to state them for the purpose of disposing of this appeal are as follows:

One Gokul Thathera was owner of the property in suit. He died more than

12 years ago and was succeeded by his widow Mt. Jwala. Sometime after the death of her husband Gokul, Mt. Jwala married Sheo Narain, the cousin of Gokul and thus Sheo Narain began to live with her in the house occupied by her. She was permitted by the custom of her caste to remarry. It was thus a valid marriage. Ram Lal, defendant 1, holds a decree against Sheo Narain, defendant 2. In execution of that decree he attached the property of Gokul mentioned above. The property was sold and purchased by Jagannath defendant 3 at the auction sale. Mt. Jwala (plaintiff) filed an objection under O. 21, R. 58, Civil P. C. but the objection was disallowed. She then brought the present suit for declaration of her right to the property against Ram Lal and Jagannath. Sheo Narain was also impleaded as a defendant in this suit.

Sheo Narain and Jagannath (defendants 2 and 3) admitted the claim. The suit was resisted by Ram Lal (defendant 1). His sole defence was that under S. 2, Act 15 of 1856 Mt. Jwala on her remarriage lost her right to the property in suit and thus Sheo Narain (defendant 2) became entitled to the property as a reversionary heir of Gokul deceased.

Ram Lal's defence was rejected by the learned Munsif. He went in appeal to the learned Subordinate Judge of Unao, who upheld the decision of the learned Munsif. He has now come to this Court in second appeal.

The only point for determination in this appeal is whether under Act 15 of 1856, Mt. Jwala has by marrying again forfeited her interest in the property left by her first husband. We are of opinion that Mt. Jwala's second marriage has not the result of divesting her of the property of her first husband.

The whole point is this: Do the provisions of Hindu Widows' Remarriage Act, 15 of 1856, apply to the case of a remarriage where such remarriage is allowed by the custom of the caste. If they do, a widow by remarriage forfeits all interest in her husband's property. If they do not, she does not forfeit her rights. There is a conflict of authorities on this point. The Allahabad High Court holds that where the rules of her caste recognize the right of a Hindu widow to remarry, a second marriage has not the result of divesting her of the property of her first husband—see *Gajadhar* v. *Kaunsilla* (1); *Mulla* v. *Partab* (2). The other High Courts hold that she forfeits her interest in her husband's estate by remarriage. The following observations were made in the case of *Bhagwandin* v. *Indrani* (3) decided by a Bench of the late Court of the Judicial Commissioner of Oudh in 1921:

> The provisions of Act 15 of 1856 do not govern this case. The remarriage among Muraos is recognized by the custom of the brotherhood and is not validated by statute. Defendant 1, therefore, does not suffer from the incapacity enjoined by S. 2 of the Act. In *Gojadhar* v. *Kaunsilla* (1) Banerji, J. laid down, after an examination of the case-law on the subject, that the Act was inapplicable to the case of a widow who was permitted by the custom of her caste to remarry and that she does not forfeit the property inherited by her from her former husband. The same view was expressed by a learned Judge of this Court in *Narpat* v. *Janaka* (4) where the case-law on the subject is collected and discussed.
>
> The provisions of the Act of 1856 can be the only bar to a Hindu widow continuing in possession after remarriage because even if her remarriage be not valid, her unchastity will not deprive her of the estate which has vested in her for life (Mayne, para. 555). It is admitted that defendant 1 remarried a year after she had been in possession of her first husband's property. The plaintiff's claim for possession must therefore, fail.

According to these rulings, not only is Act 15 of 1856 inapplicable in the case of a widow who is permitted by the custom of her caste to remarry, but she does not forfeit the property inherited by her from her first husband. We see no sufficient reason to doubt the soundness of these decisions. We do not think it proper that the law on this point which has been prevailing all these years in the United Provinces should be unsettled.

We think no case has been made out to disturb the judgment of the learned Subordinate Judge. We dismiss the appeal with costs. The decree of the lower appellate Court is confirmed in all respects.

N.K. *Appeal dismissed.*

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(1) [1909] 31 All. 161=1 I. C. 761=6 A. L. J. 107.
(2) [1910] 32 All. 489=6 I. C. 116=7 A. L. J. 417.
(3) A. I. R. 1921 Oudh 233=24 O. C. 297.
(4) A. I. R. 1921 Oudh 130=24 O. C. 11.